



**Submission to DFAT on the Plurilateral Services Agreement
Australian Fair Trade and Investment Network March 2013**

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade on the negotiations for a Plurilateral Services Agreement (PSA). AFTINET is a network of 60 community organisations which conducts public education and debate about trade policy. AFTINET supports the principle of multilateral trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. However, for this principle to work in practice, there must be a multilateral framework that is transparent, guarantees the interests of less powerful nations and moderates corporate influence. The current WTO framework has not achieved these goals. However, the WTO multilateral framework includes more countries and has more transparency compared with bilateral, limited regional or plurilateral negotiations.

AFTINET has been engaged in discussion and analysis of trade in service negotiations since 2000. Our concerns focus on the social impact of the narrow treatment of services as traded goods within a trade law framework. Many services like health, education, water, energy and social welfare services require government provision and/or regulation to ensure they are accessible to all. Other services like financial services are subject to market failure unless regulated by governments, a fact which was spectacularly demonstrated by the global financial crisis of 2008-9.

The WTO General Agreement on Trade in Services (GATS) applies global market access rules in a legally binding trade agreement from which governments cannot withdraw without exposing themselves to action by other GATS signatory governments. GATS rules, like all legally binding trade agreements, also enable governments to challenge specific policies or regulations of another government before a trade tribunal on the grounds that they contravene the provisions of the agreement, with trade sanctions applied as penalties if the challenge is successful.

GATS is a positive list agreement for its rules or disciplines on national treatment, market access and domestic regulation, which means that many of its rules only apply to those services which each government agrees to list in its legal commitments as part of the agreement. This means that each government can decide which services are covered by the rules of the agreement.

GATS applies to all services listed by governments the free trade principle of “national treatment” for transnational investors (WTO GATS, 1994, Article XVII). This means that there can be no preference or assistance for local service providers, no limits on levels of transnational investment, and no requirements for joint ventures, technology transfer or links with local firms.

GATS applies the principle of “full market access” for transnational investors (WTO GATS, 1994, Article 16). This means there can be no regulatory limits on the number of service providers, and no requirements for services to be located in particular regions or to employ or train local people (Article XVI.)

GATS also restricts the ability of governments to regulate essential services in the public interest. For example, qualifications, licensing and technical standards for services cannot be “more burdensome than necessary” for business (WTO GATS, 1994, Article VI.4).

The trade law policy approach to regulation is to treat regulation perceived as unfavourable to business interests as if it were a tariff, to be frozen, reduced and removed over time, often without adequate consideration of the social or environmental impacts of particular regulation.

In the context of continuing financial instability and climate change, many governments, including the Australian government, are currently taking steps to re-regulate financial markets and financial services, are regulating energy markets to reduce the levels of greenhouse gases, and are regulating water markets to reduce waste and conserve water. This means that governments should have the ability to consider very carefully whether such services should be listed in the GATS and subjected to GATS rules.

National policies on the regulation and provision of essential services should be decided through transparent democratic parliamentary processes, not through trade negotiations conducted behind closed doors.

We want to ensure that any negotiations about trade in services do not restrict the ability of government to fund or provide public services, to regulate to ensure equitable access to essential services and to regulate for financial stability and environmental sustainability.

We note that the very brief information on the DFAT website states:

Australia will advocate that trade commitments in the plurilateral services agreement reflect existing government policy. Australia will seek commitments from other Members that correspond as closely as possible to actual practice and provide opportunities for improved market access for Australian service providers. New and enhanced disciplines will also be developed.

The impact of “new and enhanced disciplines” on existing government policy and the ability of governments to regulate services is unclear.

This submission begins with some comments on the nature of the negotiations and their relationship with the WTO process and then makes specific recommendations about issues which may arise in the negotiations.

The Nature of the negotiations and their relationship to the WTO Process

We note that, although the negotiations being held in Geneva, they are not taking place as part of the WTO process, and are not mentioned on the WTO website. According to the DFAT website:

The plurilateral services agreement is aimed at developing a new pathway on services trade reform that will support the multilateral trading system.

The initiative currently involves 21 World Trade Organization (WTO) Members – Australia, Canada, Chile, Colombia, Costa Rica, European Union (comprising 27 countries), Hong Kong, Iceland, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Republic of Korea, Switzerland, Taiwan, Turkey, and the United States.

The objective is a high-quality and comprehensive agreement, which is compatible with the WTO General Agreement on Trade in Services (GATS), will attract broad participation and could be multilateralised in the future.

The conduct of the negotiations outside the WTO framework presents a number of problems, which may prevent the negotiations from meeting these objectives. These include the fact that most developing member countries of the WTO are not involved, lack of transparency and possible incompatibility with the WTO GATS agreement.

Most developing country members in the WTO not involved

WTO multilateral negotiations are based on participation by 157 governments at different levels of economic development, and some recognition that special and differential treatment is required for developing countries.

In bilateral, limited regional or plurilateral negotiations between larger and smaller economies, governments of large economies have more bargaining power. Multilateral negotiations have the potential for some mitigation of these power inequalities. This is why historically Australia, as a relatively small economy in the global context, has been committed to multilateral negotiations.

Of the 21 parties involved in negotiating the PSA, fourteen are members of the OECD, including the EU, (comprising 27 countries) Japan and the US, which are three of the world's most powerful economies. Only 7 countries are non-OECD members, of which 5 (Colombia, Costa Rica, Pakistan, Panama and Peru) could be described as developing countries. The PSA does not include the vast majority of the 157 WTO members, most of which are developing or least developed countries.

The danger of this plurilateral negotiation, which is dominated by OECD governments, is that agreements reached by them will be primarily in their interests, and in the interests of global services corporations based in the strongest economies. The small minority of developing countries involved in the PSA have little bargaining power. The result of this negotiation would then be presented to other WTO members on a take it or leave it basis. This brings into question the commitment to multilateral negotiations.

Lack of transparency, even compared with limited WTO transparency

In previous WTO GATS negotiations, there were some reports of meetings, and some position papers and proposals which were published on the WTO website. In 2003, GATS offers were published by a number of governments, including the Australian Government. This enabled public discussion and feedback to governments and negotiators.

The fact that the negotiations are taking place outside the WTO framework could mean that even the limited transparency of negotiations within the WTO framework is not available to stakeholders in the PSA negotiations.

We are aware that the Australian Government is proposing consultations with Australian stakeholders for the PSA, which we welcome. However, these consultations are likely to be limited in the absence of specific information about the texts which are being negotiated.

A step backwards from limited WTO rules for transparency is not acceptable at a time when there are increasing stakeholder demands from AFTINET and others for more openness and transparency in trade negotiations, for negotiating position papers and texts to be published, and for the final text of any agreement to be published and available for public and Parliamentary discussion before it is signed by Cabinet.

Recommendations:

1.1 That the Australian government

- **consider carefully whether the PSA is in fact compatible with the stated aim of multilateralisation through the WTO**
- **prepare a position paper on the background and rationale for its participation in the PSA negotiations, for public and Parliamentary discussion;**
- **submit all policies on the PSA to full parliamentary debate before commitments are made and**
- **disclose details of its specific requests to other governments and of other governments' requests to Australia.**

1.2 That background papers, offers and other documents of the PSA negotiations be made public

1.3 That the final text of the PSA be made available for public and Parliamentary debate before it is signed by Cabinet.

Lack of clarity about relationship of the negotiations to the WTO GATS agreement

The current negotiations have been described as a stand-alone agreement. However, it is also asserted on the DFAT website quoted above that the aim is “a high-quality and comprehensive agreement, which is compatible with the WTO General Agreement on Trade in Services (GATS), will attract broad participation and could be multilateralised in the future”.

Although these negotiations have been compared to the WTO plurilateral Government Procurement Agreement, a key difference is that there is no multilateral WTO agreement on government procurement.

The proposed PSA essentially duplicates the subject matter of the multilateral WTO GATS negotiations, but is a preferential agreement with limited participation. This presents numerous problems, and raises questions about whether the agreement can achieve its aims of compatibility with the GATS agreement.

For example, if concluded, a preferential agreement would not have access to the WTO disputes process. Will the agreement have a government-to-government disputes process, which would be separate from the WTO dispute process? How would these two processes be integrated in future, if there are ongoing disputes?

We know that the US and some other governments insist on the inclusion of investor-state dispute processes in bilateral and regional agreements, which do not exist in the GATS or any WTO agreement. The inclusion of investor state dispute processes would not be compatible with GATS.

What will be the structure of coverage of services in the agreement? We know that the US and some other governments insist on a negative list structure in bilateral and regional agreements. As explained below, this would not be in the public interest and would not be compatible with GATS.

Coverage of services should be positive list

If the objective of the agreement is to be compatible with GATS, it should have the same basic structure.

Currently GATS is mainly a positive list agreement, with disciplines on National Treatment, Market Access and Domestic Regulation only applying to those services which each government agrees to list in the agreement (Articles VI.1, XVI. 2, XVII.1)

A negative list structure includes all services which are not specifically excluded.

GATS does contain disciplines which apply to all services, but only for most favoured nation treatment and transparency (Articles 2 and 3).

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

However, it was recently reported (*Inside US trade*, February 15, 2013) that the parties in the PSA had already agreed, before the formal commencement of negotiations, to a "hybrid" structure, which would combine a negative list on national treatment with a positive list on market access. If this is the case, it would mean a key decision was taken before any public consultation process, which would undermine the consultation process.

Moreover, such a decision would also undermine the principle of enabling governments to make decisions about which services are included in GATS disciplines, and could render the PSA incompatible with the GATS.

Recommendation 2:

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

Clear exclusion of public services

Along with many other organisations and some governments, AFTINET remains concerned about the ambiguity of the definition GATS Article 1.3 (b) and (c), which defines a public service as "a service carried out in exercise of governmental authority" and "supplied neither on a commercial basis nor in competition with one or more service suppliers".

Australia, as with many other countries, has many commercial elements within local, state or national provision of public services. This has been specifically noted by the WTO Secretariat:

The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and the applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article 1.3? ... The hospital sector in many countries ... is made up of government and privately owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided ... It seems unrealistic in such cases to argue for continued application of Article 1.3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services. In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII. (WTO 1998, quoted in Ellis-Jones & Hardstaff, 2002: 42).

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

Recommendations:

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

3.2 The Australian Government should explicitly exclude public services from any offers made in PSA.

Clear support for the right of governments to regulate services in the public interest, and no provisions which would reduce this right

The establishment of disciplines under GATS article VI. 4 including discussion of how a 'necessity test' could be applied to licensing, qualifications and service standards has been the subject of ongoing controversy in GATS negotiations

It is likely that this issue will also be discussed in the PSA negotiations.

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

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

It is particularly puzzling that such proposals are being made at a time when governments are taking steps to re-regulate financial markets and financial services, are regulating energy markets to reduce the levels of greenhouse gases, and are regulating water markets to reduce waste and conserve water.

Recommendation 4:

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

Clear exclusion of investor-state dispute Processes

It is well-known that the US and global services business groups insist on investor-state dispute processes in bilateral and regional trade agreements. The PSA may be seen by some as an opportunity include investor-state dispute processes in relation to cross-border investment in services.

AFTINET opposes investor-state disputes because they give a single foreign investor the right to sue a government for millions of dollars of damages if a law policy harms their investment, regardless of whether the law or policy is in the public interest. The Philip Morris Company is using an obscure Hong Kong-Australia investment agreement to sue the Australian Government for damages over its tobacco plain packaging legislation, despite the fact that the High Court found that tobacco companies were not entitled to claim damages under Australian law. This case demonstrates the threat posed by investor state disputes to health and other public interest regulation.

Inclusion of investor state dispute processes would also render the PSA incompatible with the GATS, which uses the WTO government to government dispute settlement process.

AFTINET supports Australian government policy which opposes investor state dispute processes in all trade agreements.

Recommendation 5:

The Australian government should oppose the inclusion of investor state dispute processes in the PSA.

Mode 1V (Temporary movement of people)

Australia's current legal commitments in the GATS Agreement on movement of temporary skilled workers who are not executives or independent service sellers are in Mode 4 commitment clause 4d) which reads as follows:

Specialists, subject to individual compliance with labour market testing, for periods of initial stay up to a maximum of two years with provision of extension provided the total stay does not exceed four years.

Specialists being natural persons with trade, technical or professional skills who are responsible for or employed in a particular aspect of a company's operations in Australia. Skills are assessed in terms of the applicant's employment experience, qualifications and suitability for the position.

Labour market testing is not required for (i) natural persons who have specialised knowledge at an advanced level of the proprietary nature of the company's operations and have been employed for a period of not less than two years and (ii) if the position in question is within the Labour agreement in force at the time of application. A Labour agreement is an agreement between the Australian government, employers or industry organisations and unions for the entry of specialists from overseas

The above commitments to not apply in cases of labour/management dispute.

AFTINET has raised concerns about changes to these commitments and the exploitation of vulnerable workers under visa 457 arrangements in Australia's GATS since 2004 (AFTINET, 2004)

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

The Labor Government recognised these serious issues, and conducted a review of Visa 457 conditions, which documented the problems. (Deegan 2008)) This recommended changes to employment conditions, protection from exploitation, improved health and safety requirements, and English language requirements. On April 1, 2009 the government announced changes to Visa 457 conditions to address some of these issues. On February 26, 2013 further changes were announced, including requirements for labour market testing (Evans, 2009, Hurst and Lucas, 2013).

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

Further, we question whether such arrangements can be part of trade agreements which operate under trade law that has no current jurisdiction to ensure that workers' rights are protected. Workers are not commodities and the current rules that govern trade in goods and services are not adequate to protect their rights.

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

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

Recommendation 6 :

The Australian government should make no offers on the temporary movement of non-managerial workers in the PSA negotiations, nor agree to any proposals which would have the effect of restricting the right of governments to regulate in this area.

Specific Services

The Australian government trade policy adopted in April 2011 states that the Government

will not support provisions in trade agreements that constrain our ability to regulate legitimately on social, environmental or other similar important public policy matters (Emerson 2011: 19).

Education services

The Government has made commitments in education under GATS in private secondary and tertiary education services, and English language tuition services.

Given the ambiguity of the definition of public services, as recognised by the WTO Secretariat on p.4 above, there is a danger that, in the absence of specific reservations for public education, public education could be seen as a service which is operating in competition with one or more service providers, and therefore subject to the provisions of GATS, including equal access to government funding.

This is of particular importance given current policy recommendations, including the Gonski review, which advocate for more resources for public education.

The Australian government should make explicit in any negotiations that there are no commitments being given on public education services, and should not agree to any other proposals which would have this affect.

Recommendation 7:

The Australian government should make no further offers in the PSA on education services, should make explicit in any negotiations that there are no commitments being given on public education services, and should not agree to any other proposals which would have the effect of including public education services in the agreement.

Health services

Australia's current scheduled health commitments are limited to podiatry, chiropody and dental services. As with education, some health services are currently provided by the states and territories on a commercial basis, and it may be argued that this is done in competition with one or more service providers, and therefore subject to the provisions of GATS, including equal access to government funding.

The Australian government should make explicit in any negotiations that there are no commitments being given on public health services, and should not agree to any other proposals which would have this affect.

Recommendation 8:

The Australian government should make no offers in the PSA on health services, should make explicit in any negotiations that there are no commitments being given on public health services, and should not agree to any other proposals which would have the effect of including public health services in the agreement.

Water Services

The supply of water in Australia, the driest continent in the world, involves the balancing of public policy objectives, including the need to ensure affordable access to all, and the need to conserve water resources for environmental reasons.

This means governments should retain maximum flexibility to provide and regulate water services, including water catchment areas, water distribution and water treatment. For these reasons, the Australian government has generally excluded water services from trade agreements.

Water services were included in the US Australia FTA the insistence of the US. However, this has not been repeated in subsequent negotiations and it would be a mistake to repeat this in the context of plurilateral negotiations.

Australia should retain full flexibility to provide and regulate water services and should not make offers on water services.

Recommendation 9:

The Australian government should make no offers on water services in the PSA negotiations, and should not agree to any other proposals would have the effect of including water services in the coverage of the agreement.

Public utilities, transport and energy

It is important that the Government retain full capacity to regulate these essential services, especially in the context of current regulation to achieve environmental goals like reductions in carbon emissions.

The Australian government has generally excluded these services from trade agreements. They were included in the US Australia FTA the insistence of the US. However, this has not been repeated in subsequent trade negotiations and it would be a mistake to repeat this in the context of plurilateral negotiations

Currently Australia has GATS commitments in road passenger transport, excluding urban bus services, and in business services incidental to energy distribution. The Government should not make any further commitments in these areas.

Recommendation 10:

The Australian government should make no offers on public utilities, public transport or energy in the PSA negotiations, nor agree to any proposals which would have the effect of including these services in the coverage of the agreement.

Audio-visual services and other cultural policies

The Australian government has made no offers on audio-visual services in the GATS, and has generally sought complete exemption for cultural services and policies from trade agreements, except in the case of the Australia-US free trade agreement, where some concessions were made at the insistence of the US.

In 2009, Australia joined 150 other countries in ratifying the UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which legitimates government measures aimed at furthering cultural life through assistance to the creative arts, investment in film and TV production, and maintenance of Australian content quotas in broadcasting.

Consistent with this Convention, Australia has generally sought complete exemption for cultural services and policies in trade agreements.

Recommendation 11:

The Australian Government should make no offers on audio-visual services in the PSA, should seek a complete exemption for audio-visual services and other cultural policies and should not agree to any other proposals which would have the effect of including audio-visual services or other cultural policies in the agreement.

Postal services

Australia Post is a government business enterprise which provides postal services on an equitable basis to all Australians in urban and rural areas. The reserved service sets a common price for the delivery of standard letters throughout Australia.

The Government should not forfeit in any trade negotiations the ability to retain Australia Post in public ownership and both regulate and provide equitable access to postal services.

Recommendation 12:

The Australian government should make no offers in the PSA on postal services, should make explicit in any negotiations that Australia Post and the reserved services should not be included in the agreement, and should not agree to any other proposals which would have the effect of including public postal services or the reserved service in the agreement.

Summary of recommendations

1.1 That the Australian government

- consider carefully whether the PSA is in fact compatible with the stated aim of multilateralisation through the WTO
- prepare a position paper on the background and rationale for its participation in the PSA negotiations, for public and Parliamentary discussion;
- submit all policies on the PSA to full parliamentary debate before commitments are made and
- disclose details of its specific requests to other governments and of other governments' requests to Australia.

1.2 That background papers, offers and other documents of the PSA negotiations be made public

1.3 That the final text of the PSA be made available for public and Parliamentary debate before it is signed by Cabinet.

2. If negotiations proceed, the Australian Government should support a positive list structure with disciplines on National Treatment, Market Access and Domestic Regulation only applying to those services which each government agrees to list in the agreement.

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

3.2 The Australian Government should explicitly exclude public services from any offers made in PSA

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

5. The Australian government should oppose the inclusion of investor state dispute processes in the PSA.

6. The Australian government should make no offers on the temporary movement of non-managerial workers in the PSA negotiations, nor agree to any proposals which would have the effect of restricting the right of governments to regulate in this area.

7. The Australian government should make no further offers in the PSA on education services, should make explicit in any negotiations that there are no commitments being given on public education services, and should not agree to any other proposals which would have the effect of including public education services in the agreement.

8. The Australian government should make no offers in the PSA on health services, should make explicit in any negotiations that there are no commitments being given on public health services, and should not agree to any other proposals which would have the effect of including public health services in the agreement.

9. The Australian government should make no offers on water services in the PSA negotiations, and should not agree to any other proposals which would have the effect of including water services in the coverage of the agreement.

10. The Australian government should make no offers on public utilities, public transport or energy in the PSA negotiations, and should not agree to any proposals which would have the effect of including these services in the coverage of the agreement.

11. The Australian Government should make no offers on audio-visual services in the PSA, should seek a complete exemption for audio-visual services and other cultural policies and should not agree to any other proposals which would have the effect of including audio-visual services or other cultural policies in the agreement.

12. The Australian government should make no offers in the PSA on postal services, should make explicit in any negotiations that Australia Post and the reserved services should not be included in the agreement, and should not agree to any other proposals which would have the effect of including public postal services or the reserved service in the agreement.

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