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Submission to the Department of Foreign Affairs and Trade on the proposed Australia-UK free trade agreement

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Summary of Recommendations

Trade transparency

- Prior to commencing negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
- There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. The Australian government should release its proposals and discussion papers during trade negotiations.
- Draft texts should be released for public discussion.
- The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.
- Comprehensive independent economic, social and environmental impact assessments should be completed before the agreement is signed. Impact assessments should be made public for debate, consultation and review by parliamentary committees.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.

ISDS

- ISDS should not be included in the Australia-UK free trade agreement.

IP rules and medicine and copyright monopolies

- There should be no extension of monopolies on patents or copyright in the Australia-UK free trade agreement.

Trade in services

- Public services should be clearly and unambiguously excluded from the Australia-UK free trade agreement, and there should be no restrictions on the government's right to provide and regulate services in the public interest.
- The Australia-UK free trade agreement should use a positive list to identify which services will be included in an Agreement.
- The government should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to address privatisation failures.

Government Procurement

- That the Australian government should not enter into any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.
- That the Australian government should maintain its current government procurement exemptions for SMEs, indigenous enterprises and for local government procurement**.**

Social and environmental standards

- Trade agreements should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

- Trade agreements should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.

Temporary movement of people

- That Australia make no offers for the extension of temporary movement of workers other than senior executives and managers in the Australia-UK free trade agreement.

E-commerce

The Australia-UK free trade agreement should not include provisions that:

- prevent current and future governments from regulating the cross-border flow of data;
- prohibit the use of local presence requirements.
- prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination.
- Prevent governments from setting standards for the security of electronic transactions.
- cover financial services.

The Australia-UK free trade agreement should include:

- full exemptions for tax policy.
- mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.

1. Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

We welcome this opportunity to make a submission on the proposed Australia-UK free trade agreement. This submission will address our concerns relating to:

a) The lack of transparency and democratic accountability in trade negotiations
b) The inclusion of Investor-State Dispute Settlement provisions
c) The inclusion of rules that extend intellectual property rights on patents and copyright
d) The potential impact of the trade in services provisions on essential services
e) The potential risks of government procurement provisions
f) The potential risks of electronic commerce provisions
g) The potential impact of provisions relating to trade in financial services
h) Compliance with International Human Rights and Labour Rights law and Environmental standards

The UK's other trade negotiations and uncertainty about its regulatory regime

We also note that the UK's decision to leave the EU and its subsequent departure from the Union on 31 January 2020 has created a high degree of uncertainty regarding the UK's regulatory regime and its trading relationships. The outcome of the UK's ongoing negotiations with the EU will inevitably play a role in determining the extent to which the UK's regulatory regime can be changed. However, concerns have been raised about the possibility that the UK government could significantly reduce its standards in relation to food and environmental standards, workers' rights and human rights (The Independent 2019). These concerns were compounded by leaked documents from the UK's discussions with US trade negotiators, which addressed issues of food safety and labelling standards and specifically excluded discussions on climate change (BBC 2019). It is important that the government takes into consideration the UK's evolving regulatory regime when developing rules in relation to regulatory cooperation.

2. The trade agreement process should be transparent, democratic and accountable

AFTINET has consistently raised concerns about the lack of transparency and democratic accountability in trade negotiations. Australia's current procedure for negotiating and ratifying trade agreements is highly secretive and is not compliant with the basic democratic principles that underpin our domestic policy-making processes. Trade negotiations are conducted in secret through a Cabinet process and neither the Parliament nor the wider public has input into, or oversight over, the development of Australia's negotiation mandate.

Negotiation texts are confidential, and the final text of the agreements are not made public until after Cabinet has made the decision to sign them. It is only after they have been tabled in Parliament that they are examined by the Joint Standing Committee on Treaties.

The National Interest Analysis (NIA) presented to JSCOT is not independent but is conducted by the same department that negotiated the agreement. There are no independent human rights or environmental impact assessments. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

A Senate Inquiry in 2015 entitled *Blind Agreement* criticised this process and made some recommendations for change. The Productivity Commission has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet. The direction of change at the international level is towards increased transparency and accountability. For example, the EU has developed a more open process, including public release of documents and texts during negotiations and release of texts before they are signed (Senate Foreign Affairs, Defence and Trade Committee 2015, European Union 2015a, Productivity Commission 2010).

In the case of the Australia-UK FTA, no information has been released publicly about the content of discussions that have taken place between Australia and the UK since the establishment of the Joint Trade Working Group (TWG) in September 2016. The DFAT website states that "Four formal meetings of the Australia–UK TWG have now been held. Working Group leads have maintained regular contact" (DFAT 2019). However, the government has not released any detailed information about the scope of these discussions or of any progress that has been made. Significant improvements in transparency are required as the government begins official negotiations.

Recommendations:

- Prior to commencing negotiations with the UK, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement.

Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts that are expected to arise.

- There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. The Australian government should release its proposals and discussion papers during trade negotiations.
- Draft texts should be released for public discussion.
- The final text should be released for public and parliamentary discussion before it is authorised for signing by Cabinet.
- Comprehensive independent economic, social and environmental impact assessments should be completed before the agreement is signed. Impact assessments should be made public for debate, consultation and review by parliamentary committees.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.

3. Trade agreements should not contain Investor-State Dispute Settlement Processes (ISDS)

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. The inclusion of Investor-State Dispute Settlement provisions (ISDS) in trade and investment agreements gives additional special rights to foreign investors to sue governments for damages in an international tribunal.

3.1 ISDS provisions

The ISDS system was initially designed to ensure international investors were compensated for the expropriation of property. However, the provisions have now been expanded to include "indirect" expropriation, "minimum standard of treatment" and "legitimate expectations" which do not involve taking of property and do not exist in most national legal systems.

These provisions enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment, and/or that they were not consulted fairly about the change, and/or that it did not meet their expectations of the regulatory environment at the time of their investment.

Developing countries have been hardest hit with massive payments of billions of dollars, potentially crippling their national budgets. In 2019, the Pakistan government was ordered by an ISDS tribunal to pay a mining company $US 5.8 billion, equivalent to one eighth of its national budget (Tienhaara, 2019).

Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

3.2 The impact of ISDS on human rights and the environment

There has been a dramatic increase in the number of known ISDS cases, from less than 10 in 1994 to 300 in 2007 and 983 in July 2019 (UNCTAD 2019a and UNCTAD 2019b). The number of cases against health, environment (including laws to address climate change), Indigenous land rights and other public interest laws and policies is also growing. There are also cases against governments which have acted to reverse the failures of privatisation of public services. Recent cases include the following:

- The US Philip Morris tobacco company shifted assets to Hong Kong and used ISDS in an Australia-Hong Kong investment agreement to claim billions in compensation for Australia's plain packaging law. It took over 4 years and $24 million in legal costs for the tribunal to decide that Philip Morris was not a Hong Kong company, and the case was an abuse of process, and the government only recovered half the costs (Ranald 2019).
- US Pharmaceutical company Eli Lilly used the ISDS provisions of NAFTA to claim compensation for a Canadian Supreme Court decision that found a medicine was not sufficiently different from existing medicines to deserve a patent, which gives monopoly rights for at least 20 years. Canada has a higher standard of patentability than the US and some other countries. The Canadian government won the case after six years and $15 million in costs, but the tribunal decision was ambiguous on some key points about Canada's right to have distinctive patent laws (Baker 2017).
- The US Bilcon mining company won US$7 million plus compound interest from 2007 in compensation from Canada because its application for a quarry development was refused for environmental reasons (Withers 2019, Permanent Court of Arbitration, 2019). The Canadian Federal Court found that this impinged on Canada's "ability to regulate environmental matters" but could do nothing to change the decision (Mann 2018).
- The US Westmoreland mining company is suing the Canadian government over the decision by the Alberta province to phase out coal-powered energy as part of its emission reduction strategy (UNCTAD 2019c). This is just one of an increasing number of cases against government actions to combat climate change, including a recent German coal company ISDS threat against the Netherlands (Tienhaara, 2018, Van der Schoot, 2019)
- An Australian company also listed in the UK has lodged a claim for US 1.8 billion compensation from the Swedish government because in 2018 it decided to phase out uranium mining for environmental reasons (Aura Energy Ltd, 2019).
- The Canadian Bear Creek mining company won $26 million in compensation from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests. The tribunal essentially rewarded the company despite the fact that it had violated its obligations in the ILO Convention on Indigenous Peoples to which Peru is a party (ICSID 2017).
- The French Veolia Company sued the Egyptian Government over a local government contract dispute in which they claimed compensation for a rise in the minimum wage. This claim eventually failed but it took seven years and the costs to the Egyptian government are unknown (Breville and Bulard 2014, UNCTAD 2019d).
- After a decade of privatisation of water and other public utilities resulted in failures like lack of investment and high prices, Argentina's government responded by reversing privatisation and freezing prices for basic services. By the end of 2008, Argentina had faced over 40 ISDS cases and had been ordered to pay a total of US$1.5 billion in compensation over reversals of privatisation and other regulatory measures to address a financial crisis (CEO and TNI 2012: 19).

3.3 ISDS Tribunals not independent, no precedents or appeals

ISDS has been widely criticised for its lack of transparency, with cases often taking place entirely behind closed doors or only limited information being publicly released. Tribunals are not independent or impartial and and lack the basic standards of national legal systems (French 2014, Kahale 2014, Kahale 2018). ISDS has no independent judiciary. Tribunals are organised by one of two institutions, the United Nations Commission on International Trade Law (UNCITRAL) and the World

Bank International Centre for Settlement of Investment Disputes (ICSID). Tribunals for each case are chosen by investors and governments from a pool of investment lawyers who can continue to practice as advocates, sitting on a tribunal one month and practising as an advocate the next. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest. ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent.

3.4 ISDS cases cost governments millions to defend, even if they win

ISDS cases result in huge costs for governments. A 2012 OECD Study found ISDS cases last for three to five years and the average cost to governments for defending cases was US$8 million per case, with some cases costing up to US$30 million (OECD 2012). Australia's experience in the US Philip Morris tobacco case, in which only half of the $24 million costs of the case were recovered despite the tribunal's decision that the case was an abuse of process, demonstrates just how significant the costs can be, even where governments win the case (Ranald 2019).

3.5 ISDS and regulatory chill

ISDS can have a significant impact on government's regulatory sovereignty. Many cases have resulted in settlements in which governments have revised the policies/legislation/legal decisions that the claim has been brought against (Canadian Centre for Policy Alternatives 2010, UNCTAD 2019e, Global Justice Now 2019). However, even the threat of ISDS can deter governments from implementing public interest policies, including in relation to health, workers' rights and the environment. For example, New Zealand delayed the implementation of its tobacco plain packaging legislation until after the Philip Morris case was concluded (Johnstone 2015).

Recommendation

- ISDS should not be included in the Australia-UK free trade agreement.

4. No extension of intellectual property rights on patents or copyright

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines**.** Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade (Stiglitz 2015).

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented and copyrighted products, the extension of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading partners, especially for developing countries in areas like access to medicines (Productivity Commission 2010: 263). Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015 (Productivity Commission 2015).

Public health experts and humanitarian medical organisations like Doctors Without Borders (MSF) have also demonstrated how successive trade agreements have strengthened patent rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines (Lopert and Gleeson 2013, MSF 2015).

Recommendation

- There should be no extension of monopolies on patents or copyright in the Australia-UK free trade agreement.

5. Trade in services: positive list, clear exclusion of public services, right of governments to regulate services in the public interest

Trade agreements should not undermine the ability of Governments to regulate in the public interest, particularly regarding essential services like health, education, social services, water and energy.

Trade in services chapters often use a negative list structure, which means that all services, including those which may be developed in future, are included, except those which governments list as specific exclusions.

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. A positive list allows governments and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas which are yet to be developed. This means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the the need for financial regulation following the Global Financial Crisis, the Royal Commission into the banking and financial services Industry and governments' responses to climate change (United Nations 2009, Stiglitz 2016).

Services chapters also use a "ratchet "structure which treats the regulation of services as if it were a tariff, to be frozen at current levels and not raised in future, unless particular services are specifically exempted from this structure. This can prevent governments from addressing the failures of privatisation or deregulation. For example, the deregulation and privatisation of vocational education services in Australia resulted in failures in service delivery for students and fraudulent use of public funds, and the government had to reregulate to address these failures in 2016 (Conifer, 2016).

The inclusion of essential services, like health, water and education in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals.

Public services should be clearly excluded from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in many trade agreements which defines a public service as "a service supplied in the exercise of governmental authority … which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side-by-side.

Even when essential services are not publicly provided, governments need clear rights to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

Recommendations

- Public services should be clearly and unambiguously excluded from the Australia-UK free trade agreement, and there should be no restrictions on the government's right to provide and regulate services in the public interest.
- The Australia-UK free trade agreement should use a positive list to identify which services will be included in an Agreement.
- The government should retain the right to regulate and re-regulate all services to meet service standards, health, environmental or other public interest objectives. This should include the right to address privatisation failures.

6. Government procurement

There has been much debate in Australia about both Commonwealth and State government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions (AFTINET 2015).

Several Australian states have developed such policies, and the 2017 Joint Select Committee inquiry into changes to Commonwealth procurement guidelines recommended that the Australian government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses (Join Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017).

Australia has also maintained exemptions for Small and Medium-Sized Enterprises (SMEs) to procurement rules, including exemptions for indigenous enterprises

More recently in the process of Australia's accession to the WTO procurement agreement, the EU, of which the UK was at that time a member, objected to Australia's exemptions for SMEs and indigenous enterprises as discriminatory. The EU demonstrated its objection through a clause which says that:

> "The provisions of Article XVIII shall not apply to suppliers and service providers of Japan and Korea US and Australia in contesting the award of contracts to a supplier or service provider of parties other than those mentioned which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses."
>
> (WTO GPA Committee, October 2018a: 20, clause 2.2).

Article XVIII refers to access to the national judicial appeals mechanism available to all companies bidding for procurement contracts if they can argue that they have not been treated according to the rules of the agreement.

This means that Australian SMEs will have access to the European procurement market, but will not have access to the appeals mechanism, and that EU members will continue to press for change to Australia's policy. The EU reference to "discriminatory measures in favour of certain domestic small and minority businesses" indicates a clear intention of the EU to pursue the removal of exemptions for SMEs, and for Aboriginal and Torres Strait Islander businesses.

Iceland and Switzerland, which are not EU members but are parties to the GPA, have similar clauses as part of their terms of Australia's accession. It may be that the UK will continue to pressure against SME and indigenous enterprise exemptions in the negotiations for the UK FTA. The government should resist this pressure.

Australia has not previously included local government procurement in trade agreements, because of the importance of local firms in contributing to local employment, especially in regional areas. The experience of the need to sustain local employment in the process of rebuilding after the recent severe bushfires in regional areas has underlined the importance of this policy.

There have also been reports that the EU is pressing to include Australian local government in the EUFTA procurement arrangements. The UK was part of this negotiation until recently. The government should resist such pressure in the negotiations with the UK.

Recommendations

- That the Australian government should not enter into any commitments on government procurement that undermine its ability, or the ability of state governments, to support local Australian businesses.
- That the Australian government should maintain its current government procurement exemptions for SMEs, indigenous enterprises and for local government procurement**.**

7. E-commerce

Electronic commerce is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The e-commerce agenda is highly influenced by the US tech industry lobby, which seeks to codify rules that suit the dominant tech industry companies. These rules were the basis of the USA's negotiating position during the Trans-Pacific Partnership negotiations (Kelsey 2017a: 5-8), and are known as the Digital2Dozen principles (Office of the United States Trade Representative 2016).

The aim of this e-commerce agenda is to secure the free flow of cross-border data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of big tech companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of big tech companies including:

- Facebook and Google's data abuse scandals (Waterson 2018, MacMillan and McMillan 2018);
- Uber classifying itself as as a technological platform to avoid regulation and enable its exploitation of workers (Bowcott 2017);
- Apple's tax avoidance (Drucker and Bowers 2017);
- Anti-competitive practices by Facebook, Google and Amazon (Ho 2019).

The Australian Competition and Consumer Commission's (ACCC) ground-breaking digital platforms report, released in July 2019, identified the need for regulatory reform in Australia to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms (ACCC 2019). In its response to the ACCC report in December 2019, the government "accepted the overriding conclusion that there was a need for reform" and has outlined a plan for immediate and long-term action.

Concerns have already been raised that the government's response to the ACCC inquiry does not go far enough to address existing and emerging gaps in Australia's regulatory framework and that additional reform may be required (Kemp and Nicholls 2019). In this context, is is vital that the UK FTA does not include e-commerce provisions that restrict policy flexibility for this government, or future governments.

7.1 E-commerce rules and privacy rights and consumer protections

The risk of e-commerce rules to privacy rights and consumer protections has been widely documented and contradicts government assurances that e-commerce rules are compatible with privacy and consumer protections (Greenleaf 2018, Kelsey 2017b). Privacy rights and data security are undermined by rules that restrict the regulation of electronic transmissions, preventing governments from requiring encryption of personal data and other security measures.

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively evading privacy legislation. The assertion that the inclusion of privacy and consumer protections in e-commerce chapters, which require parties to have/enact privacy and consumer laws, is enough to ensure privacy is upheld, is misleading. Unless these provisions outline a minimum standard for this legislation there is no guarantee that once data is moved and stored offshore it will be subject to the same privacy standards as in Australia (Greenleaf 2018).

7.2 E-commerce rules and government responses to anti-competitive and discriminatory practices

The use of algorithmic systems to collect and analyse data is a fundamental aspect of the digital economy. However, there is growing evidence that demonstrates that algorithms can be used by companies to reduce competition (European Commission 2017, ACCC 2019: 12.) and that algorithmic bias can result in race, gender, class or other discrimination (Mittelstadt et al 2016: 1-2, Dastin 2018).

For governments and regulators that are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, source code is an important tool in this process. Regulators may require access to source code in a range of situations, including for example, to determine whether practices contravene competition law or to detect if algorithms are discriminatory (Reid-Smith 2017a). E-commerce rules that prevent governments from requiring that companies transfer or give access to their source code can undermine government efforts to identify and respond to anti-competitive practices and algorithmic bias.

7.3 E-commerce rules, cybersecurity and security standards for electronic transmissions

Trade agreements are increasingly including provisions that impact on the regulations of electronic transactions, which could increase cybersecurity risks. For example, the TPP-11 includes provisions that restrict governments from setting security standards for electronic transactions (DFAT 2018, Article 14.6). This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others (Ried-Smith 2018: 8-25). The impact of electronic transactions rules is worsened when combined with e-commerce rules that enable the free flow of cross-border data, as governments are restricted in their ability to ensure that this data is encrypted when it is transferred or stored securely (Ried-Smith 2018: 26).

It is important that governments retain the ability to regulate security standards in order to reduce cybersecurity issues. This is particularly the case given the rapid emergence of new technologies in this space, which could adapt or create new cybersecurity risks requiring new regulatory frameworks.

7.4 E-commerce rules and financial services

E-commerce rules relating to financial services are an emerging trade issue that raises additional privacy concerns and poses new financial oversight and management risks. These provisions undermine the government's ability to protect privacy by enabling companies to move financial data to jurisdictions where privacy laws are more limited. Once finance data has moved offshore it is extremely difficult for states to control or have oversight over this data (Ried-Smith 2017b: 6-7).

The Global Financial Crisis demonstrated the risks of foreclosing governments' control over financial data. US Treasury Secretary Lew told Congress there were times during the crisis when they were cut off from timely and appropriate information (Lew 2016, Guida 2016). Because of that experience, the US insisted in the TPP that financial data were treated more restrictively than other data and was exempted from the data transfer rules that prevent requirements that data is stored and processed locally. This provision remained in the TPP-11 text after the US left the agreement (DFAT 2018).

Given the size of the UK's financial services sector, it is likely that e-commerce provisions that impact financial services will be on the negotiating table. The government must ensure that provisions do not reduce privacy in relation to financial data or restrict the government's ability to respond to a financial crisis.

7.5 E-commerce rules and workers' rights

Trade rules that enable global corporations, including those operating in the gig-economy, to access Australian markets without a local presence, could worsen the situation for workers and undermine Australian employment law.

The International Trade Union Confederation (ITUC) argues that "without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged" (ITUC 2019). Concerns have also been raised about the impact that new technologies and Artificial Intelligence can have in recruitment practices and on work conditions (Centre for Future Work 2019: 17-18).

It is essential that e-commerce rules do not restrict the government's ability to implement policy reform and new innovative regulation to respond to emerging issues in relation to labour rights and conditions.

Recommendations

The Australia-UK FTA should not include provisions that:

- prevent current and future governments from regulating the cross-border flow of data;
- prohibit the use of local presence requirements.
- prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination.
- Prevent governments from setting standards for the security of electronic transactions
- cover financial services

The Australia-UK FTA should include:

- full exemptions for tax policy
- mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.

8. Support for and implementation of internationally recognised labour rights

The Australian government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and the associated Conventions. These include:

- the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98)
- the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105)
- the effective abolition of child labour (ILO conventions 138 and 182), and
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).
- The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

- The Australia-UK free trade agreement should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

9. Support for and implementation of internationally recognised Environmental Standards

Protection of the environment is a critical trade policy objective. Trade agreements should require full compliance with an agreed-upon set of Multilateral Environmental Agreements including the Paris Agreement and future agreements on carbon emissions reductions, with effective sanctions for non-compliance.

At the same time, the government must ensure that other provisions that are included in the agreement, such as investor-state dispute processes, do not undermine the ability of governments to regulate in the interest of protecting the environment.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should not restrict governments' ability to adopt measures to address climate change.

The implementation of environmental standards should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

- The Australia-UK free trade agreement should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.

10. Movement of natural persons

Australia is a nation built on immigration and has a permanent migration scheme which has created our vibrant multicultural society. AFTINET strongly supports the permanent migration scheme. Permanent migrants have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary work visas for overseas workers were originally designed to address specific skills shortages and were subject to local labour market testing to establish whether there was a skills shortage. However, there are now many different forms of temporary work visas, and there were over 800,000 temporary visa workers in Australia in 2018 (Mares, 2018).

Temporary workers are in a far weaker bargaining position than permanent migrants because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they are commodities and removes policy flexibility. Governments should always retain their ability to regulate labour market policies, which need constant adjustment to ensure workers are not exploited. The inclusion of these provisions in legally binding trade agreements removes such flexibility.

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas as a means of deregulating labour markets. (Rosewarne 2015, Howe 2015).

Recent Australian studies have provided more evidence of the exploitation of temporary workers. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to the agency in 2015. In the three years from 2012, the agency dealt with 6,000 complaints and recovered more than $4 million in outstanding wages (Toscano 2015).

A 2015 Senate inquiry into temporary work visas provided similar evidence (Senate Standing Committee on Education and Employment 2015**)** and more recent evidence was provided to the Joint Parliamentary Committee Inquiry into a Modern Slavery Act (Joint Standing Committee on Foreign Affairs, Defence and Trade 2017).

A survey by UNSW academics found temporary migrant workers experienced widespread wage theft (Berg and Farbenblum 2017). A study published in 2019 by Professor Joanna Howe and others of the horticultural industry showed widespread exploitation and wage theft in the horticultural industry, which is entirely dependent on temporary workers, the majority on working holiday visas (Howe et al, 2019).

The evidence from all these studies shows gross violations of Australian minimum work standards including failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries. The extension of temporary worker arrangements in trade agreements adds more workers with less bargaining power who are more vulnerable to these violations because loss of their employment can lead to deportation.

Recommendation

- That Australia make no offers for the extension of temporary movement of workers other than senior executives and managers in the Australia-UK free trade agreement.

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