Submission to the Department of Foreign Affairs and Trade on the Regional Comprehensive Economic Partnership from the Australian Fair Trade & Investment Network (AFTINET)

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) on issues to be considered in the negotiation of the Regional Comprehensive Economic Partnership (RCEP).

AFTINET supports the principle of multilateral trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. However, for this principle to work in practice, there must be a multilateral framework that is transparent, guarantee the interests of less powerful nations, moderates corporate influence and is based on respect for human rights, labour rights and environmental sustainability. The current WTO framework has not achieved these goals. However, we are concerned that the proliferation of bilateral and regional preferential agreements could undermine the principle of multilateralism, exclude those with least power and lead to a noodle bowl of agreements with inconsistent provisions.

AFTINET believes that the following principles should guide Australia's approach to the RCEP:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations;
- Before an agreement is signed by Cabinet, the text should be published for public and Parliamentary debate. Comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation;
- Trade agreements should support human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments;
- Trade agreements should support the ability of governments to regulate in the public interest.

The 2010 Productivity Commission report and 2011 Australian trade policy

The Productivity Commission Report of December 2010 found that the claimed economic benefits of many bilateral and regional trade agreements have been overestimated, and are in fact often not significant. The overestimation of benefits has often been based on unrealistic assumptions that all trade barriers will be immediately removed upon the agreement coming into force. In practice, the outcomes of trade negotiations do not deliver immediate removal of all trade barriers and economic benefits based on these assumptions are seldom delivered. The Report also criticises the proliferation of preferential agreements which can result in conflicting rules of origin and

trade diversion, which reduce the claimed economic benefits. The Report recommends that there be public discussion and independent assessment of the costs and benefits of the final text of trade agreements before any decisions are made[1].

1. Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation

The Australian Government should commit to effective and transparent community consultation before, during and at the conclusion of negotiations with sufficient time frames to allow informed public debate about the impact of particular agreements.

Before negotiations begin, the Government should publish the rationale, aims and objectives of the negotiations for public and Parliamentary debate.

The Productivity Commission report made a recommendation which would be a step forward for transparency and accountability. This recommendation is that after completion of negotiations, but before the signing of any trade agreement, the Government should publish the text of the agreement with an independent assessment of the costs and benefits of the agreement, which would be debated publicly and in parliament before the decision to sign is made by Cabinet[2]

There is increasing public support for the demand that texts of trade agreement should be published for full public and Parliamentary debate before they are signed by Cabinet. The World Trade Organisation publishes background documents and draft texts on its website. The draft text of the Anti-Counterfeiting Trade Agreement (ACTA) was also published before signing by governments.

> ***Recommendation 1.1*: The Government should prepare a position paper on the objectives for its participation in the RCEP negotiations, for public and Parliamentary discussion.**
>
> ***Recommendation 1.2:*** **That there should be regular public consultations with all stakeholders, including release of draft texts. These should include the ability of stakeholder to be present and meet with negotiators at negotiating rounds, with the following conditions:**
>
> - **Early release of timing of negotiations and topics to enable planning for stakeholder travel and meetings with negotiators**
> - **Reception, if held, to be open to stakeholders**

[1] Productivity Commission, 2010, *Report on Bilateral and Regional Trade Agreements*, Canberra, December, p. xxviii.
[2] Productivity Commission report, 2010, p.p. 309 -10.

- **Stakeholder presentations at a time when negotiations are not being held**
- **Minimum time of 15 minutes for stakeholder presentations**
- **Stakeholder presentations in rooms large enough to accommodate negotiators**
- **Access for stakeholders to the venue and space for meetings with negotiators throughout the period of the negotiations**
- **Internet access for stakeholders in venue**

***Recommendation 1.3*: After completion of negotiations, but before signing by Cabinet, the Government should publish the final draft text to allow an independent assessment of the costs and benefits of the agreement, which would be debated publicly and in Parliament before the decision about signing is made.**

Special and differential treatment for developing and least developed countries

AFTINET notes that the RCEP countries vary widely in terms of levels of economic development, size of economies and negotiating power. AFTINET welcomes the statement in the RCEP Principles and Guiding Objectives[3] that the agreement will include appropriate forms of flexibility including provision for special and differential treatment, plus additional flexibility for the least-developed ASEAN Member States. It is important for all governments to ensure that trade agreements do not limit the ability of governments to regulate in areas of public interest, including health, the environment, financial regulation and economic development. It is particularly important for developing and least developed countries to retain the regulatory space to address these issues.

2. Labour rights and environmental standards

We welcome the fact that Australian trade policy supports the concept of including labour and environmental provisions in trade agreements, and that the Australian Trade Minister in a media release on the RCEP said on September 1 2012 that "Australia will pursue the inclusion of labour and environment issues in the scope of the agreement once

[3] RCEP Ministerial Statement "Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership," September1, 2012, found at http://www.asean.org/images/2012/documents/GuidingPrinciplesandObjectivesforNegotiatingtheRegionalComprehensiveEconomicPartnership.pdf

negotiations are launched" [4].

The Australian Government should ensure that the agreement includes commitments by governments to implement agreed international labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. 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 rights should be enforced through the government to government dispute processes contained in the agreement.

The agreement should also include commitments not to undermine environmental standards and to implement appropriate environmental standards as defined in United Nations environmental agreements. These should be enforced through the government to government dispute processes contained in the agreement.

Recognition of special and differential treatment for developing and least developed countries should include assistance and capacity building for them to implement the labour rights and environmental standards in the agreement.

> ***Recommendation 2.1*: The agreement should contain commitments by governments to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, and to implement United Nations environmental agreements. The implementation of these rights and standards should be enforced through the government to government dispute processes contained in the agreement.**

> ***Recommendation 2.2*: There should be assistance and capacity building for developing and least developed countries to implement these rights and standards.**

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[4] Emerson, C., (2012) "Groundwork laid for massive Asian regional trade agreement" Media Release, September 1, found at http://www.trademinister.gov.au/releases/2012/ce_mr_120901.html.

3. The RCEP should not undermine the ability of governments to regulate and provide services in the public interest.

The RCEP Principles and Guiding Objectives state that:

> Rules and obligations on trade in services under the RCEP will be consistent with the General Agreement on Trade in Services (GATS) and will be directed towards achieving liberalization commitments building on the RCEP participating countries' commitments under the GATS and the ASEAN+1 FTAs. All sectors and modes of supply will be subject to negotiations.

AFTINET is concerned to ensure that these negotiations do not undermine governments' capacity to provide public services and to make laws and policies in the public interest, in regard to essential services like health, education, social services, audio-visual services, post, public transport, water and energy.

In the context of continuing financial instability and climate change, many governments, including the Australian government, are currently taking steps to re-regulate financial markets and financial services, are regulating energy markets to reduce the levels of greenhouse gases, are regulating water markets to reduce waste and conserve water, and are regulating tobacco advertising services for public health reasons. Trade Agreements should not reduce the ability to regulate in these areas.

To the extent that services are included in the agreement, a positive list rather than a negative list system should be used. A positive list based on the GATS model would mean that disciplines on National Treatment, Market Access and Domestic Regulation should only apply to those services which each government agrees to list in the agreement

A positive list structure enables governments to make deliberate decisions about which services will be included in the agreement. A positive list also allows for services which may develop in the future, and which governments may wish to retain the flexibility to regulate. This structure is important for all governments, but is especially important for developing countries, where many service industries have yet to develop.

The inclusion of essential services 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 of numbers of services, location of services, employment and training of local people, transfer of technology or relationships with local industry Governments should maintain the right to regulate to ensure equitable access to essential services, local employment and industry development and to meet social and environmental goals.

Public services should be clearly exempted from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in the GATS which defines a public service as "a service supplied in the exercise of governmental authority … which means a "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.

This has been specifically noted by the WTO Secretariat in relation to the GATS:

> The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and the applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article 1.3? … The hospital sector in many countries … is made up of government and privately owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided … It seems unrealistic in such cases to argue for continued application of Article 1.3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services. In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII[5].

This statement by the WTO secretariat confirms that a clearer definition for exclusion of public services is needed in trade agreements. In the meantime, Government should explicitly exclude public services from coverage.

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

AFTINET recorded its objections to Australia's support for a 2009 proposal that the GATS include a clause to restrict governments' ability to regulate services in the public interest by introducing a 'necessity test' on matters to do with licensing, qualifications and technical standards.

We continue to oppose any similar proposals in the RCEP negotiations. A necessity test would hand to trade tribunals the right to decide whether government regulations were "necessary", within the narrow framework of trade law, without due regard to the social and environmental purposes of such regulation. Opinions about the necessity of particular legislation can differ widely, and change over time, as demonstrated by the global financial crisis and climate change impacts.

[5] WTO secretariat, 1998, quoted in Ellis-Jones, M and Hardstaff, P (2002) *Serving (up) the nation: a guide to the UK's commitments under the WTO General Agreement on Trade in Services*, World Development Movement, London, p. 43.

Recommendation 3.1: **The Australian Government should support a positive list structure with disciplines on National Treatment, Market Access and Domestic Regulation only applying to those services which each government agrees to list in the agreement.**

Recommendation 3.2: **The Australian Government should support a definition of public services which clearly excludes all public services, and retains the right of governments to provide and fund public services without being obliged to provide public subsidies to private providers.**

***Recommendation* 3.3: The Australian Government should explicitly exclude public services from any offers in the negotiations.**

***Recommendation* 3.4: The Australian Government should oppose any proposals which would reduce the right of governments to regulate services, including the application of a stricter 'necessity test' to regulation of licensing, qualifications and service standards**

***Recommendation* 3.5 The Australian Government should make no offers in the services negotiations on health, education, audio-visual media services, public transport, postal services, energy or water services**

Mode 1V of trade in services: movement of natural persons

The RCEP Principles and Guiding Objectives state that all sectors and modes of supply in trade in services will be subject to negotiations.

This would include Mode 1V, the temporary movement of people

AFTINET does not support the inclusion of the temporary movement of workers other than executives and senior management in trade agreements. This is because their labour market position is different from that of executives and senior management, and there is overwhelming evidence that they are in a far weaker bargaining position which leaves them vulnerable to exploitation as temporary migrant workers.

Our concerns are prompted by widespread evidence of the exploitation of temporary workers under the previous government's visa 457 regulations, especially the lack of protection of their basic rights, low pay and unacceptable working conditions, including poor health and safety conditions leading to injury and death in some cases. The fact that these workers are temporary, and that their visa applies only to employment with a particular employer, means that they are rightly afraid they will be dismissed and deported if they complain, and are more vulnerable to exploitation than other workers.

The Labor Government recognised these serious issues, and conducted a review of Visa 457 conditions, which documented the problems[6]. The review recommended changes to employment conditions, protection from exploitation, improved health and safety requirements, and English language requirements. On April 1, 2009 the government announced changes to Visa 457 conditions to address some of these issues. On February 26, 2013 further changes were announced, including requirements for labour market testing[7] .

We submit that the visa 457 arrangements differ from the movement of executives and senior management arrangements, because the labour market position of such workers makes them vulnerable to exploitation unless their rights are protected through specific arrangements.

The inclusion of labour mobility arrangements in trade agreements, can mean they are effectively 'locked in", and extremely difficult for future governments to change. There have already been changes to Visa 457 arrangements. If, for example, a future government made further changes, Australia could be subject to legal action under the disputes process, resulting in trade sanctions.

AFTINET advocates that any arrangements about the temporary movement of workers whose labour market position means they are vulnerable to exploitation, should not be part of trade agreements, but should be separate government-to-government arrangements. This would enable such arrangements to include safeguards for labour rights. It would also enable them to be changed as circumstances change.

> ***Recommendation 3.6:*** **The agreement should not include provisions for the temporary movement of non-executive and non-senior management workers.**

4. No Investor-State Dispute Settlement process

AFTINET has long advocated against investor state dispute settlement processes (ISDS), on the grounds that they have enabled individual foreign investors to sue governments for

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[6] Deegan, Barbara, (2008) *Visa Subclass 457 Integrity Review Report to the Minister for Immigration*, October, found at *www.minister.immi.gov.au/media/.../457-integrity-review-report.pdf*

[7] Senator Chris Evans, (2009), Minister for Immigration and Citizenship, "Government announces changes to 457 visa programme", April 1, found at www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm

Daniel Hurst and Clay Lucas, (2013)"Foreign worker scheme 'rorted'", *the Age* February 27, 2013, found at http://www.theage.com.au/opinion/political-news/foreign-worker-scheme-rorted-20130226-2f46p.html#ixzz2M47KemnE

millions of dollars in response to legitimate public interest legislation on health and the environment.

US-based global tobacco company Philip Morris was unable to sue the Australian Government for damages over its plain packaging legislation because public opposition ensured there was no ISDS in the US-Australia Free Trade Agreement. The company then shifted some assets to Hong Kong to enable it to sue for damages under an obscure 1993 Australian Hong Kong bilateral investment treaty. The case is continuing despite the fact that the legislation was passed with support from all parties and a group of tobacco companies lost their claim for damages in the Australian High Court. This example illustrates perfectly the dangers of such processes, which undermine democratic national parliamentary and legal processes.

There is now a large body of academic studies which demonstrate that investment disputes launched by corporations and arbitrated by panels of investment law experts which are not open to the public do not deal adequately with public policy considerations[8].

The Productivity Commission Report found no evidence that these processes resulted in greater inflows of foreign direct investment. It also found no evidence for some of the key arguments used to justify investor-state dispute processes. For example, it found no evidence of market failure resulting from political risk to foreign investors, and no evidence that regulation is systematically biased against foreign investors On the contrary, the report concluded that that 'experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'. The report recommended against inclusion of investor state dispute settlement processes in future trade agreements[9].

We welcome Australia's 2011 trade policy on investor state disputes settlement which states:

> 'The Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses… In the past, Australian governments have sought the inclusion of investor State dispute resolution procedures in trade and agreements with developing countries at the behest of Australian businesses. The Gillard government will discontinue this practice… The government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme[10] '

[8] See Kyla Tienhaara, *The expropriation of environmental governance: protecting foreign investors at the expense of public policy*, Cambridge University Press, 2009.
[9] Productivity Commission Report, 2010, pp. 267-9, p. 274 and p xxxviii.
[10] Craig Emerson, "Trading our way to more jobs and prosperity" Canberra, Department of Foreign Affairs and Trade, April 12, p.20.

***Recommendation 4*: The Australian Government should continue to implement its policy against the inclusion of investor state dispute settlement processes in all trade agreements, including the RCEP.**

5. Intellectual property rights

The RCEP Principles and Guiding Objectives state that:

> The text on intellectual property in the RCEP will aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights.

The meaning of economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights is unclear in the context of RCEP. Does integration mean that all countries should adopt the same standards, despite the fact that their intellectual property laws differ according to levels of development and membership of other trade agreements?

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 at reasonable cost, particularly access to essential products like medicines**.** The law should also prevent patenting of life forms and of traditional knowledge and artefacts.

The Productivity Commission report concluded that, since Australia is a net importer of patented and copyrighted products, the extensions of patents and copyright in the AUSFTA imposed net costs on the Australian economy[11].

Australia's Pharmaceutical Benefits Scheme relies on comparisons by health experts of new patented medicines with existing medicines, including generic non-patented medicines, which have the same health effects. Wholesale prices of medicines are determined on the basis of both cost effectiveness and medical effectiveness. Prescription medicines are then made available at subsidised retail prices. The cost of the scheme to taxpayers is the difference between the negotiated wholesale price and the subsidised retail price. Any extension of patent rights and delays in cheaper generic medicines becoming available would increase the cost of this scheme to taxpayers, and would create pressure for higher retail prices.

The Australian Government therefore has no interest in the extension of patent rights for pharmaceuticals.

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:

[11] Productivity Commission report p. 259, 260

> 'The Commission is not convinced, however, that the approach adopted by Australia in relation to IP in trade agreements has always been in the best interests of either Australia or (most of) its trading partners. Among other things, there does not appear to have been any economic analysis of the specific provisions in AUSFTA undertaken prior to the finalisation of negotiations, nor incorporated in the government's supporting documentation to the parliament. As noted above, the AUSFTA changes to copyright imposed net costs on Australia, and extending these changes to other countries would be expected to impose net costs on them, principally to the benefit of third parties.
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> Concerns have also been raised about the effects of IP provisions in some other trade agreements that Australia has supported. For example, Australia supported the 1994 TRIPS agreement — which was included in the Uruguay Round single undertaking — and saw Australia extend the term of protection for patents from 16 years to 20 years. Subsequent analysis by Commission staff found that the extension of rights to existing patents could result in a large net cost to Australia.
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> Some economists have also argued that implementation of TRIPS by developing countries would result in significant net costs to them, costs not offset by the other provisions in the Uruguay agreement …To the extent that 'emerging international standards' would extend IP rights further, requiring developing countries to adhere to these standards could do them further harm, again principally to the benefit of business interests in the United States and Europe' [12]

Based on this evidence, the Productivity Commission Report recommended that 'the Australian government should avoid the inclusion of intellectual property matters as an ordinary matter of course in future bilateral and regional trade agreements'[13]. This recommendation was supported by the Australian government in its 2011 trade policy statement[14].

The RCEP countries include the Republic of Korea, which has recently concluded a bilateral trade agreement with the US, which contains the most extreme extension of IP provisions for medicines of any trade agreement, and limits on the ability of governments to regulate medicine prices[15]. The Australian government should resist any such proposals in the RCEP.

The Productivity Commission discussion of the changes to Australian copyright law resulting from the AUSFTA show that these changes were not in Australia's national

[12] Productivity Commission Report, p.263
[13] Productivity Commission Report, p. xxxviii.
[14] Emerson, 2011, p. 26
[15] See Gleeson, Deborah, Analysis of the June 2011 leaked TPP Transparency Chapter Annex (Annex on Transparency and Procedural Fairness for HealthCare Technologies) A comparison with the text of Annex 2 of the Australia US Free Trade Agreement and Chapter 5 of the Korea US Free Trade Agreement found at http://www.dfat.gov.au/fta/tpp/subs/tpp_sub_gleeson_120911.pdf

interest, and should be questioned. A similar discussion is taking place in the context of the current Review of Australia's Pharmaceutical Patents legislation by IP Australia. See the Submission by AFTINET, the Public Health Association of Australia and other health groups, and other submissions, and the Draft Report published on April 3, 2013.[16]

Given the differences in levels of development and intellectual property regimes between negotiating parties, the goal of integration of IP laws is not desirable, and would not be in the interests of Australia or most RCEP countries. Several countries like India are large producers of generic medicines, with both economic and public health interests in reducing delays for generic medicine market entry. Many of the ASEAN countries are developing countries which rely on timely access to generics for any hope of affordable access to medicines, and have no interest in the extension of IP rights. They also wish to prevent the granting of copyright, patents or trademarks on traditional medical practices, medicinal preparations and other traditional knowledge and artefacts. As documented above by the Productivity Commission, least developed countries are still struggling with the implementation of the WTO TRIPS agreement.

***Recommendation 5*: The Australian government should not support inclusion of increased intellectual property rights in the RCEP**

[16] Found at http://pharmapatentsreview.govspace.gov.au/files/2013/01/2013-01-21-AFTINET-Submission.pdf
The draft report of the Review is at https:/ / pharmapatentsreview.govspace.gov.au/ draft-report-2

Summary of Recommendations

***Recommendation 1.1*: The Government should prepare a position paper on the objectives for its participation in the RCEP negotiations, for public and Parliamentary discussion;**

***Recommendation 1.2:* That there should be regular public consultations with all stakeholders, including release of draft texts. These should include the ability of stakeholder to be present and meet with negotiators at negotiating rounds, with the following conditions:**

- **Early release of timing of negotiations and topics to enable planning for stakeholder travel and meetings with negotiators**
- **Reception, if held, to be open to stakeholders**
- **Stakeholder presentations at a time when negotiations are not being held**
- **Minimum time of 15 minutes for stakeholder presentations**
- **Stakeholder presentations in rooms large enough to accommodate negotiators**
- **Access for stakeholders to the venue and space for meetings with negotiators throughout the period of the negotiations**
- **Internet access for stakeholders in venue**

***Recommendation 1.3*: After completion of negotiations, but before signing by Cabinet, the government should publish the final draft text to allow an independent assessment of the costs and benefits of the agreement, which would be debated publicly and in Parliament before the decision about signing is made.**

***Recommendation 2.1*: The agreement should contain commitments by governments to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, and to implement United Nations environmental agreements. The implementation of these rights and standards should be enforced through the government to government dispute processes contained in the agreement.**

***Recommendation 2.2*: There should be assistance and capacity building for developing and least developed countries to implement these rights and standards.**

Recommendation 3.1: **The Australian Government should support a positive list structure with disciplines on National Treatment, Market Access and Domestic Regulation only applying to those services which each government agrees to list in the agreement.**

Recommendation 3.2: **The Australian Government should support a definition of public services which clearly excludes all public services, and retains the right of governments to provide and fund public services without being obliged to provide public subsidies to private providers.**

Recommendation **3.3: The Australian Government should explicitly exclude public services from any offers in the negotiations.**

Recommendation **3.4: The Australian Government should oppose any proposals which would reduce the right of governments to regulate services, including the application of a stricter 'necessity test' to regulation of licensing, qualifications and service standards**

Recommendation **3.5 The Australian Government should make no offers in the services negotiations on health, education, audio-visual media services, public transport, postal services, energy or water services**

Recommendation 3.6: **The agreement should not include provisions for the temporary movement of non-executive and non-senior management workers.**

***Recommendation 4*: The Australian government should continue to implement its policy against the inclusion of investor state dispute settlement processes in all trade agreements, including the RCEP.**

***Recommendation 5*: The Australian government should not support inclusion of increased intellectual property rights in the RCEP**