

**Submission to the Department of Foreign Affairs
and Trade on the Trans-Pacific Partnership
Agreement on Behalf of the Australian Fair Trade
and Investment Network**

Prepared for AFTINET by Adam Wolfenden

AFTINET
Level 3, Suite 3B,
110 Kippax St
Surry Hills
NSW 2010
Email: campaign@aftinet.org.au
Phone: 02 9212 7242
Fax: 02 9211 1407
www.aftinet.org.au

1. Overview

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 90 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) on the Trans-Pacific Partnership Agreement (TPPA).

This submission addresses general principles and issues of common concern to our members.

Introduction and background to the TPPA

At consultations held by DFAT on October 30, 2008 it was explained that the Australian Government had been invited by the US government in September 2008 to negotiate a new TPPA with the current P4 governments (Chile, Singapore, Brunei and New Zealand). The Peruvian and Vietnamese governments have also been invited to join the negotiations, but have not yet agreed. The TPPA would be a legally binding trade agreement which would then be presented to other Asia Pacific governments in the context of APEC on a take-it-or-leave-it-basis. They would be invited to join the agreement if they so wished.

Under US law, proposed US trade negotiations must be approved by Congress before they commence. The Australian government believes that the US government has Congressional authority to commence these negotiations. However, it is aware that the US government has no 'fast track' authority to conclude the negotiations, which means it cannot present a draft agreement to Congress to be either approved or rejected without amendment. Without this authority, there is no guarantee that the outcome of any negotiations will be endorsed without amendment by Congress. Moreover, the US Presidential and Congressional elections are currently underway, which could result in a change of Administration and changes to trade policy. It is remarkable that US and Australian trade negotiators seem to be proceeding,

regardless possible outcomes of either Congressional or Presidential democratic processes.

The timetable for negotiations has already been set by the US, which has agreed that they will commence in March 2009. This means that the Australian Government must make a Cabinet decision in November, with no time even for a feasibility study, let alone proper community consultation. It appears that Australia is being steamrolled into these negotiations at the behest of a US Administration which may not be in office by the time the proposed negotiations commence.

Since Australia already has bilateral FTAs with the New Zealand, the US, Singapore, and Chile, and is about to enter a regional agreement with ASEAN which includes Brunei and Vietnam, it is difficult to see what Australia has to gain in commercial terms from such a negotiation. Indeed, there were no significant specific gains identified in the consultation.

The major purpose of the negotiation was identified as the formation of a 'building bloc' and a "trans-pacific bridge" for a binding trade agreement involving the US and a small number of Latin American and Asian countries, a "coalition of the willing". It was conceded that the US has until now approached all bilateral and regional negotiations with the "NAFTA" template, which requires that other government surrender key rights to regulate on intellectual property rights, especially to achieve affordable access to medicines, on services and investment regulation, on media regulation, on government procurement policy and on food labelling, especially on genetically modified foods. It was claimed that the US negotiators were aware that this model would not necessarily be welcomed by developing countries in the region. However the record of US bilateral negotiations with Latin American and other developing countries does not provide any evidence of this.

Indeed, this model was rejected by the majority of APEC countries, which is why APEC has no legally binding trade agreements. Many developing countries rightly judge that this model would remove rights of governments to regulate in key areas of social and economic development. In Australia, following an unprecedented community debate, only parts of this model were incorporated into the US-Australia

Free Trade Agreement. Australia did not achieve the promised access to US agricultural markets, despite unpopular concessions that were made on medicines and media policy. Lowy Institute annual surveys consistently show that the vast majority of Australians believe that the AUSFTA was a poor deal for Australia.

Given this history, it is surprising to say the least that the Australian government would decide, at the behest of the US, to rush into a negotiation which will require considerable resources, the main object of which is to attempt to pave the way for the NAFTA model in the region, with no significant gains for Australia. Indeed it could be argued that Australia's assumption of such a role could have a negative affect on relationships with other significant key trading partners in the region, including China, Japan and the majority of ASEAN countries who have not been invited to be part of the proposed TPPA.

AFTINET believes that the Government should not agree to commence negotiations without following the democratic processes outlined below.

2. Process for Entering into Negotiations

2.1 Parliamentary Process

The Australian Government should commit to effective and transparent community consultation about proposed trade agreements, with sufficient time frames to allow informed public debate about the impact of particular agreements.

AFTINET is aware of the current timeframes that are being demanded in order to enter into TPPA negotiations in March 2009. AFTINET is deeply concerned that this timeframe is inadequate to undertake effective community dialogue and will result in a reduced capacity for the public to engage in the process and to critically comment on the potential costs and benefits of such an agreement.

To facilitate effective community debate, it is important that DFAT develop a clear structure and principles for consultation processes that can be applied to all proposed trade agreements. The Senate Foreign Affairs, Defence and Trade Committee made detailed recommendations for legislative change in its November

2003 report, *Voting on Trade*, which, if adopted, would significantly improve the consultation, transparency and review processes of trade negotiations¹. The key elements of these recommendations are that:

- Parliament will have the responsibility of granting negotiating authority for particular trade treaties, on the basis of agreed objectives;
- Parliament will only decide this question after comprehensive studies are done about the economic, regional, social, cultural, regulatory and environmental impacts that are expected to arise, and after public hearings and examination and reporting by a Parliamentary Committee; and
- Parliament will be able to vote on the whole trade treaty that is negotiated, not only on the implementing legislation.

We welcomed the Australian Labor Party policy platform on increased transparency in the process of undertaking talks regarding a trade agreement. We are encouraged that the platform now states:

“...prior to commencing negotiations for bilateral or regional trade agreements, a document will be tabled in both Houses setting out the Labor Government’s priorities and objectives, including independent assessments of the costs and benefits of any proposals that may be negotiated. This assessment should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.”²

AFTINET eagerly anticipates the implementation of this policy and the inclusion of social, cultural and environmental impacts into the assessment of any proposed trade agreements.

AFTINET welcomed the policy put forward by the ALP to table any trade agreements in Parliament with any implementing legislation. However, AFTINET still believes that to properly increase transparency and democracy the Parliament

¹ Senate Foreign Affairs, Defence and Trade Committee, ‘Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement’, 26 November 2003 at paragraph 3.91.

² Australian Labor Party National Platform and Constitution 2007, Section 3.26.

should be the body that decides on whether or not to approve a trade agreement, not just its implementing legislation.

Recommendation: That the Government set out the principles and objectives that will guide Australia's consultation processes for the TPPA negotiations and all other trade agreements, and that the Government will have regular consultations with unions, community organisations and regional and demographic groups which may be adversely affected by the agreement.

Recommendation: That the Government establish parliamentary review processes, which give parliament the responsibility of granting negotiating authority for proposed trade agreements like the proposed TPPA and that Parliament should vote on the agreement as a whole, not only the implementing legislation.

2.2 Modelling of Impacts for Free Trade Agreements

As mentioned below in relation to the AUSFTA and the Singapore Australia FTA, the econometric modelling that was used as a basis to justify entering into negotiations has been severely flawed. As shown with the AUSFTA projections, assumptions of perfect labour mobility and complete and instantaneous market access are far from reality and often act to exaggerate the economic benefits.

In addition to the problematic econometric aspects of the modelling that is undertaken, such studies also exclude the social and environmental impacts of an FTA. The decisions and implications of FTAs have impacts that extend well beyond the economic sphere. The impact that changes in economic relations can have on communities can be enormous and disastrous, yet such potential impacts are seldom addressed in the initial scoping for an FTA.

It has been indicated by the Department of Foreign Affairs and Trade that a decision by Cabinet is sought by the end of November. This rules out any time to undertake independent studies to assess the impacts that such an agreement would have on economic, regional, environmental, and social aspects.

The next section will discuss in more detail the impacts that Australia's current agreements have had with some of the countries involved in the TPPA.

It's important to note that the recently released Mortimer Review into Australia's export policies and programs titled "Winning in World Markets" has ruled that the benefits from Australia's FTAs are inconclusive. The review finds that there has been a worsening of Australia's terms of trade with all FTA partners, the rates of increased market share are ambiguous, limited evidence of new market entrants, and with the exception of some food, manufacturing and service exports, many exporters saw no increase in exports³.

Given the lack of clear benefits from Australia's previous FTAs, AFTINET considers rushing forward into a more comprehensive and far-reaching agreement without undertaking adequate studies to be a misguided approach.

Recommendation: Before Australia enters into negotiations for the TPPA it must ensure that the social, environmental and economic impacts are incorporated into the assessment of an agreement.

Recommendation: The implementation of ALP Policy that states "A Labor Government will also ensure that all major trade agreements into which Australia enters, bilateral and multilateral, are assessed to ensure that they are consistent with the principles of sustainable development and environmental protection for all regions of Australia" (Chapter 3, Section 22).

³ Mortimer, D., (2008) "Winning in World Markets", pg. 96-98. www.dfat.gov.au/trade/export_review.

3. Impacts of the Australia's FTAs

Prior to Australia entering into negotiations to gain further concessions with our FTA partners, it's important to gain an understanding of what our current FTAs have delivered for Australia.

3.1 Economic impacts

Australia's FTAs have been promoted to the public by the previous government as agreements that would significantly boost our economy. This policy was based solely on the econometric studies undertaken by consultants that were often based on flawed assumptions.

Econometric studies are limited by the assumptions built into the models they use. Most models include the assumption of perfect labour mobility. This assumes that all of those displaced by increased imports will be perfectly mobile and able to be retrained to take advantage of growth elsewhere in the economy, which is not generally the case in practice. The omission of unemployment effects means that such studies generally overstate economic benefits⁴.

It is therefore significant that econometric studies on the AUSFTA, TAFTA, and SAFTA predicted either very small gains or losses to the Australian economy, even without full inclusion of unemployment effects.

For example, the original CIE economic consultants' study commissioned by the then government for the AUSFTA assumed totally free trade in agriculture yet predicted gains for the Australian economy of only 0.3% (\$Aus 4 billion) after 10 years. The results of this study were heavily dependent on the assumption that the AUSFTA would result in the complete removal of key US barriers to trade in agriculture, especially in the sugar, dairy and beef industries⁵. This was highly

⁴ Quiggin, J., 1996, *Great Expectations: Microeconomic Reform and Government in Australia*, Allen and Unwin, Sydney

⁵ Australian APEC Study Centre, *An Australia-US Free Trade Agreement: Issues and implications* Canberra, 2001

unlikely, and was not delivered in the final Agreement. It is thus not surprising that the predicted gains have not been delivered.

The impact of Australia's FTAs has resulted in a worsening balance of trade for Australia in all agreements⁶. Australia has seen exports to Singapore actually decrease whilst imports have increased 150 times⁷. In the first two years of the AUSFTA's implementation, US imports have grown four times faster (by 20 percent between 2004 and 2006) than Australia's exports to the US⁸. In 2006 Australia's bilateral trade deficit in merchandise goods totaled \$11 billion. This almost accounted for Australia's entire 2006 estimated deficit in goods and services⁹.

The impacts of increased imports of goods combined with the decrease in exported Australian goods are felt in the loss of employment in related industries. It is estimated that under all of Australia's FTAs there have been 26,000 job losses which have been almost all in the manufacturing area, with no significant job creation in the mining or agriculture sectors¹⁰.

3.2 Impacts on the Pharmaceutical Benefits Scheme (PBS)

Australia has a pharmaceutical benefit scheme that is the envy of many other nations. In the US, common prescription medicines cost three to ten times the price paid in Australia and many people cannot afford them¹¹. During the negotiations for the AUSFTA, Australians were repeatedly told that the PBS would not be changed as a result of a trade agreement with the US.

The inclusion in the AUSFTA of the joint Medicines Working Group, based on the commercial principles that result in higher prices in the US, has resulted in price increases in the PBS. These commercial principles include the 'need to recognise the value' of 'innovative pharmaceutical products' through strict intellectual property rights protection. The PBS has in the past kept the wholesale prices of medicines

⁶ Australian Manufacturing Workers Union, *The Potential Impacts of the Australia-China Free Trade Agreement*, Sydney, 2007

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

low by comparing the cost of new medicines with the cost of existing medicines with the same health outcomes, known as reference pricing. AFTINET obtained papers through a Freedom of Information application that show that changes to the reference pricing system were discussed at the Medicines Working Group in January 2006, well before they were announced by the previous government, which passed legislation affecting the PBS in June 2007.

The legislation introduced a new category of medicines known as F1, which will not be subject to reference pricing, and for which the government will pay much higher prices. This is a change that the pharmaceutical companies and the US government have strongly supported. The government calculates that the reductions in price for generic medicines, which were also included in the legislation, will outweigh the higher prices for new medicines, but this may not be the case for the government, nor for individual consumers. The then ALP Opposition moved a successful amendment to the legislation, requiring the price impact of the legislation to be reviewed after one year. We look forward to the conduct of this review by the current government.

3.3 The debate about Blood Fractionation Services

Under AUSFTA the previous Government agreed to undertake a review of Australia's plasma fractionation arrangements and to recommend to the states and territories that the processing of blood be opened to competitive tender by US companies, regardless of the outcome of the review. The side letter which contained this commitment was a result of last-minute lobbying by US firm Baxter Healthcare¹².

The Flood Review of plasma fractionation arrangements took place in 2007, and was conducted by health experts. AFTINET and many health and community groups made submissions arguing that tendering would be risky and more costly, and that the current arrangements be retained. AFTINET also wrote to all state and territory governments, and with other community organisations, debated the issues in the media. The review recommended against tendering on the grounds of increased

¹¹ The Australia Institute (2003) *Trading in our Health System*, Canberra www.tai.org.au

¹² Baxter Healthcare, (2004) Submission to the Joint Standing Committee on Treaties Inquiry into the US Free Trade Agreement, April 14.

costs and health risks, but the Howard government still recommended that the states proceed with it.

Under the 2003 National Blood Agreement, the Commonwealth and all state and territory governments must jointly agree if any change in policy is to take place. The state and territory governments took the advice of the review and of strongly expressed public opinion, and rejected changed fractionation arrangements for Australia.

Following this refusal by the States, the Commonwealth Government announced on March 30, 2007, that the existing arrangements for processing of blood for plasma products would remain.

AFTINET supports this outcome, which was based on a proper policy process that gave priority to health policy. However, this example shows the potential for trade agreements to undermine the democratic process. The federal government was bound by the terms of the AUSFTA to ignore the outcomes of its own review on a vital health policy issue. Fortunately the wording of the agreement and the previous legal agreements with the states meant that state governments were free to judge the issue on health grounds.

3.4 Changes to Copyright Laws

Copyright law is supposed to provide a balance between fair rewards for authors and excessive protection which raises prices. The AUSFTA extends the period for which copyright payments must be made from 50 years after the death of the author to 70 years, in line with US law (article 17.4). The Australian Intellectual Property and Competition Review Committee recommended that copyright not be extended without a public inquiry. The AUSFTA denied us this public debate¹³.

These changes are costly for libraries and educational bodies, as Australia has adopted the US copyright standard without the US's more generous rules for copying for research and education purposes. US educational bodies pay no or only nominal

royalties to use copyrighted material. In effect, the AUSFTA resulted in Australia providing more stringent protection for American copyright owners than they are afforded in their own country.

These same provisions have now been included in the Australia/Chile FTA (ACI FTA).

3.5 Reduced Rights for Review of Foreign Investment

Under the AUSFTA, US investment in Australia must be given 'national treatment', meaning it must be treated in the same way as local investment (Article 11.3). US investors cannot be required to use local products, transfer technology or contribute to exports (Article 11.9).

Existing limits on foreign investment are retained for newspapers and broadcasting, Telstra, Qantas, Commonwealth Serum Laboratories, urban leased airports and coastal shipping. However, these limits are subject to 'standstill' and cannot be increased. The Foreign Investment Review Board (FIRB) retains the power to review investments of over \$50 million in these areas, and in military equipment, and security systems, the uranium and nuclear industries (Annex 1).

Regulation of foreign investment can only be increased for urban residential land, maritime transport, airports, media co-production, tobacco, alcohol and firearms (Annex 2).

However under the AUSFTA the threshold for FIRB review of all other US investment in existing businesses has been lifted from \$50 million to \$800 million (adjusted for inflation). The vast majority of companies listed on the Australian stock exchange have market capitalisation of less than \$800 million. Further, US investment in new businesses in areas not listed as reservations will not be reviewed at all. The US government estimates that if these rules had applied over the three

¹³ Henry Ergas 'Patent Protection an FTA complication', *Australian Financial Review*, 24 February 2004, p. 63

years leading up to the signing of the AUSFTA, nearly 90% of US investment in Australia would not have been reviewed¹⁴.

This is a massive reduction in the ability of the Australian government to review whether a particular investment is in the national interest. Other governments are now demanding the same rules as part of other FTA negotiations.

If Australia enters into negotiations for the TPPA, it must retain the right to review investment to ensure that it is in the public interest.

3.6 Reduced rights for governments to regulate services

The services chapter of AUSFTA applies to all levels of government – federal, state and local. Trade agreements generally exclude public services, particularly essential services, to ensure that governments can regulate to ensure equitable access to them. However, an ambiguous definition of public services could mean that such services could be covered by the agreement, unless they are listed as reservations.

Following the NAFTA template, AUSFTA has a ‘negative list’ structure for both services and investment. All of Australia’s laws and policies on services and investment at all levels of government can be affected by the agreement unless they are specifically listed as reservations.

US service companies must be given national treatment and full market access to non-government services, meaning that US companies must be treated as if they were Australian companies, and that there can be no limits on levels of foreign ownership, no requirements to have joint ventures with local firms, no limits on the number of service providers, and no requirements on staffing numbers for particular services. Qualifications, licensing and technical standards for services cannot be ‘more burdensome than necessary to ensure the quality of the service’ (AUSFTA Articles 10.2, 10.4, 10.7). Regulations could be challenged if they do not conform to

¹⁴ US Trade Representative, ‘Summary of the US-Australia Free Trade Agreement’, Trade Facts, p 1, 8 February 2004

these terms. These obligations apply to all services unless they have been specifically reserved.

Social welfare, public education, public training, health and childcare are reserved, but only 'to the extent that they are established or maintained for a public purpose', which is not defined. Non-profit providers of child care and aged care, both sectors which have been substantially commercialised, have questioned the ambiguity of the reservations, and expressed concerns about challenges to regulation for licensing and quality standards.¹⁵

The list of reservations leaves out key essential services that **were** included in a similar list of reservations in the Singapore-Australia Free Trade Agreement. Water and energy services and public transport were omitted from the list of reservations at the insistence of the US.

The lack of reservation of water and energy services means that Australian governments now have restricted rights to regulate them. This is of even greater concern given the need for governments to regulate to address the impacts of climate change and drought.

The impact of the inclusion of water and energy services in the AUSFTA became visible in 2006 in the public debate about the privatisation of the Snowy Mountains Hydro-electric scheme, jointly owned by the Australian Federal Government and two state governments. The Federal government held 15% of the shares, valued at \$450 million of the estimated total value of \$3 billion.

The sale of the scheme was initiated by the two state governments, which had corporatised their shareholdings, and the Federal Government agreed. However, Federal legislation was required to complete the sale. A very broad community campaign developed against the sale, on the grounds that private and possibly transnational foreign ownership would reduce the ability of governments to regulate both water flows and electricity supply for public interest and environmental reasons.

The campaign was led by the Federal Government Member of Parliament in whose electorate the scheme was located, and supported by other government back benchers and a former conservative Prime Minister, the National Farmers' Federation, members of the Opposition and minor parties and a broad range of prominent individuals and community and environmental groups ¹⁶

The Government sought to defuse the campaign by announcing it would amend the sale legislation to limit transnational investment to 35% of total shares, and require the management of the scheme to be located in Australia. However, the Government then reportedly received legal advice that such regulation could be directly contrary to AUSFTA investment chapter, which did not exclude water or energy services and forbids any limits on foreign ownership of assets worth less than \$800 million. The Federal Government share of the scheme fell below this threshold. The Government was reportedly highly embarrassed by the prospect of any public discussion of the possibility of its own proposed nationalist safeguards being in conflict with AUSFTA¹⁷.

The Prime Minister hurriedly withdrew the sale legislation altogether, announcing that he was responding to community concerns about privatisation, and the sale did not proceed (Howard, 2006). This was clearly a victory for the community campaign. However, it also showed that some government departments were unaware of the restrictions placed on government policy by AUSFTA, and the Government was not willing to defend these restrictions publicly.¹⁸ It is clear that AUSFTA means that governments have reduced rights to regulate water, energy and public transport services if they are privatised. All of these are areas which will require regulation in the context of climate change.

¹⁵ UnitingCare, NSW.ACT 2004, "Submission to the Joint Standing Committee on Treaties Inquiry into the US Free Trade Agreement.

¹⁶ (Myer, Rod, (2006) "Free Trade Fears in Snowy Backflip" *The Age*, June 12.

National Farmers' Federation, (2006) 'NFF concerned about Snowy Hydro privatization' Media Release, May 30, Grigg, Angus, (2006) "Snowy hydro a political football" *Australian Financial Review*, July 27, p. 61.

¹⁸ Myer, op cit.

These examples from the AUSFTA show that the Agreement has not delivered the promised economic benefits. It has also had detrimental social impacts in areas like medicines and health policy, copyright law and the ability of governments to regulate essential services, especially in the context of climate change.

AFTINET believes that the Government should take the opportunity of the annual reviews of the AUSFTA to renegotiate those aspects of the agreement which have led to the impacts described above. The priority should be to ensure that medicines remain affordable to all under the PBS, and that governments retain the ability to regulate essential services like energy, water and public transport, in the context of measures needed to address climate change. These negotiations should be informed by the knowledge that either party can withdraw from the agreement after giving due notice and that there would be popular support for this if the AUSFTA undermined important health or other social policies.

4 Benchmarks for Negotiations on the TPPA

4.1 Trade Agreements Should Support International Standards on Environment Protection and Labour, Human, and Indigenous Rights

It should be a prerequisite of Australia pursuing trade agreements that parties to the agreement abide by international standards on human, labour, and Indigenous rights and environmental sustainability, as defined by the United Nations (UN) and the International Labour Organisation (ILO). Trade agreements should not undermine these standards.

The recent Joint Standing Committee on Treaties report into the ACI FTA revealed the Australian Government position in regards to the ILO Conventions. When questions about the inclusion of ILO conventions like abolition of child labour in trade agreements, the DFAT Trade Development Assistant Secretary replied that “It has not been Australia’s policy to include those sorts of provisions in free trade agreements”¹⁹.

¹⁹ Questioning of Ms Trudy Witbreuk by JSCOT, August 25, 2008

Despite Australia's reluctance to include such provisions in agreements, Australia's recent entering into negotiations with China is a prime example of the need to have trade agreements that do not undermine international standards. AFTINET is concerned about China's compliance with the *ILO Declaration on Fundamental Principles and Rights at Work* and the failure of the Chinese Government to enforce some of its own labour laws. China has ratified only three of the eight ILO Conventions that form the basis of the ILO Declaration and there are numerous reports of labour rights abuses, many of which occur in export processing industries.

Australia must ensure that it does not give preferential access for goods and services from countries where labour rights and human rights are being violated. Australia has a responsibility to criticise governments that are violating human rights and this extends to Australia's trade policy.

Environmental protection must not be undermined by Australia's trade policy. Australia's trading relationships should support and strengthen multilateral environmental agreements as well as actions taken by the United Nations Environment Program. This includes not only environmental protection but also the right to develop in a sustainable way.

On a domestic level, trade policy must not undermine the ability of governments to regulate in the interest of protecting the environment. This includes ensuring that disputes settlement processes at both a multilateral and bilateral level do not erode the space for governments to regulate. As discussed below, Australia should avoid any mechanism such as the Investor-State Disputes Settlement process in its bilateral agreements. Such a mechanism has seen rulings against governments trying to regulate in the interests of environmental protection.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should recognise the primacy of environmental agreements, and trade rules should not restrict governments from regulating to address climate change. WTO rules currently recognise the right of governments to regulate for environmental goals, but there is still debate about the legal meaning of this. If there

is a conflict between trade rules and the ability of governments to regulate, we believe trade rules should be clarified or amended to enable such regulation.

The rights of Indigenous people's must also be respected in Australia's trade policy. This would involve ensuring that any trade agreement does not undermine the goals of the United Nations Declaration on the Rights of Indigenous Peoples. The current Government has stated that it would support Australia becoming a signatory to the agreement. If Australia is supportive of the Declaration then it needs to ensure that this is reflected in trade policy.

Recommendation: Prior to undertaking any trade agreement the Australia government outline how it will strengthen and support international standards on the environment, labour rights, human rights and the rights of Indigenous Peoples.

Recommendation: Australia becomes a signatory to the United Nations Declaration on the Rights of Indigenous Peoples.

4.2 No Investor-State Disputes Settlement Process

All Trade Agreements contain State-to-State dispute processes to resolve disagreements arising from the agreements. The current P4 Agreement contains only a State-to-State disputes process. Investor-State disputes processes are additional disputes processes which allow investors to challenge government actions and policies, and to sue governments for damages if they believe their investments have been harmed. The Thailand/Australia FTA, Singapore/Australia FTA, and Australia/Chile FTA include such a clause. Investor-State dispute processes in other agreements like the North America Free Trade Agreement (NAFTA) have seen a range of government regulation aimed at protecting public health and the environment overturned in the interests of trade²⁰. This allows unaccountable investors to challenge the democratic powers of governments to enact legislation that is in the public interest.

²⁰ See Public Citizen's Report on all the cases included under the Investor-State Disputes Process in NAFTA at http://www.citizen.org/documents/Ch11cases_chart.pdf

Whilst such a mechanism exists in Australia's trade agreements with Singapore, Chile and Thailand it was not included in the agreement with the United States, in part because of strong public opposition in both Australia and the United States.

Recommendation: Australia should continue with the example set by the AUSFTA and the current P4 Agreement and not include investor-state dispute processes in any future TPPA.

4.3 Positive List for Trade in Services

The AUSFTA, ACI FTA, and the current P4 Agreement have a negative list structure for both services and investment. This means that all laws and policies are affected by the agreement unless they are specifically listed as reservations. This differs from WTO multilateral agreements like the General Agreement on Trade in Services (GATS), which is a 'positive list' agreement, meaning that it only applies to those services which each government actually lists in the agreement. The negative list is therefore a significantly greater restriction on the right of governments to regulate services than the WTO GATS agreement.

A 'positive list' approach to Australia's trade negotiations in services and investment allows Australia to determine exactly which sectors are going to be included in any agreement. This provides for future industries and sectors to be excluded from an agreement unless specifically included under government direction. This approach also places Australia's trade strategy more in line with multilateral efforts within the WTO.

Recommendation: Trade in services, if included, should be done so only on a "positive list" arrangement.

4.4 Exclusion of Public Services

AFTINET is highly critical of the definition of public services used in Free Trade Agreements and the WTO's General Agreement on Trade in Services (GATS), which defines a public service as "a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial

basis, nor in competition with one or more service suppliers.” This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, many public and private services are provided side by side. This includes education, health, water, prisons, and many more.

Even when essential services are not publicly provided, governments need to regulate them to ensure equitable access to them, and to meet other social and environmental goals. To the extent that services and investment are included in any trade agreement, it should be under a positive list rather than a negative list.

Recommendation: Public services should be clearly and unambiguously exempted from the TPPA and there should be no restrictions on the right of governments to regulate services in the public interest

4.5 Temporary labour arrangements and trade agreements.

The P4 agreement currently contains a provision for movement of people as part of its chapter on service delivery. This provision will be revisited in the commencement of TPPA negotiations.

AFTINET has raised concerns about 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 afraid they will be dismissed and deported if they complain, and are more vulnerable to exploitation than other workers.

We welcome the current governments review of Visa 457 arrangements by Industrial Relations Commissioner Barbara Deegan, now due to report to the Minister for Immigration and Citizenship in early November 2008.

The terms of reference of the review include:

- The employment conditions that apply to workers employed under the temporary skilled migration program;
- The adequacy of measures to protect 457 visa holders from exploitation;
- The health and safety protections and training requirements that apply in relation to temporary skilled workers;
- The English language requirements for the granting of temporary skilled migration workers' visas; and
- The opportunities for Labour Agreements to contribute to the integrity of the temporary skilled migration program.

AFTINET expressed our concerns about Visa 457 to the previous government, and asked that the Visa 457 arrangements not be included in any trade negotiations, specifically, in the GATS negotiations, or in the Australia-China Free Trade Agreement negotiations.

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

We question whether such arrangements should 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 such arrangements in trade agreements, which do not include any protections for basic rights, also means they are effectively “locked in”, and extremely difficult for future governments to change. If, for example, such arrangements were included in the GATS, and a future government did make changes, Australia might have to compensate other trading partners or could be subject to legal action under the WTO disputes process, resulting in trade sanctions. Similar action could be taken under the disputes provisions of FTAs.

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 the range of safeguards of labour rights and other rights that the terms of reference of the review indicate are necessary. It would also enable them to be changed as circumstances change.

Recommendation: That trade agreements should not include provisions for the movement of vulnerable workers, such arrangements should be made in separate agreements that are better suited to deal with the range of safeguards for labour rights.

Recommendation: That no offers be made on Visa 457 arrangements in any trade agreement until the review is complete and its recommendations implemented.