Submission to the Department of Foreign Affairs and Trade (DFAT) on the negotiations for the Australia-India Comprehensive Economic Cooperation Agreement (AI-CECA)

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Introduction

AFTINET is a network of 60 community organisations advocating for fair trade based on human rights, labour rights and environmental sustainability.

We support the development of fair trading relationships with all countries, based on those principles. 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 Australia-India Comprehensive Economic Cooperation Agreement (IA-CECA).

The negotiations for the comprehensive agreement follow negotiations conducted and signed by the previous government for the interim Australia-India Economic Cooperation and Trade Agreement (AI-ECTA)

This submission begins by noting the government's policy for a more transparent and accountable trade agreement process, and the recommendations of the Joint Standing Committee on Treaties (JSCOT) for changes to the process, and makes recommendations about the process consistent with these.

The submission also notes that the interim agreement text allows for amendments to the text of the interim agreement during negotiations for the comprehensive agreement. The submission recommends a slight change to Annex 8F Part B of the trade in services chapter, and a review of the provisions for entry of temporary workers to ensure they are consistent with current government policy.

The submission then makes substantive recommendations on other chapters which have been foreshadowed in the interim agreement and in government policy, including labour rights, environmental standards, investment, government procurement and digital trade.

Summary of Recommendations

- ***The government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement, 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, gender 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 in services

- ***The government should seek to amend Annex 8F Part B of Chapter 8 Trade in Services to include paragraph 4 from Annex 8F Part A, to enable future changes to regulation of licensing, qualifications and service standards in services like aged care according to government policy.***
- ***The government should ensure that there is full consultation with all relevant professional and other licensing bodies about any moves to mutual recognition of standards and consideration of temporary licensing to ensure that there is no reduction in standards that could have negative impacts both for employees and consumers.***

Temporary Movement of Natural Persons

- ***That the entry of temporary workers in the comprehensive agreement should be based on the principle that they address genuine labour shortages evidenced by local labour market testing.***
- ***That the government review the commitments for temporary workers in the interim agreement to ensure they are consistent with the above principles.***
- ***That there be no commitments in the comprehensive agreement to removal of labour market testing or other provisions that are not consistent with these principles.***
- ***Arrangements for temporary workers should be separate government-to-government agreements or Memoranda of Understanding which enable explicit protection of the rights of workers and specify the obligations on employers.***

Labour rights

- ***The agreement should include enforceable commitments by both governments not to reduce labour rights in order to gain a trade advantage and develop a program 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 Ten 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)***
- ***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).***
- ***Appropriate national 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.

Environmental Standards

The agreement should include legally binding commitments to implement United Nations multilateral environmental agreements, including:

- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)***
- ***the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.***

The implementation of these agreements 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.

Investor-State Dispute settlement (ISDS)

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

Copyright and patent monopolies, including medicine monopolies

- ***There should be no extension of copyright or patent monopolies, including medicine monopolies.***

Australia should not require harmonisation of intellectual property rules or replicate any proposals for extension of medicine monopolies in the original TPP-12, nor any clauses in the leaked UK-India FTA draft proposals.

Government procurement

- ***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 industry in accordance with government policy, especially the development of local renewable energy industries, consistent with its Buy Australia Plan and domestic procurement policies.***

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

Digital Trade

The agreement should not include provisions that:

- ***Prevent governments from regulating the cross-border flow of data***
- ***Prevent regulation to address market power imbalances***
- ***Prohibit the regulation 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 and preventing cybercrime***
- ***Prevent full regulation of financial services***
- ***Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and to ensure that workers have access to data collected about them***
- ***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.***

The agreement should include:

- ***Full exemptions for tax policy to enable regulation to ensure that digital companies do not evade tax***
- ***Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.***

The trade agreement process should be transparent, and democratically accountable

The government should 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.

Australia's procedures for negotiating and ratifying trade agreements have been secretive, and neither the Parliament nor the wider public has had input into the development of Australia's negotiation mandate.

Negotiation texts have been kept confidential, and the final text of trade agreements is not made public until after Cabinet has made the decision to sign. It is only after signing that they have been tabled in Parliament and examined by 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, gender, 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*[1] 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 JSCOT majority report recommended independent cost-benefit assessments of agreements, while the minority reports recommended wider changes.[2] 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, independent impact assessments and release of texts before they are signed.[3]

The current Australian government has a policy for a more open process[4] and we ask that it be implemented for the AI-CECA. The recommendations below reflect that policy.

Recommendations:

- ***The government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement, including potential economic, social, gender, environmental and human rights impacts.***
- ***There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. During these consultations, stakeholders should 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, gender and environmental impact assessments should be completed and published before the agreement is signed.***
- ***Parliament should vote on the whole text of the agreement, not just the implementing legislation.***

Trade in Services Chapter of the interim AI-ECTA

The interim agreement includes Article 14.5, which states that after the signing of the interim agreement, the parties will commence

> *negotiations on amendments to this Agreement, on a without prejudice basis, on areas including inter alia market access for goods and services, a complete Product Specific Rules Schedule, a Digital Trade Chapter, and a Government Procurement Chapter, to transform this Agreement into a Comprehensive Economic Cooperation Agreement. Following such negotiations, the Parties may make amendments to this Agreement in accordance with Article 14.3 (Amendments), to transform this Agreement into a Comprehensive Economic*

[1] 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.

[2] 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.

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

[4] Australian Labor Party Policy Platform 2019, p. 90-91, paras 14-17, https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf

Cooperation Agreement.

This means that specific amendments to the AI-ECTA text consistent with Australian government policy can be made in the AI-CECA negotiations.

AFTINET's submission to the JSCOT Inquiry on the interim AI-ECTA argued for a specific amendment to Annex 8B of the trade in services chapter in the comprehensive agreement.

Australia's commitments have negative list structure, which means all Australian services are included unless they are specifically excluded.

Regulation is treated as a tariff, to be frozen at current levels and reduced in future. There are prohibitions on certain forms of regulation, including numbers of service suppliers and numbers employed to supply a service (Article 8.6.2), and there are specific restrictions on domestic regulations concerning qualifications, licensing and technical standards (Article 8.14).

Australia's negative list structure of commitments means that all services have these rules applied to them, unless they are specifically listed as reservations or exemptions in Annex 8F, Part A and Part B. Part A lists current nonconforming services or forms of regulation, for which existing regulation that is contrary to the trade in services rules can be retained, or frozen, but not increased in future. Part B lists services or forms of regulation for which governments reserve the right to increase or make new regulation in future. This applies to both state and federal government regulation.

This means that governments have to be very careful to list as exemptions all services and forms of regulation for which they wish to retain current regulation and/or increase future regulation.

Changes to Annex 8F Part B exemptions to enable increased regulation of Aged Care and other services

Annex 8F Part A, p. 3 para 4, applying to existing regulation of services, states that governments may have requirements relating to qualification requirements and procedures, technical standards, authorisation requirements and licensing requirements and procedures "where they do not constitute a limitation within the meaning of Article 8.4 (National Treatment– Cross Border Trade in Services) and Article 8.6 (Market Access – Cross-Border Trade in Services)." In other words, such regulation is not prohibited but has to conform with the rules in the investment chapter and the trade in services chapter.

The same paragraph states that these measures "may include, in particular, the need to obtain a licence, to satisfy universal service obligations, recognised qualifications in regulated sectors, to have completed a recognised period of training, to pass examinations, including language examinations, to fulfil a membership requirement of a particular profession, such as membership in a professional organisation, to have a local agent for service, or to maintain a local address, or any non-discriminatory requirements that certain activities may not be carried out in protected zones or areas."

This would mean that governments can continue to have existing regulation of licensing, qualifications and service standards in any service if required by government policy, including services like aged care or disability services.

In the Australia-UK FTA, this exemption is included in both parts of the equivalent Annex I and Annex II to the Trade in Services Chapter 8, which means that the exemption applies to both current and future regulation.[5]

It is therefore surprising that this exemption is not included in Annex 8F Part B of the AI-ECTA, which deals with the ability of governments to change or increase future regulation, for example to implement government policy changes like the recommendations of the Royal Commission into Aged Care Quality and Safety.

It makes no sense to exempt existing regulation on licensing qualifications on service standards from the rules of the agreement but not to exempt from such rules future regulation required by government policy, like the recommendations of the Royal Commission into Aged Care Quality and Safety which are still in the process of being implemented.

DFAT negotiators have not provided any explanation as to why the Australia-UK free trade agreement specifically enabled governments to make new regulations in relation to future regulation of licensing qualifications and service standards, but the AI-ECTA does not.

Recommendation:

- ***The government should seek to amend Annex 8F Part B of Chapter 8 Trade in Services to include paragraph 4 from Annex 8F Part A, to enable future changes to regulation of licensing, qualifications and service standards in services like aged care according to government policy.***

Annex 8c: consultative process for recognition of professional and other occupational qualifications

The interim agreement does not have legally binding commitments for immediate mutual recognition of professional qualifications other licensed occupations.

However it does commit to consulting with relevant bodies about mutual recognition and about temporary licensing of migrant workers.

Australia and India have agreed to consult with their relevant national bodies about developing a framework to facilitate the mutual recognition of qualifications, licensing and registration procedures between professional services bodies and bodies dealing with other licensed occupations**.** The framework for this consultation process is set out in the AI-ECTA but is a separate process from the agreement (Annex 8C Article 8C5).

The consultation process may also "consider, if feasible, taking steps to implement a temporary, limited or project-specific licensing or registration regime based on a foreign service supplier's home licence or recognised professional body membership, without the need for further written examination" (Annex 8C Article 8C.6).

There are obvious potential impacts in this process on both professionally qualified and other licensed workers and on the health and safety of consumers. This requires full public consultations to avoid possible negative impacts.

Recommendation:

[5] DFAT, (2021) Text of the Australia-UK Free Trade Agreement, Annexes to Trade in Services Chapter 8, Annex I, p.2, Annex II p.2 https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text.

- ***The government should ensure that there is full consultation with all relevant professional and other licensing bodies about any moves to mutual recognition of standards and consideration of temporary licensing to ensure that there is no reduction in standards that could have negative impacts both for employees and consumers.***

Temporary Movement of Natural Persons Chapter 9 and Annex 9A

AFTINET supports Australia's permanent migration scheme which has contributed to our vibrant multicultural society. Permanent migrants have the same rights as other workers because they are not tied to one employer. They cannot be deported if they lose employment but are free to seek other work.

Numerous studies[6] show that the recent expansion of numbers of temporary migrant workers tied to one employer has resulted in exploitation of these workers, because they are tied to one employer and can be deported if they lose the job. We support arrangements for temporary overseas workers where they are designed to address local labour market shortages based on local labour market testing. These arrangements should be government-to-government agreements separate from trade agreements. Such agreements like the Pacific Labour Scheme can have specific provisions to protect worker's rights and specific obligations for employers.

The movement of natural persons chapter in the interim agreement is not enforceable through the state-to-state disputes process, and unlike some previous agreements does not provide unlimited access for contractual service providers or other temporary workers. The text specifies that labour market testing "may be required" (Annex 9, p. 6).

However, there are a number of commitments in the text to specific numbers of temporary workers. These include:

a) 1800 qualified chefs and yoga teachers for four years (Annex 9a, p. 6).
b) A list of other industries and occupations for those with specialised qualifications and experience to enter for one year (Annex 9a, Tables A and B, pp 11-13).
c) A Side Letter on work and holiday visas which permits entry for up to 1000 people, 18-31 years old, who have completed 2 years of post-secondary study, and meet other current work and holiday visa requirements. These are more restrictive than the A-UKFTA conditions.

A Side Letter on post-study work visas permits longer post-study stays for ICT and STEM graduates of 2-4 years for those with higher degrees.

[6] Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (Migrant Worker Justice Initiative: 2017), 30, https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf.
Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Parliament of Australia, December 2017), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MonSlavery/Final_report.
Joanna Howe, Stephen Clibborn, Diane van den Broek, Alex Reilly and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*, (2019), University of Sydney, https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf.

The current government has a policy to expand permanent migration and increase skills training for local workers, rather than relying so heavily on temporary migrant workers who are vulnerable to exploitation.[7]

Recommendations:

- ***That the entry of temporary workers in the comprehensive agreement should be based on the principle that they address genuine labour shortages evidenced by local labour market testing.***
- ***That the government review the commitments for temporary workers in the interim agreement to ensure they are consistent with the above principles.***
- ***That there be no commitments in the comprehensive agreement to removal of labour market testing or other provisions that are not consistent with these principles.***
- ***Arrangements for temporary workers should be separate government-to-government agreements or Memoranda of Understanding which enable explicit protection of the rights of workers and specify the obligations on employers.***

Labour rights and human rights

Recent reductions in labour rights in India

India was a founding member of the International Labour Organisation (ILO) and has played an active role in its institutions, but despite this has not ratified four of its key core conventions.

These are the right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98) and the effective abolition of child labour (ILO Conventions 138 and 182).[8]

A 2012 document on the Indian government's website states that it has had a policy of not ratifying ILO conventions until they were confident that they can be enacted in domestic legislation and implemented throughout the country, and claims progress was being made in this process. However there has been no additional ratification of the fundamental conventions since 2012.[9]

Instead, effective labour rights have been reduced over the last three years. The current Modi BJP government enacted major changes to labour laws through the Industrial Relation Code, 2020. The changes were justified as modernising and simplifying previous complex state and national legislation but were met with mass protests organised by unions, which put forward alternative proposals for change which were ignored by the government. The International Trade Union Confederation (ITUC) also argued the new law violated ILO conventions and reduced labour rights.[10]

An analysis of the Industrial Relation Code published in the *Indian Journal of Labour Economics* argues that these changes reduce the rights of workers to organise by encouraging short-term

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[7] Prime Minister and Treasurer (2022) Media release on the Jobs and Skill Summit outcomes, September 2, https://www.pm.gov.au/media/outcomes-jobs-and-skills-summit.

[8] International Labour organisation (2022) up-to-date conventions and protocols not ratified by India. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102691.

[9] Labour Office of the Government of India (2012) India and the ILO, https://labour.gov.in/sites/default/files/gyanesh.pdf.

[10] ITUC (2020), Indian Parliament passes laws that attack the rights of working people, Media Release, September 20, https://www.ituc-csi.org/indian-parliament-passes-laws.
See also the ITUC detailed analysis of the proposed law. ITUC (2019) Labour Law deregulation in India: a threat to the application of international labour standards and workers' rights, https://www.ituc-csi.org/labour-law-deregulation-in-india.

employment contracts, reducing employer obligations on retrenchments, and increasing restrictions on the right to strike, shifting the balance of bargaining power in favour of employers.[11]

A summary of the changes by a law firm in India claims that

> "the aim is more ease in the conduct of business in India and to remove the hurdles faced in the past by investors wanting to invest in Indian organizations".[12]

The Australian government has a policy of requiring commitment to ILO standards and conventions in trade agreements. Part of the wording in such commitments in previous trade agreements is that governments shall "not reduce labour rights in order to gain a trade advantage." These recent laws do appear to reduce labour rights in order to gain a trade advantage.

Violations of Human Rights

India has ratified the UN International Covenant on Civil and Political Rights ('ICCPR'). However the current government has a poor record on implementing these rights, and has actively reduced or violated them for some groups.

The Citizen Amendment Act 2019 refuses citizenship rights to Muslims entering India from neighbouring countries, while granting such rights to other religious groups. An analysis by the Asia Law Centre at the University of Melbourne found that this law was discriminatory and clearly violates India's anti-religious discrimination obligations under the ICCPR and the prohibition on arbitrary deprivation of nationality, now recognised as a fundamental norm of international law.[13]

In June 2022 a Panel of Independent International Experts (the Panel), consisting of three renowned international law experts, Sonja Biserko, Marzuki Darusman and Stephen Rapp, launched a report on serious human rights violations against Muslims in India since 2019.

The Panel found that there is credible evidence to suggest that a wide range of international human rights of Muslim communities have been violated by the authorities in India. According to the evidence in the report, federal and state-level authorities "adopted a wide range of laws, policies and conduct that target Muslims directly or affect them disproportionately." These included specific discrimination against Muslim women. In relation to violations perpetrated by non-state actor, the State failed to take the necessary measures to prevent the acts, effectively investigate and prosecute them.[14]

The reports by Amnesty International and Human Rights Watch on India for 2021 indicate that the Modi BJP government has been violating other provisions of the ICCPR, including rights to freedom

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[11] **Bhuta A, (2022) Imbalancing Act: India's Industrial Relations Code, 2020, *Indian Journal of Labour Economics* vo1 65(3): 821–830 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9409614/#CR18**.

[12] India Law Offices (2022), New Labour Laws in India, March 28, https://www.indialawoffices.com/legal-articles/new-labour-laws-in-india.

[13] Foster, M., and Hasan Khan. A., (2021) Citizenship Amendment Act 2019 and International Law, April 1, University of Melbourne Asian Law Centre, https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3769484/Citizenship-Amendment-Act-and-International-Law.pdf.

[14] Biserko, S., *et a*l, (2022) Report of the panel of international experts to examine information about alleged violations of international law committed against Muslims in India since July 2019, June 6, Centre for Human Rights, University of the Free State and Amsterdam Law Clinics, June 2022, https://www.ufs.ac.za/docs/librariesprovider21/default-document-library/piie-report-final.pdf?sfvrsn=624e4920_0.

of expression, freedom of religion, freedom of assembly, freedom from arbitrary arrest and detention, and freedom from threats to life.[15] Below are some examples from these reports.

Amnesty reports that fourteen human rights activists were detained in 2021 under the Unlawful Activities (Prevention) Act (UAPA) anti-terror legislation. They were academics, a tribal rights activist; a poet; lawyers; a writer; activists; and cultural performers. An Adivasi woman was arrested under the UAPA for highlighting sexual violence against women by state security forces.

The Chair of Amnesty International India was arrested for "creating communal disharmony" after tweeting about hostility towards the Ghanchi Muslim community. The complaint was filed by a sitting member of the legislative assembly who was affiliated to the ruling BJP party.

Human Rights Watch reports that a climate activist was arbitrarily arrested for "sedition" and "spreading disharmony between communities" for sharing a social media toolkit intended to help farmers to protest against three contentious farming laws. More than 183 people were arrested for protesting against the three laws, which were repealed in December 2021.

At least 28 people were killed in targeted attacks in Jammu and Kashmir by members of armed groups. The Indian government failed to address the human rights and safety concerns of the people of Jammu and Kashmir.

These violations of civil and political rights should be condemned in themselves and also impact on labour rights as these rights are preconditions for basic labour rights like freedom of speech, freedom of association and the right to organise.

The Australian government should implement its policy of including enforceable labour rights in trade agreements by proposing that India undertake not to reduce human rights and labour rights and to develop a program to implement internationally agreed human rights and labour rights before concluding a comprehensive preferential trade agreement.

Recommendations

- ***The agreement should include enforceable commitments by both governments not to reduce labour rights in order to gain a trade advantage and to develop a program 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 Ten 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)***
  - ***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).***
- ***Each country should also develop appropriate minimum standards for working hours, wages and health and safety, based on ILO principles.***

[15]Amnesty International (2022) India report in *Amnesty International Report 2021, the state of the world's human rights*, https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/india/report-india/
Human Rights Watch,(2022) India events of 2021, https://www.hrw.org/world-report/2022/country-chapters/india.

- ***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.***

Environmental Standards, including measures to address climate change

India has ratified four of the five key international environmental conventions, but has a reservation to the *UN Convention on International Trade in Endangered Species.*[16]

On climate change, India adopted positive carbon intensity goals at COP26 in Glasgow, and as a developing country has pledged to achieve net zero carbon emissions by 2070. It made no new commitments at COP27.[17]

The recommendations below are consistent with those commitments.

Recommendations

The agreement should include legally binding commitments to implement United Nations multilateral environmental agreements, including

- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001)***
- ***the United Nations Framework Convention on Climate Change 1992, the Paris Agreement 2015, and subsequent Climate Change Agreements at COP 26 2021 and COP 27 2022.***

The implementation of these agreements 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.

No Investor-State Dispute Settlement (ISDS)

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

All trade agreements have government-to-government dispute processes which enable one government to lodge a dispute to an agreed tribunal process if there are violations of the terms of the agreement , which can result in trade sanctions.

ISDS is a separate process which is not included in WTO agreements or in many other agreements.

ISDS gives international (not local) corporations the right to claim damages of millions or billions of dollars from governments if they can argue that a change in law or policy will reduce future expected profits, even if the change is in the public interest.

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[16] United Nations, Record of ratifications of the Convention on international trade in endangered species of wild fauna and flora, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280105383.

[17] Indian Ministry of Environment, Forest and Climate Change (2022) India's Stand at COP-26, February 3, https://pib.gov.in/PressReleasePage.aspx?PRID=1795071.

The number of reported ISDS cases has been increasing rapidly, reaching 1,190 as of November 2022.[18]

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 2022[19] 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.

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.[20]

For example, the Westmoreland Coal Company[21] 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 unsuccessful[22] but only due to technicalities regarding changes in the company's ownership.

[18] UNCTAD (2022) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[19] 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.

[20] Intergovernmental Panel on Climate Change (2022) Climate Change Impacts, Adaptation & Vulnerability, May, https://www.ipcc.ch/report/ar6/wg2/.

[21] 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/.

[22] 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/.

In Europe, German energy companies RWE and Uniper have ISDS cases pending[23] against the Netherlands under the ISDS provisions of the Energy Charter Treaty (ECT) over its moves to phase out coal-powered energy by 2030.[24]

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 cases.[25]

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, the EU is considering withdrawal from the ECT, 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.

Recommendation

- ***ISDS should be excluded from the AI-CECA negotiations.***

No extension of intellectual property rights, including on medicines

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

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines**.** Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade.[26]

The WTO Trade-related Intellectual Property Rights (TRIPS) agreement grants monopolies on products including medicines for 20 years, with some limited exceptions for least developed countries and for medical emergencies.

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' access to medicines.[27] 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

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

[24] 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/.

[25] 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.

[26] 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

[27] 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.

second report in 2015.[28] A study of the costs of biologic medicines in Australia found that longer data exclusivity monopolies proposed in the original Trans-Pacific Partnership (TPP) agreement would cost the Pharmaceutical Benefits Scheme (PBS) hundreds of millions of dollars per year.[29]

Other studies indicate additional costs resulting from longer medicine monopolies in other bilateral agreements.[30] Public health experts have also demonstrated how successive bilateral and regional 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.[31]

This has been confirmed by a more recent systematic review of studies which showed that stronger pharmaceutical monopolies created by intellectual property rules stronger 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.[32]

India's role in supplying generic medicines to the developing world must not be undermined

India's large generic pharmaceutical industry produces generic medicines at affordable prices after patents have expired, and has earned the reputation as "the pharmacy of the world". This has been essential in countering HIV-AIDs and other epidemics. India's large-scale industry also produced the lowest-cost versions of COVID-19 vaccines for distribution to low-income countries.[33]

India's patent laws comply with WTO TRIPs provisions but also contain essential public health safeguards which enable the production of affordable generic lifesaving medicines which are sold to developing countries.

We note that a leaked draft proposal from the UK of the UK-India FTA's Chapter of Intellectual Property contains a series of clauses that would undermine India's public health safeguards and the supply of affordable medicines to other countries.

These clauses have been analysed by public health experts from Medicines sans Frontieres (MSF).[34] The analysis shows that they include proposals based on US-initiated proposals in the original Trans-Pacific Partnership Agreement, which were suspended in the amended version of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership to which Australia is a party. The suspension of these clauses shows they were not supported by any of the remaining CPTPP parties.

Both the US and the UK have powerful pharmaceutical industries which lobby to extend patents and other monopoly rights on medicines which go beyond the rules of the WTO TRIPs agreement, and

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

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

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

[31] 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.

[32] 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/.

[33] Thankom, A., and Reji, J, (2020) Indian pharma is being squeezed – and it's bad news for drug access in developing countries, The Conversation, October 31, https://theconversation.com/indian-pharma-is-being-squeezed-and-its-bad-news-for-drug-access-in-developing-countries-149122.

[34] MSF (2022) Damaging provisions for access to medicines in the leaked UK-India FTA negotiation text, Fact Sheet, November, https://msfaccess.org/sites/default/files/2022-11/IP_UK-India%20FTA_Factsheet_Final_

which would delay the availability of more affordable medicines. Australia adopted some of these clauses when it ratified the Australia-US FTA. However there has been strong community opposition to any further extension of medicine monopolies and Australian governments have so far resisted imposing these on developing country trading partners.

The MSF study demonstrates that the UK draft contains clauses which would:

- Move to "harmonise" Indian patent laws with TRIPS-Plus provisions in Australian law, which would ignore the needs of India and other developing countries for access to affordable medicines.
- Lower the bar of patentability and increase opportunities for evergreening strategies to patent slight variations of existing patented medicines without requiring improved clinical effectiveness.
- Introduce patent term extensions above the WTO standard of 20 years.
- Introduce data exclusivity, a separate monopoly which prohibits regulatory agencies from relying on test data submitted by the originator corporation to assess and approve generic medicines. This leads to unnecessary duplication of clinical trials and delays in the availability of cheaper generic medicines.
- Introduce draconian border enforcement provisions for export of generic medicines which may allow multinational pharmaceutical corporations to claim that their patents are being infringed and request customs officials to block legitimate generic medicines from being exported or transiting through third countries.

The Australian government should not propose any such clauses in the comprehensive agreement.

Recommendations:

- ***There should be no extension of copyright or patent monopolies, including medicine monopolies.***
- ***Australia should not require harmonisation of intellectual property rules or include any proposals for extension of medicine monopolies in the original TPP-12, nor any clauses in the leaked UK-India FTA draft proposals.***

No restriction of the use of government procurement as part of industry development programs, including renewable energy industries

The current 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.[35]

[35] 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.

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.[36]

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:

- ***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 industry in accordance with government policy, especially the development of local renewable energy industries, consistent with its Buy Australia Plan and domestic procurement policies.***
- ***The government should maintain its current government procurement exemptions for SMEs, Indigenous enterprises and for local government procurement.***

Digital trade rules must not prevent public interest regulation of digital companies

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 digital industry lobby, which seeks to codify rules that suit the dominant digital industry companies. These rules were the basis of the USA's negotiating position during the Trans-Pacific Partnership negotiations,[37] and are known as the Digital2Dozen principles.[38]

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 scandals[39]
- Uber classifying itself as a technological platform to avoid regulation and enable its exploitation of workers[40]
- Apple's tax avoidance[41]

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[36] 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.

[37] 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.

[38] 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.

[39] 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.

[40] 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.

[41] 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.

- Anti-competitive practices by Facebook, Google and Amazon.[42]

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 platforms.[43] 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.

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.[44]

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 the need to regulate 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.[45] 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.[46] 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

[42] 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.
[43] 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.
[44] 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.
[45] 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.
[46] 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/.

consumer protections.[47] 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 same privacy standards as in Australia.[48]

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.[49]

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 competition[50] and that algorithmic bias can result in race, gender, class or other discrimination.[51]

For governments and regulators who are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, access to algorithms and source code is an important tool in this process. Regulators may require access to algorithms and source code in a range of situations, including for example, to determine whether practices contravene competition law or to detect if algorithms are discriminatory.[52] Digital trade rules that prevent governments from requiring that companies transfer or give access to their algorithms and 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 CPTPP includes provisions

[47] 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.

[48] ibid.

[49] 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*, March1, 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.

[50] 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.

[51] 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.

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

that restrict governments from setting security standards for electronic transactions.[53] This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others.[54] The impact of electronic transactions rules is worsened when combined with digital trade rules that enable the free cross-border flow of data, as governments are restricted in their ability to ensure that this data is encrypted when it is transferred or stored securely.[55]

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.[56] 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."[57]

It is clear that governments must retain the ability to regulate security standards in order to reduce cybersecurity risks. 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 data.[58]

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 information.[59] 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

[53] 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.
[54] Reid Smith, S (2018) Preliminary note: Electronic authentication: some implications, via: http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf.
[55] Ibid.
[56] 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.
[57] 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.
[58] Ibid.
[59] 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.

requirements that data is stored and processed locally. This provision remained in the CPTPP text after the US left the agreement.[60]

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

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 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."[61] Concerns have also been raised about the impact that new technologies and artificial Intelligence can have in recruitment practices and on work conditions.[62]

These technologies can threaten workers' rights to privacy, including though inadequate protections against cybercrime, and can enable intrusive employer surveillance. Workers should be fully consulted and informed about data collected, such data should be restricted to what is necessary, and not permit intrusive surveillance. Workers should have right of access to their own data and rights to rights to object and have data rectified.

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.[63]

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."[64]

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

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[60] 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.

[61] International Trade 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.

[62] 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.

[63] 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.

[64] 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.

Recommendations:

The agreement 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 and preventing cybercrime***
- ***Prevent full regulation of financial services***
- ***Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and to ensure that workers have access to data collected about them***
- ***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.***

The agreement should include:

- ***Full exemptions for tax policy to ensure that digital companies do not evade tax.***
- ***Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.***