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**Updated submission to the Department of Foreign Affairs and Trade (DFAT)
on the scoping discussions for a proposed Australia-United Arab Emirates
Comprehensive Economic Partnership Agreement (UAE CEPA)**

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Introduction

AFTINET supports the development of fair trading relationships with all countries, based on the principles of human rights, labour rights and environmental sustainability. We recognise 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 and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral rules 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.

AFTINET welcomes the opportunity to make a submission to the scoping discussions about negotiating a Comprehensive Economic Partnership Agreement (CEPA) with the United Arab Emirates (UAE). This submission will present evidence of gross violations of basic human rights and labour rights in the UAE, and argue that Australia should not reward such violations with a preferential trade agreement.

In the event that negotiations might proceed, the submission presents evidence about why certain harmful provisions should be excluded.

Summary of Recommendations

Preconditions for negotiations

- ***Before embarking upon negotiations, for a UAE CEPA the Australian government must require evidence of improvements in the UAE human rights legislation and record – including accession and adherence to UN human rights conventions – as a precondition for the commencement of negotiations.***
- ***Before embarking upon negotiations, the Australian government must require ratification of the Arms Trade Treaty (ATT) by the UAE.***
- ***Before embarking upon negotiations, the Australian government must require evidence of improvements in labour rights legislation and implementation – including accession and adherence to ILO Fundamental Conventions and the Migrant Workers Convention – as a precondition for the commencement of negotiations***
- ***Before embarking upon negotiations, the Australian government must require evidence of improvements in and implementation of women’s rights legislation and domestic workers protections – including accession and adherence to ILO Domestic Workers Convention – as a precondition for the commencement of negotiations***
- ***Before embarking upon negotiations, the Australian government should require evidence from the UAE of improved implementation of the Paris agreement and net zero emissions by 2050***
- ***Trade agreements should bind parties to upholding international environmental law, including the Paris Agreement.***

In the event that negotiations proceed:

- ***Prior to commencing negotiations with the UAE, 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 UAE CEPA and GCC free trade agreement, including potential economic, social, environmental and human rights impacts.***
- ***There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. During these consultations, stakeholders must have access to government proposals and discussion papers.***
- ***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 should be excluded from negotiations***
- ***There should be no extension of patents or copyright monopolies in trade negotiations***

- ***Public services should be clearly and unambiguously excluded from any agreement, and there should be no restrictions on the government's right to provide and regulate services in the public interest.***
- ***If a trade i-services chapter is included, it 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.***
- ***The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local manufacturing industry, especially the development of local renewable energy industries.***
- ***The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.***

Any agreement with the UAE should not include provisions that:

- ***Prevent governments from regulating the cross-border flow of data***
- ***Prevent regulation to address market power imbalances***
- ***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.***
- ***Prevent full regulation of financial services***
- ***Prevent governments from regulating to ensure that digital platform workers workers have access to the same minimum standards for wages and working conditions as other workers***

Any 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**

Respect for human rights must be a precondition of preferential trading relationships

The UAE and Australia already engage in \$6.8 billion in two-way trade across a number of industries, including aluminium oxide, meat, vehicle parts, and telecommunications¹. Given the existing trading relationship, it must be asked why Australia seeks to grant preferential trading rights above and beyond existing WTO rules to a country that is routinely criticised and investigated for gross violations of human rights and labour rights, including war crimes.

Any potential future benefits from some expansion of trade must be weighed against the potential cost of damaging the international human rights system. By granting preferential trading rights to the UAE, Australia may be seen to be legitimising and incentivising violations of human rights and labour rights in the UAE, which are subject to consistent criticisms and investigations.

Human rights abuses in the UAE

Evidence of the violations of human rights and labour rights in the UAE has been extensively documented over an extended period by both the UN and human rights organisations.

The UAE is not a signatory to key human rights treaties, including: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²

Amnesty International's 2020-2021 Report³ documented a range of human rights breaches in the UAE, including against labour rights, migrant rights, women's rights, and citizenship rights. It also exposed continuing illicit trade in arms and military equipment with militias in Yemen and Libya, despite its February 2020 withdrawal from direct participation in the Yemeni Civil War.

The UN has made repeated investigations into and reports on the UAE's involvement in the war in Yemen. In each of its annual reports, the United Nations Human Rights Council's Group of Eminent Experts on Yemen (GEE) found "reasonable grounds to believe that the parties to the conflict have committed and continue to commit serious violations of international human rights and international humanitarian law. Some of which may amount to war crimes."⁴⁵

¹ Tehan, D (2022) Expanding trade and investment with the United Arab Emirates, 17 March 2022, via: <https://www.trademinister.gov.au/minister/dan-tehan/media-release/expanding-trade-and-investment-united-arab-emirates>

² OHCHR (2022) UN Treaty Body Database – United Arab Emirates, via: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=184&Lang=EN

³ Amnesty International (2022) Amnesty International Report 2021/22, via: <https://www.amnesty.org/en/location/middle-east-and-north-africa/united-arab-emirates/report-united-arab-emirates/>

⁴ Group of Eminent International and Regional Experts on Yemen (2020) Fresh war crimes fears highlighted in new Yemen report, 9 September, via: <https://news.un.org/en/story/2020/09/1072012>

⁵ United Nations Human Rights Office of the High Commissioner (2018) Yemen: United Nations Experts point to possible war crimes by parties to the conflict, 28 August, via: <https://www.ohchr.org/en/press-releases/2018/08/yemen-united-nations-experts-point-possible-war-crimes-parties-conflict?LangID=E&NewsID=23479>

In its reports, the GEE specified that responsibility lies “with all parties to the conflict... Namely the Government of Yemen, de facto authorities, the Southern Transitional Council and members of the Coalition, in particular Saudi Arabia and the United Arab Emirates.”⁶

Despite the UAE ‘s participation in wars in Yemen and Libya, the Australia Defence Export Control agency approved 80 permanent export permits to the UAE between 2015 and 2021⁷. despite warnings from the UN that a decade-long arms embargo on the conflict in Libya is “totally ineffective”⁸ because of continued supply of arms from countries including the UAE.

Australian civil society organisations have warned that “all states, including Australia, risk complicity in war crimes if they continue to supply the Saudi-led coalition [including the UAE] with arms.”⁹

As a signatory of the Arms Trade Treaty (ATT), Australia is obliged to reject export applications if there is a risk of negative consequences for human rights, terrorism, peace, security, and transnational organised crime. As the UAE has signed but not ratified the ATT, Australia must consider the heightened risk of breaches to its international obligations under the ATT should a UAE CEPA go ahead.

The UAE continues to impose capital punishment, including an Israeli woman condemned to death for drug possession in April 2022, although the sentence is not always carried out. ¹⁰

Recommendations:

- ***Before embarking upon negotiations, the Australian government must require evidence of improvements in the UAE human rights legislation and record – including accession and adherence to UN human rights conventions – as a precondition for the commencement of negotiations.***
- ***Before embarking upon negotiations, the Australian government must require ratification of the Arms Trade Treaty (ATT) by the UAE.***

Trade agreements must not undermine workers’ rights nor enable the exploitation of temporary migrant workers

The Australian government should ensure that all trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation’s (ILO) Declaration on Fundamental Principles and Rights at Work and the Fundamental 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)

⁶ Group of Eminent International and Regional Experts on Yemen (2020) Fresh war crimes fears highlighted in new Yemen report, 9 September, via: <https://news.un.org/en/story/2020/09/1072012>

⁷ Fahy, M (2021), Australia defies UN pleas over atrocities in Yemen, escalates weapons exports to Saudis, May 17, via: <https://www.michaelwest.com.au/revealed-australia-defies-un-pleas-over-atrocities-in-yemen-escalates-weapons-exports-to-saudis/>

⁸ United Nations Panel of Experts on Libya (2021) Libya arms embargo ‘totally ineffective’: UN expert panel, 17 March, via: <https://news.un.org/en/story/2021/03/1087562>

⁹ Human Rights Watch (2021) Australia: Freeze Arms Sales to Saudi Arabia, UAE, February 3, via: <https://www.hrw.org/news/2021/02/04/australia-freeze-arms-sales-saudi-arabia-uae>

¹⁰

Jerusalem Post Staff , Israeli receives death penalty in UAE for drug possession, April 5 , <https://www.jpost.com/breaking-news/article-703276>

- 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).
- A safe and healthy working environment (ILO Conventions 185 and 187).¹¹

Each country should also develop appropriate minimum standards for working hours, wages and health and safety, based on ILO principles.

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement, in the same way as other chapters and provisions of the agreement.

Exploitation, discrimination and modern slavery in the UAE

Repeated investigations and reports have documented systemic exploitation, discrimination and modern slavery in the UAE. In particular, temporary migrant workers are subject to abuse of their labour rights. As these workers cannot stay permanently in the UAE, nor become citizens, they are dependent on their employers for visas and can be deported if they lose their employment.

With more than 90% of the private sector workforce being composed of temporary migrant workers¹², the UAE is host to the fifth largest temporary migrant population in the world¹³. The majority of migrant workers in the UAE are nationals of India, Bangladesh, Nepal, Sri Lanka, and Pakistan, working across all sectors and skill levels.

The UAE is not a signatory to key International Labour Organisation (ILO) Fundamental Conventions, including the Freedom of Association and Protection of the Right to Organise Convention (1948), and the Right to Organise and Collective Bargaining Convention (1949).¹⁴ Furthermore, the UAE has not signed the ILO Migrant Workers Convention (1975)¹⁵.

The International Trade Union Confederation (ITUC) has classified the UAE, in its 2021 Global Rights Index as a 'Rating 5' country, meaning that there is "no guarantee of rights"¹⁶. The UAE's status has not changed since 2014¹⁷.

¹¹ On 10 June 2022 the ILO adopted a resolution to add the principle of a safe and healthy working environment to the International Labour Organization's (ILO) Fundamental Principles and Rights at Work. These are the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). These are now considered as fundamental Conventions.

¹² Migration Policy Institute (2013) Labor Migration in the United Arab Emirates: Challenges and Responses, via: <https://www.migrationpolicy.org/article/labor-migration-united-arab-emirates-challenges-and-responses>

¹³ Ibid.

¹⁴ International Labour Organisation (2022) Conventions and Recommendations, via: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

¹⁵ International Labour Organisation (2022) Up-to-date Conventions and Protocols not ratified by United Arab Emirates: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103495

¹⁶ International Trade Union Confederation (2021) Global Rights Index, via: <https://www.globalrightsindex.org/en/2021/countries/are>

¹⁷ International Trade Union Confederation (2021) UAE labour law reforms fail to address abuses of workers' rights, 22 November, via: <https://www.ituc-csi.org/uae-labour-law-reforms-fail>

Despite new laws touted to be a major reform of the UAE’s labour relations coming into force this year, the ITUC has determined that these laws “fail to meet international standards for workers’ rights” and bring “no change to the *kafala* system of modern slavery.”¹⁸

According to Human Rights Watch¹⁹, the *kafala* system – which is used in the UAE – ties migrant workers to individual employers who act as their visa sponsors, and restricts their freedom to change employers. The system punishes workers for ‘absconding’, and gives employers the power to revoke sponsorship at will. This automatically removes the right of a worker to remain in the country and triggers repatriation procedures. The ITUC classifies *kafala* as a system of modern slavery.

Systematic abuse of labour rights in the UAE continues to draw international condemnation. Recent scandals have included, but are not limited to:

- The arbitrary detention and deportation from the UAE of 700 migrant African workers in June 2021²⁰
- Reports of violations of migrant workers’ rights during the COVID19 pandemic in the UAE^{21 22}

Recommendations:

Before embarking upon negotiations for a UAE CEPA, the Australian government must require evidence of improvements in labour rights legislation and implementation – including accession and adherence to ILO Fundamental Conventions and the Migrant Workers Convention – as a precondition for the commencement of negotiations.

Trade agreements must not undermine women’s rights

Because of existing social and economic disadvantage, trade agreements can have greater negative impact on women and exacerbate gender inequality. To ensure trade does not deepen gender inequality, trade agreements should include enforceable commitments to upholding women’s rights.

AFTINET welcomed the inclusion of Australia’s first ever gender equality chapter in the Australia-UK Free Trade Agreement²⁴, but notes that the commitments are not enforceable. We look forward to the inclusion of enforceable provisions on gender equality in all future trade deals.

¹⁸ International Trade Union Confederation (2021) UAE labour law reforms fail to address abuses of workers’ rights, 22 November, via: <https://www.ituc-csi.org/uae-labour-law-reforms-fail>

¹⁹ Human Rights Watch (2014) "I Already Bought You": Abuse and Exploitation of Female Migrant Domestic Workers in the United Arab Emirates, October 22, via: <https://www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers>

²⁰ Michela Pugliese (2021) UAE: 700 African workers detained, abused and deported without due process, Business and Human Rights Resource Centre <https://www.business-humanrights.org/de/neuste-meldungen/uae-700-african-workers-detained-abused-and-deported-without-due-process-in-racially-motivated-raids/>

²¹ Migrant Rights (2021) COVID Relief Report, via: <https://www.migrant-rights.org/wp-content/uploads/2021/11/Covid-Relief-Report-Migrant-Rights.pdf>

²² McQue, K (2020) 'I'm trapped': the UAE migrant workers left stranded by Covid-19 job losses, The Guardian, April 20, via: <https://www.theguardian.com/global-development/2020/apr/20/im-trapped-the-uae-migrant-workers-left-stranded-by-covid-19-job-losses>

²³ Human Rights Watch (2020) Joint Letter to H.E. Nasser bin Thani Al Hamli, Minister of Human Resources and Emiratization, April 10, via: https://www.hrw.org/sites/default/files/supporting_resources/jointletter_emiratigov_migrantworkers_covidprotections_eng.pdf

²⁴ See: AFTINET submission on A-UKFTA (2022) March, <http://aftinet.org.au/cms/sites/default/files/220301%20AFTINET%20final%20JSCOT%20submission.pdf#overlay-context=submissions>

Violation of women's rights in the UAE

Repeated investigations and reports have documented systemic discrimination against women in the UAE. Despite some reforms in the UAE over the past decade, significant discrimination against women and girls remains.

These UAE reforms have included the prohibition of discrimination on the basis of sex and gender, and the revocation of family laws that obliged wives to “obey” their husbands, allowed husbands to discipline their wives, and punished consensual extramarital sex.

However, according to a Human Rights Watch 2021 submission to the UN Committee on the Elimination of Discrimination Against Women (CEDAW)²⁵, UAE laws still provide for male guardianship authority over women, and loopholes allow reduced sentences for men who kill a female relative. Judges may deem a woman in breach of her spousal obligations if she leaves the house or takes a job deemed outside “the law, custom, or necessity,” or if the judge considers it against the family's interests.

The UAE also criminalises homosexuality and gender expression of trans people²⁶.

Exploitation of women domestic workers in the UAE

Multiple human rights organisations have documented the exploitation of women domestic workers in the UAE and GCC countries. Despite improvements in UAE labour laws, domestic workers still do not enjoy the same protections as other workers and are at risk of labor abuses, forced labor, and human trafficking because of the *kafala* system of modern slavery.

According to the ITUC, there are approximately 236,545 domestic workers in the UAE, comprising more than 12% of the total workforce and 42% of the female workforce²⁷. Despite the scale of the domestic workforce, the primary legislation governing UAE labour rights (UAE Labour Law No. 8 of 1980, or UAELL), specifically excludes domestic workers from its scope, depriving them of even the few protections guaranteed to other workers²⁸. Furthermore, the UAE has not signed the ILO Domestic Workers Convention (2011)²⁹.

In 2017, a separate piece of labour law – the UAE Domestic Labour Law³⁰ – was introduced, extending protections like a weekly day of rest and paid leave. However, Human Rights Watch criticises the new laws for containing fewer and weaker protections than the main labor law and falls

²⁵ Human Rights Watch (2021) Submission to the Committee on the Elimination of Discrimination against Women on the United Arab Emirates, March 4, via: <https://www.hrw.org/news/2021/03/04/human-rights-watch-submission-committee-elimination-discrimination-against-women>

²⁶ Human dignity Trust (2020) UAE: Types of Criminalisation of homosexuality, London <https://www.humandignitytrust.org/country-profile/united-arab-emirates/>

²⁷ International Trade Union Confederation (2017) Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries, via: https://www.ituc-csi.org/IMG/pdf/migrant_domestic_workers_in_gulf_final-2.pdf

²⁸ Ibid.

²⁹ International labour Organisation (2022) Up-to-date Conventions and Protocols not ratified by United Arab Emirates, via: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103495

³⁰ The United Arab Emirates Government Portal (2022) The UAE's policy on domestic helpers, 30 March, via: <https://u.ae/en/information-and-services/jobs/domestic-workers/uae-policy-on-domestic-helpers>

short of international standards³¹. According to Human Rights Watch, women domestic workers remain at acute risk of labor abuses, forced labor, and human trafficking because of the *kafala* system.

Recommendation:

- ***Before embarking upon negotiations, the Australian government must require evidence of improvements in and implementation of women’s rights legislation and domestic workers protections – including accession and adherence to ILO Domestic Workers Convention – as a precondition for the commencement of negotiations***

Trade agreements must not undermine environmental protections

Without binding and enforceable environmental protections, and without an integrated approach to trade and environmental sustainability, trade agreements can detrimentally impact environmental protections.

This may occur through such means as: locking in deregulation; overlooking or overriding international environmental agreements; incentivising environmentally damaging forms of agriculture; incentivising carbon-intensive production; granting fossil-fuel corporations the right to sue governments for actions taken to protect the environment; restricting subsidies for renewable energy industries and restricting the transfer and sharing of green technologies³².

Inaction on climate change in the UAE

With 30%³³ of Gross Domestic Product (GDP) based directly in oil and gas exports, the UAE has been widely criticised by environmental defenders and sustainability experts as a laggard on climate action and environmental sustainability.

According to the Climate Action Tracker (CAT) – an independent scientific analysis that tracks government climate action and measures it against the Paris Agreement – the climate targets and policies of the UAE are “Highly insufficient”³⁴

The CAT’s “Highly insufficient” rating indicates that the UAE’s climate policies and commitments are not consistent with the Paris Agreement’s 1.5°C temperature limit, and lead to *rising* rather than *decreasing* emissions, even taking into account the recently announced net-zero ambitions of the UAE.³⁵

Recommendations:

- ***The Australian government should require evidence from the UAE of improved implementation of the Paris agreement and net zero emissions by 2050 before making a decision to commence negotiations for a preferential trade agreement***
- ***Trade agreements should bind parties to upholding international environmental law, including the Paris Agreement.***
- ***In determining a breach of the Environment Chapter, trade agreements should not establish impractically high barriers which preclude effective enforcement.***

³¹ Human Rights Watch (2021) UAE: Greater Progress Needed on Women's Rights, March 4, via: <https://www.hrw.org/news/2021/03/04/uae-greater-progress-needed-womens-rights>

³² Trade Justice Movement (2020) Alternative Trade for the Planet: aligning trade policy with climate and environmental goals, December, via: <https://www.tjm.org.uk/documents/briefings/Alternative-Trade-for-the-PlanetFINAL.pdf>

³³ OPEC (2021) UAE facts and figures, via: https://www.opec.org/opec_web/en/about_us/170.htm

³⁴ Climate Action Tracker (2021) Country summary: UAE, November 9, via: <https://climateactiontracker.org/countries/uae/>

³⁵ Ibid.

- ***Environment Chapters should be subject to the same dispute resolution processes that are applied to other chapters of trade agreements***

The trade agreement process should be transparent, democratic and accountable

This submission argues that Australia should not engage in formal trade negotiations with the UAE in the absence of UAE accession to UN and ILO agreements on human rights, labour rights and the environment.

In the event that a decision is made to commence negotiations, we ask that the government implement its policies for a more open and accountable process.

AFTINET has consistently raised concerns about the lack of transparency and democratic accountability in trade negotiations. Given the significant human rights and Environmental Social and Governance (ESG) risks stemming from trade with the UAE, transparency and consultations are all the more important in 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, and neither the Parliament nor the wider public has input into the development of Australia's negotiation mandate.

Negotiation texts are kept confidential, and the final text of a trade agreement is not made public until after Cabinet has made the decision to sign it. It is only after they have been tabled in Parliament that they are examined by the Joint Standing Committee on Treaties (JSCOT).

The National Interest Analysis (NIA) presented to JSCOT is not independent, but rather it is conducted by the same department that negotiates the agreement. There are no independent human rights, labour 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*³⁶ criticised this process and made some recommendations for change. The Productivity Commission has also made recommendations for improvements, including 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.

In 2021, the Joint Standing Committee on Treaties majority report recommended independent cost-benefit assessments of agreements, while the minority reports recommended wider changes³⁷. 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 signed³⁸.

Recommendations:

- ***Prior to commencing negotiations with the UAE the government should table in Parliament a document setting out its priorities and objectives. The document should include***

³⁶ Senate Standing Committee on Foreign Affairs Defence and Trade (2015) *Blind agreement: reforming Australia's treaty-making process*, May.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report.

³⁷ Joint Standing Committee on Treaties Inquiry into Certain Aspects of the Treaty-making Process in Australia (2021) Report 193, August, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193

³⁸ European Union (2015) EU negotiating texts in TTIP, February, Brussels. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

independent assessments of the projected costs and benefits of the UAE CEPA and GCC free trade agreement, including potential economic, social, environmental and human rights impacts.

- ***There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. During these consultations, stakeholders must have access to government proposals and discussion papers.***
- ***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.***

Trade agreements should not include Investor-State Dispute Settlement (ISDS)

The government has a policy against ISDS. In the event that negotiations proceed, ISDS should be excluded.

The number of reported ISDS cases has been increasing rapidly, reaching 1,190 as of November 2022.³⁹

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments.

Criticisms of the ISDS *structure* include: the power imbalance which gives additional legal rights to international corporations that already exercise enormous market power; the lack of obligations on investors; and the use of claims for compensation for public interest regulation.

Criticisms of the ISDS *process* include: a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by a lack of precedent and appeals; third party funding for cases as speculative investments; and excessively high awards based on dubious calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest.

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, medicine patents, environmental protections, regulation of the minimum wage and most recently, government action to reduce carbon emissions.

A comprehensive study published in the *Science* journal in May 2022⁴⁰ shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels. The study's authors recommend ISDS mechanisms be removed from trade agreements.

³⁹ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

⁴⁰ Rachel Thrasher *et al* (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, *The Conversation* May 6, <https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135>.

The Intergovernmental Panel on Climate Change (IPCC) May 2022 report *Climate Change 2022: Impacts, Adaptation & Vulnerability* also warns that ISDS clauses in trade agreements threaten action to reduce emissions.⁴¹

For example, the Westmoreland Coal Company⁴² sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American Free Trade Agreement (NAFTA). Its case was unsuccessful⁴³ but only due to technicalities regarding changes in the company's ownership.

In Europe, German energy companies RWE and Uniper have ISDS cases pending⁴⁴ against the Netherlands (under the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.⁴⁵

Legal experts and the United Nations Conference on Trade and Development (UNCTAD) have recognised the danger of ISDS claims against a wide range of government actions taken during the COVID-19 pandemic, recommending means of preventing such cases⁴⁶.

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, and the system is being reviewed by the two institutions which oversee ISDS arbitration systems. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP), the Australia-UK Free Trade Agreement (A-UKFTA) and the Australia-EU Free Trade Agreement (A-EUFTA) currently under negotiation.

Recommendations

- ***ISDS should be excluded from negotiations***

Trade agreements should not extend intellectual property rights

In the event that negotiations proceed, extension of intellectual property rights should be excluded.

⁴¹ Intergovernmental Panel on Climate Change (2022) *Climate Change Impacts, Adaptation & Vulnerability*, May, <https://www.ipcc.ch/report/ar6/wg2/>.

⁴² Investment Arbitration Reporter (2018) Canada hit with investment treaty arbitration from US coalminer, November 20, <https://www.iareporter.com/articles/canada-hit-with-investment-treaty-arbitration-from-u-s-coal-miner-relating-to-province-of-albertas-phasing-out-of-coal-fired-energy-generation/>.

⁴³ Investment Treaty News (2022) NAFTA tribunal in Westmoreland v. Canada declines jurisdiction, finding that the claimant did not own or control the investment at the time of the alleged breach, July 4, <https://www.iisd.org/itn/en/2022/07/04/nafta-tribunal-in-westmoreland-v-canada-declines-jurisdiction-finding-that-the-claimant-did-not-own-or-control-the-investment-at-the-time-of-the-alleged-breach/>.

⁴⁴ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands/respondent>.

⁴⁵ Kluwer Arbitration (2021) The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations, August 24, <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>.

⁴⁶ UNCTAD (2020b) Investment Policy Responses to the COVID-19 Epidemic UNCTAD, Investment Policy Monitor Geneva: May 4. https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf.

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 trade⁴⁷.

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 medicines⁴⁸. 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 2015⁴⁹. A study of costs of biologic medicines in Australia found that longer data protection monopolies proposed in the Trans-Pacific Partnership (TPP) would cost the Pharmaceutical Benefits Scheme (PBS) hundreds of millions of dollars per year.⁵⁰

Other studies indicate additional costs resulting from longer monopolies in other bilateral agreements.⁵¹ Public health experts have also demonstrated how successive trade agreements have strengthened patent and other monopoly rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines, especially in developing countries.⁵²

This has been confirmed by a more recent systematic review of studies which showed that stronger pharmaceutical monopolies created by intellectual property rules greater than those in the WTO TRIPs agreement (TRIPs-plus rules) are generally associated with increased drug prices, delayed availability and increased costs to consumers and governments.⁵³

Recommendations:

- ***There should be no extension of patents or copyright monopolies in trade negotiations***

⁴⁷ Stiglitz J., (2015) "Don't trade away our health," News York Times, January 15. Available at http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?_r=0

⁴⁸ Productivity Commission (2010) Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, December, via: <https://www.pc.gov.au/inquiries/completed/trade-agreements/report>

⁴⁹ Productivity Commission (2015) Trade and Assistance Review 2013-14, June. Available at <http://www.pc.gov.au/research/recurring/trade-assistance/2013-14>

⁵⁰ Gleeson D et al (2017) Financial Costs Associated with Monopolies on Biologic Medicines in Australia, *Australian Health Review* 43, no.1: 36-42

⁵¹ Gleeson D. and Labonté, R. (2020) Trade Agreements and Public Health. London: Palgrave Studies in Public Health Policy Research, pp 47-52.

⁵² Lopert, R, and Gleeson, D (2013) The high price of "free" trade: US trade agreements and access to medicines. *Journal of Law, Medicine and Ethics*, 41(1): 199-223, via: <http://onlinelibrary.wiley.com/doi/10.1111/jlme.12014/abstract>.

⁵³ Tenni, B., et al, What is the impact of intellectual property rules on access to medicines? A systematic review, *Global Health*. 2022; 18: 40, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9013034/>.

Trade agreements should not restrict the regulation of public and essential services

In the event that negotiations proceed, any agreement 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 need for financial regulation following the Global Financial Crisis⁵⁴, the Royal Commission into the Banking and Financial Services Industry, the Royal Commission on Aged Care⁵⁵, and governments' responses to climate change.

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 2016⁵⁶.

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

⁵⁴ United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (the Stiglitz Commission) New York, via: https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

⁵⁵ Ranald, P., (2021) How a new trade deal could make it harder to improve life for Australians in aged care, the Conversation, July 27, <https://theconversation.com/how-a-new-trade-deal-could-make-it-harder-to-improve-life-for-australians-in-aged-care-164947>

⁵⁶ Conifer, D (2016) Parliament passes bill to scrap troubled VET loans, overhaul vocational education sector, ABC News online, December 2, via: <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>

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 any agreement, and there should be no restrictions on the government's right to provide and regulate services in the public interest.***
- ***If a trade i-services chapter is included, it 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.***

Trade agreements should not restrict government procurement from local businesses as part of industry development programmes

The new government has a Jobs and Skills policy which requires government action to support local manufacturing industry, especially the development of local renewable energy industries, and the use of government procurement policy to assist in this process.

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.⁵⁷

Several Australian states have developed such policies, and the Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017 recommended in its report, *Buying into Our Future*, that the government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses.⁵⁸

Australia has maintained exemptions for Small and Medium-Sized Enterprises (SMEs) to procurement rules, including exemptions for Indigenous enterprises. Australia has also excluded local government from procurement rules in trade agreements. These exclusions should be maintained.

Recommendations

⁵⁷ AFTINET (2015) Submission to the Department of Foreign Affairs and Trade on Australia's proposed accession to the World Trade Organisation Government Procurement Agreement January 30, via: <http://aftinet.org.au/cms/sites/default/files/DFAT%20submission%20Jan%202015%20edited.pdf#overlay-context=world-trade-organisation>.

⁵⁸ Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Report.

The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local manufacturing industry, especially the development of local renewable energy industries.

The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.

Trade agreements should not place Big Tech interests above users' rights

Digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The digital trade 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 negotiations⁵⁹, and are known as the Digital2Dozen principles⁶⁰.

The aim of this digital trade 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 scandals⁶¹
- Uber classifying itself as a technological platform to avoid regulation and enable its exploitation of workers⁶²
- Apple's tax avoidance⁶³
- Anti-competitive practices by Facebook, Google and Amazon⁶⁴

The Australian Competition and Consumer Commission's (ACCC) 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 platforms⁶⁵. In its response to the ACCC report in December 2019, the government "accepted the overriding conclusion that there was a need for reform" and outlined a plan for immediate and long-term action.

⁵⁹ Kelsey, J (2017a) E-commerce - The development implications of future proofing global trade rules for GAFA, Paper to the MC11 Think Track, 'Thinking about a Global Governance of International Trade for the 21st Century; Challenges and Opportunities on the eve of the 11th WTO Ministerial Conference', Buenos Aires, Argentina, 13 December 2017. Via: <https://bestbits.net/wp-uploads/2017/12/Kelsey-paper-for-MC11-Think-Track.pdf>

⁶⁰ Office of the United States Trade Representative (2016) The Digital2Dozen, via: <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>.

⁶¹ Waterson, J (2018) UK fines Facebook £500,000 for failing to protect user data, The Guardian, October 25, via: <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>

⁶² Bowcott, O, (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, The Guardian, December 21, via: <https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>

⁶³ Drucker, J and Bowers, S., (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, The New York Times, November 7, via: <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>

⁶⁴ Ho, V., (2019) Tech monopoly? Facebook, Google and Amazon face increased scrutiny, The Guardian, June 4, via: <https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon>

⁶⁵ Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, via: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

Concerns were raised at the time that the government's response to the ACCC inquiry did not go far enough to address existing and emerging gaps in Australia's regulatory framework and that additional reform may be required.⁶⁶

In this context, it is vital that there are no digital trade provisions that restrict policy flexibility for the Australian governments.

Digital trade rules and concentration of market power

The need to regulate the market power of large digital platform companies was confirmed when, following advice from the ACCC, the previous government in March 2021 passed legislation for the News Media Bargaining Code, a mandatory code of conduct which governs commercial relationships between Australian news businesses and digital platforms which benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of news media information.⁶⁷ Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy.

We note that US digital companies Google and Meta strongly objected to this regulation and claimed it violated the non-discrimination rules in the Australia-US Free Trade Agreement by discriminating against US companies.⁶⁸ The government argued that the legislation was not discriminatory, but addressed power imbalances and persisted with the legislation without adverse trade consequences.

In this rapidly changing digital environment, digital trade provisions must not restrict policy flexibility for the Australian government to regulate to address the concentration of market power.

Digital trade rules and privacy rights and consumer protections

The risk of digital trade rules to privacy rights and consumer protections has been widely documented and casts doubt on assurances that digital trade rules are compatible with privacy and consumer protections.⁶⁹ 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. See the section on cybersecurity below.

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 digital trade 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

⁶⁶ Kemp, K and Nicholls, R (2019) The federal government's response to the ACCC's Digital Platforms Inquiry is a let down, 2019, via: <http://theconversation.com/the-federal-governments-response-to-the-acccs-digital-platforms-inquiry-is-a-let-down-128775>.

⁶⁷ Australian Competition and Consumer Commission (2021) News Media Bargaining Code, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code>.

⁶⁸ Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). <https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/>

⁶⁹ Greenleaf, G (2018) Free Trade Agreements and data privacy: Future perils of Faustian bargains, in Svantesson, D and Kloza D (eds.) Transatlantic Data Privacy Relationships as a Challenge for Democracy, 2018, Intersentia, via: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386.

same privacy standards as in Australia.⁷⁰

For example, in March 2020 it was revealed that Chow Tai Fook Enterprises (CTFE), the Hong Kong company that owned the privatised Australian Alinta Energy company, was storing sensitive personal data from Australian customers in Singapore and New Zealand without adequate privacy protections. The company had breached undertakings made at the time of privatisation to store the data in Australia.⁷¹

Digital trade 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 competition⁷² and that algorithmic bias can result in race, gender, class or other discrimination⁷³.

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 discriminatory⁷⁴. Digital trade 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.

Digital trade 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 transactions⁷⁵. This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others⁷⁶. The impact of electronic transactions rules is worsened when combined with digital trade rules that enable the free flow of cross-border data, as governments are

⁷⁰ *ibid.*

⁷¹ Ferguson A. and Gillett C. (2020) "Credit cards, addresses and phone numbers vulnerable: More than one million energy customers' privacy at risk", *Sydney Morning Herald*, March 1, <https://www.smh.com.au/business/companies/credit-cards-addresses-and-phone-numbers-vulnerable-more-than-one-million-energy-customers-privacy-at-risk-20200228-p545bw.html>.

⁷² European Commission (2017) Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 2017, via: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784

⁷³ Mittelstadt, B et al. (2016) The ethics of algorithms: Mapping the debate, *Big Data & Society*, July–December 2016, via: <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679>

⁷⁴ Ried-Smith, S (2017) Some preliminary implications of WTO source code proposal – MC11 briefing paper, via: https://ourworldisnotforsale.net/2017/TWN_Source_code.pdf

⁷⁵ Department of Foreign Affairs and Trade (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership text, Article 14.6, via: <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

⁷⁶ Reid Smith, S (2018) Preliminary note: Electronic authentication: some implications, via: <http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf>

restricted in their ability to ensure that this data is encrypted when it is transferred or stored securely⁷⁷.

The recent massive hacking of personal data of millions of Australians held by the Singapore-owned Optus telecommunications company and the Medibank Private health insurance company, revealed a gap between both community and government expectations about the companies' data security measures and the actual practices of the companies. Both government and digital experts criticised the companies' lack of effective data security measures.⁷⁸ The government has since flagged that it is reviewing cybersecurity regulation, with the Minister saying "we need a whole-of-nation effort of improving the security around data protection, around cyber security, so that we are better equipped in the 21st century."⁷⁹

It is clear that governments must retain the ability to regulate security standards in order to reduce cybersecurity issues. The rapid emergence of new technologies could adapt or create new cybersecurity risks requiring new regulatory frameworks.

Digital trade rules and financial services

Digital trade 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 financial data has moved offshore, it is extremely difficult for states to control or have oversight over this data⁸⁰.

As an example of the risk of foreclosing governments' control over financial data, one may observe the Global Financial Crisis, during which the US Treasury Secretary, Jack Lew, told Congress there were times when his office was cut off from timely and appropriate information⁸¹. Because of that experience, the US insisted in negotiations on 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 agreement⁸².

Given the size of the UAE's financial services sector, it is likely that digital trade provisions that impact financial services will be on the negotiating table. The government must ensure that

⁷⁷ Ibid.

⁷⁸ Baird, L., and di Stephano, M., (2022) Optus' 'opaque' Singapore owner faces scrutiny over hacking attack, Australian Financial Review, September 30, <https://www.afr.com/companies/telecommunications/optus-opaque-singapore-owner-faces-scrutiny-over-hacking-attack-20220930-p5bm5u>. See also Taylor, J., (2022) Medibank confirms hacker had access to data of all 3.9 million customers, the Guardian, October 26, <https://www.theguardian.com/technology/2022/oct/26/medibank-confirms-all-39-million-customers-had-data-accessed-in-hack>.

⁷⁹ Varghese, S., O'Neil hammers Coalition over 'useless' cyber-security laws, October 2, <https://itwire.com/business-it-news/security/o-neil-hammers-coalition-over-useless-cyber-security-laws.html>

⁸⁰ Ibid.

⁸¹ Lew, J., (2016) Evidence given to the House Financial Services Committee hearing on the international financial system, March 22, 2016, via: <https://www.c-span.org/video/?407079-1/treasury-secretary-jack-lew-testimony-international-financial-system&start=2490>

⁸² Department of Foreign Affairs and Trade (2018) Comprehensive and Progressive Agreement for Trans-Pacific Partnership text, via: <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

provisions do not reduce privacy in relation to financial data or restrict the government's ability to respond to a financial crisis.

It is well documented that the UAE's liberal financial regulations and its high level of trade in commodities and international business have embroiled UAE financial institutions in controversies concerning terrorism financing, money laundering, 'dirty' gold that is illegally mined and traded, criminal proceeds, and other illicit activity⁸³.

In a 2020 report, the global financial crime watchdog the Financial Action Task Force (FATF) called for "fundamental and major improvements" in UAE financial regulation and risk management, concluding that: "The UAE is a major international and regional financial centre and trading hub which attracts both legitimate financial and business activities as well as financial flows with links to crime and terrorism. The country must urgently deepen its understanding of the risks it faces...and take action to strengthen the effectiveness of its measures to stop money laundering, terrorist financing and proliferation financing."⁸⁴

Despite commitments by the UAE to implement the 2020 FATF recommendations, in March 2022 the FATF placed the UAE on the 'grey list' of jurisdictions under increased monitoring of "strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing." The FATF says that "the UAE must now demonstrate progress on facilitating international anti-money laundering investigations, on managing risks in certain industries including real estate agents and precious stones and metal dealers, and on identifying suspicious transactions in the economy."⁸⁵

Given the UAE's ongoing failure to adequately address various financial risks and crimes, any agreement should not expose Australian financial institutions, companies and consumers to significant ESG, privacy, regulatory, and reputational risks through digital trade clauses that apply to financial services.

Digital trade 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"⁸⁶. Concerns have also been raised about the impact that new technologies and artificial intelligence can have in recruitment practices and on work conditions⁸⁷.

⁸³ FATF (2020) United Arab Emirates' measures to combat money laundering and terrorist financing, 30 April, via: <http://www.fatf-gafi.org/countries/u-z/unitedarabemirates/documents/mer-uae-2020.html>

⁸⁴ FATF (2020) United Arab Emirates' measures to combat money laundering and terrorist financing, 30 April, via: <http://www.fatf-gafi.org/countries/u-z/unitedarabemirates/documents/mer-uae-2020.html>

⁸⁵ FATF (2022) Jurisdictions under Increased Monitoring, March, via: <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html>

⁸⁶ International Trades Union Confederation (2019) E-commerce push at WTO threatens to undermine labour standards, via: <https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers>

⁸⁷ The Centre for Future Work (2019) Turning 'Gigs' Into Decent Jobs – Submission to: Inquiry into the Victorian On-Demand Workforce. Available at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The_Australia_Institute.pdf

The rise of the digital economy can undermine workers' rights by enabling digital platform-based companies like Uber or Deliveroo to classify workers as contractors or individual businesses, thus removing the responsibility to provide basic rights like minimum wages, maximum working hours, safe working conditions and workers' compensation entitlements.

The report of the Victorian Government's Inquiry into the Victorian On-Demand Workforce made recommendations in 2020 for changes in regulation to both the Commonwealth and Victorian governments.⁸⁸

The current Australian government has foreshadowed legislation in 2023 that seeks to ensure that digital platform-based companies cannot evade these responsibilities and that gig economy workers have the same rights as other workers, through establishing "minimum wages and conditions for 'employee-like' workers."⁸⁹

Digital trade rules should not restrict the government's ability to implement regulation of labour rights and working conditions for gig economy workers.

Recommendations:

Any agreement with the UAE should not include provisions that:

- **Prevent governments from regulating the cross-border flow of data**
- **Prevent regulation to address market power imbalances**
- **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.**
- **Prevent full regulation of financial services**
- **Prevent governments from regulating to ensure that digital platform workers have access to the same minimum standards for wages and working conditions as other workers**

Any 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**

⁸⁸ Industrial Relations Victoria (2020) Report of the Inquiry into the Victorian On-Demand Workforce, June 12, Victorian Government, Melbourne, pp. 189-206 https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4915/9469/1146/Report_of_the_Inquiry_into_the_Victorian_On-Demand_Workforce-reduced_size.pdf

⁸⁹ Alderman, P., (2022) The Secure Jobs, Better Pay Bill is here: What are the proposed changes to Australia's industrial relations landscape? October 31, <https://www.lexology.com/library/detail.aspx?g=086b0c75-fbda-4b9d-933f-9f87d41b8b66>.