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AFTINET Submission to the Joint Standing Committee on Treaties Inquiry into the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland

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Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair-trading relationships with all countries, based on the principles of human rights, labour rights and environmental sustainability. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral rules are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make a submission to this inquiry. This submission deals with the transparency and democratic accountability of the negotiation process, and the areas of content of the agreement which are of concern because of their potential impacts on human rights, labour rights or environmental sustainability. The submission makes recommendations for changes to improve the agreement before consideration of the enabling legislation and ratification.

Summary and recommendations

The A-UKFTA was negotiated in haste, driven by the UK's desire to secure bilateral trade agreements in the wake of Brexit, and the UK's bid to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Some areas remain uncompleted, to be negotiated in future.

Stakeholder briefings during negotiations were limited because there was no public access to draft texts, or to the final agreed text. There has been no independent assessment of the economic, environmental health and gender impacts, before the agreement was signed.

We welcome the fact that Investor-State Dispute Settlement (ISDS), which enables international corporations to sue governments in international tribunals if they make regulatory changes, was excluded from the agreement because both governments expressed faith in their robust legal systems. The UK is the second largest investor in Australia and UK companies are the third highest users of ISDS cases. It would therefore be inconsistent and risky for ISDS to apply if the UK joins the CPTPP. A CPTPP side letter should exclude both governments from applying ISDS in the CPTPP.

The Investment and Trade in Services chapters include all investment and services, freeze existing regulation at current levels unless they are specifically exempted, and only allow increased regulation for specific exemptions. Unlike the CPTPP and the RCEP, these chapters do not have a blanket exemption for existing state government regulation, instead requiring all existing exempted state regulations to be listed separately. This is more restrictive of state government regulation than

the CPTPP and the RCEP. Australia has also foreshadowed further negotiations to remove exemptions which allow requirements for senior managers or board members to reside in Australia, and require foreign investors to use local technology, to locate regional or world headquarters in its territory and to conduct research and development locally. These needs more scrutiny, as the removal of those exemptions could be contrary to local industry development needs. We welcome new clauses which appear to confirm that regulation of licensing, qualifications and service standards for all services are exempted, which should enable governments to increase regulation if required by government policy, for example in aged care or disability services.

The Government Procurement Chapter opens up more federal and state government entities to international competition for government procurement and foreshadows the inclusion of local government. The expansion of entities could impact on local industry capability programs being developed in response to the pandemic and to the development of local renewable energy capacity and other low carbon industries to meet emission reduction targets and provide local employment. The proposed future inclusion of local government procurement would reduce regional employment opportunities.

The Labour Chapter includes basic labour rights, and new articles on modern slavery and gender discrimination. But the latter are aspirational not legally enforceable. Penalties for reduction of labour rights only apply if there are sustained and recurrent violations affecting trade and investment. These high barriers are not required in other chapters. There is also a long and convoluted consultation process before any resort to the state-to-state dispute settlement process, which is not required in other chapters. This means the chapter is effectively less enforceable than other chapters in the agreement.

AFTINET supports Australia's permanent migration scheme which has contributed to our vibrant multicultural society. We support arrangements for temporary overseas workers where they are designed to address local labour market shortages based on local labour market testing. But the Temporary Movement of Business People Chapter removes the requirement for labour market testing, and expands the number of temporary workers who are dependent on one employer and who are vulnerable to exploitation because they can be deported if they lose the job. It also foreshadows further expansion of such schemes.

The Environment Chapter refers to existing commitments of each government to multilateral environment agreements, including on climate change, and pledges cooperation on this and some other important environmental issues. But, in contrast with the UK-New Zealand FTA, there are no commitments to specific emissions reductions targets. As in the Labour Chapter, penalties for reduction of environmental standards only apply if there are sustained and recurrent violations affecting trade and investment. These high barriers are not required in other chapters. The complaints and dispute resolution process is longer and more convoluted than the process in other chapters of the agreement. This makes the commitments in the Environment Chapter less enforceable than other chapters in the agreement

We welcome the inclusion of a new chapters on Gender Equality and Animal Rights not previously seen in Australian bilateral agreements. However, as these chapters are not legally enforceable at all through the government-to government disputes process, it remains aspirational and limited to cooperation.

The Intellectual Property Chapter includes articles not found in the CPTPP which support the position argued by the UK against a temporary waiver of COVID 19-related intellectual property

rights to increase global production and address the serious inequity in access to vaccines in low-income countries. This appears to question Australia's claimed support for the temporary waiver, which is also supported by over 100 WTO member countries. Also of concern is that the A-UKFTA includes some clauses which were suspended from the original Trans-Pacific Partnership (TPP) text, when the text was incorporated into the CPTPP after the United States left the agreement in 2016. These were clauses which favoured the rights of IP holders, supported by industry lobbyists in the US, which were not supported by most other governments.

Given the issues identified above, the recommendations below should be implemented to change the agreement before the enabling legislation proceeds

Recommendations

1. **AFTINET continues to advocate that the trade agreement process must be more transparent and democratically accountable. This would require consultation during negotiations, release of draft texts, that the final agreed text be released with an independent evaluation of economic, environmental, health and gender impacts for public and parliamentary scrutiny before it is signed, and that parliament vote on the whole agreement, not just the enabling legislation.**
2. **Comprehensive independent economic, environmental, health and gender impact assessments should be completed and made public before the enabling legislation and ratification of the A-UKFTA.**
3. **During the A-UKFTA implementation process, there should be regular public consultation on any further negotiations. The various working groups, committees, and dialogues established through the agreement must provide stakeholders with proposals and draft texts, allow for public submissions, and recommendations should be published for public and parliamentary scrutiny.**
4. **Australia should insist as a condition of support for UK accession to the CPTPP that both governments exchange side letters agreeing that ISDS provisions are not applied to each other, similar to the CPTPP side letter on ISDS with the government of New Zealand.**
5. **That the government further consult with state governments and carefully review whether all existing state government regulations relating to investment and services that needed to be exempted in Annex II have been exempted.**
6. **That the government further consult with state governments and carefully review whether it is in the national interest to remove state government exemptions that enable senior managers or board members be Australian or to reside in Australia, and which allow government requirements on foreign investors to use local technology, to locate regional or world headquarters in its territory, to conduct research and development locally, and to accept restrictions on royalty payments.**
7. **That the government further consult with state governments and carefully review whether all existing state government regulations relating to services that needed to be exempted in Annex II have been exempted.**
8. **That the government confirm that the new clauses in Investment and Trade in Services Annex I and Annex II on licensing, qualifications and service standards are exempted for all services, and enable governments to increase regulation if required by government policy, for example as recommended by the Royal Commission on Aged Care.**

9. **That the Government remove Annex 8B from the FTA and rely on the general provision that maritime cabotage is 'carved out' from the Chapter 8 services provisions in the FTA as provided in Annex II.**
10. **The inclusion of a more complete definition of cabotage in footnote 23 in Annex II so that it reads as follows:**
    "*For the purposes of this entry, "cabotage" is defined as the reservation for Australian registered ships, crewed by Australian nationals, in the transportation of passengers or goods between a port located in Australia and another port located in Australia and traffic originating and terminating in the same port located in Australia*".
11. **That DFAT be required to confer again with the states/NT governments to ensure that state/NT marine or related law regulating the procurement of port services involving ships, be specifically listed for exclusion from the operation of the FTA so that states/NT are permitted to set conditions for the procurement of such port service providers that could include the exclusive use of ships registered under the *Shipping Registration Act 1981*.**
12. **That the government oppose the inclusion of local government in the procurement chapter in future discussions on this issue.**
13. **That the government should carefully review the additional procurement commitments made in the A-UKFTA chapter to ensure they are consistent with other government policies, including local industry development policies.**
14. **The Labour Chapter should be strengthened to ensure that the chapter is not less legally enforceable than other chapters in the agreement.**
15. **That all commitments on labour rights, modern slavery and gender discrimination should be hard commitments that are legally enforceable.**
16. **That the high barrier that reductions in labour rights must be sustained and recurring and must affect trade and investment before disputes apply should be removed**
17. **The lengthy and convoluted consultation processes before recourse to the dispute process should be removed and the Labour Chapter should apply the same Dispute Resolution processes that are applied to other chapters of the A-UKFTA**
18. **That the entry of temporary workers should be based on the principle that they address genuine labour shortages evidenced by local labour market testing.**
    19.That the government revoke the removal of labour market testing for uncapped numbers of installers, contractual service providers and other categories of workers who are tied to one employer and vulnerable to exploitation, and to terminate them if they are not consistent with this principle..
19. **That the government take the opportunity of the review of the Temporary Entry Chapter in two years to review terms of the side letters and understandings on Youth Mobility, Early Career Skills Exchange and the Australian Agricultural Visa to prevent exploitation of these workers, and to terminate them if they are not consistent with this principle.**
20. **The Environment Chapter should be strengthened to ensure that the chapter is not less legally enforceable than other chapters in the agreement.**
21. **Articles on Climate Change, UNFCCC and the Paris Agreement, the Circular Economy, Air Quality, Marine Litter, and Sustainable Forest Management and Trade should be hard commitments that are be legally enforceable.**
22. **The high barrier that reductions in environmental standards must be sustained and recurring and must affect trade and investment before disputes apply should be removed.**

23. **Any consultative mechanisms established must include environmental advocacy organisations and environmental scientists, and the A-UKFTA Environment Working Group meeting records should be made public.**
24. **The lengthy and convoluted consultation processes before recourse to the dispute process should be removed and the Environment Chapter should apply the same Dispute Resolution processes that are applied to other chapters of the A-UKFTA under Chapter 30 (Dispute Resolution).**
25. **The same Dispute Resolution processes that are applied to other chapters of the A-UKFTA under Chapter 30 should be applied to the chapters on Trade and Gender Equality and Animal Welfare.**
26. **Targets, standards, and metrics, and means of establishing them, should be included in the Trade and Gender Equality and Animal Welfare chapters to ensure that an enforcement mechanism has performance measures to uphold.**
27. **That the government should publicly affirm its support for the WTO TRIPs waiver and disassociate itself from the UK opposition to the TRIPs waiver.**
28. **That the government should oppose any re-instatement of suspended CPTPP clauses like patent term extensions in the CPTPP.**
29. **That recommendations 1-30 should be implemented to change the agreement before the enabling legislation proceeds**

Overview of the process and framework of the agreement

Negotiation, ratification and implementation processes should be more transparent and democratically accountable

The A-UKFTA negotiation process was launched in June 2020, and completed in 18 months, a short time frame compared with other agreements. This haste was driven by the UK's desire to secure bilateral trade agreements in the wake of Brexit, and the UK's bid to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is now under way.

Although there were consultations with business and community organisations during negotiations, there a was no access to draft texts, and the final text was not published until the agreement was signed on 17 December 2021.

The haste of the negotiations is evidenced by many incomplete areas of negotiation, which have been postponed to be considered by working groups and committees. These should also be conducted through a transparent and democratically accountable process.

The National Interest Analysis presented to the Joint Standing Committee on Treaties (JSCOT) is not independent, but is conducted by the same department which negotiated the agreement. Neither JSCOT nor the wider Parliament has the ability to change the agreement and can only vote on the enabling legislation.

AFTINET understands that the government will not commission an independent analysis of the costs and benefits of the A-UKFTA. This ignores the August 2021 JSCOT report (Report 193[1]) recommendation that the government to commission "independent modelling and analysis of a trade agreements, at both the macro and sectoral levels" (Recommendation 5).

AFTINET maintains that ad hoc stakeholder meetings are insufficient forms of engagement so long as there is no public access to draft texts, the final agreed text, and no independent assessment of the economic, environmental health and gender impacts, before the agreement is signed.

For AFTINET's full analysis of the limitations of Australia's trade negotiation process, see AFTINET's July 2020 submission[2] to the JSCOT Inquiry on Certain Aspects of the Treaty in Making Process in Australia in respect of Trade Agreements.

Recommendations:

- **AFTINET continues to advocate that the trade agreement process must be more transparent and democratically accountable. This would require consultation during negotiations, release of draft texts, that the final agreed text be released with an independent evaluation of economic, environmental, health and gender impacts for public**

[1] Joint Standing Committee on Treaties (2021) Report 193: Strengthening the Trade Agreement and Treaty-Making Process in Australia, August, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193

[2] AFTINET (2020) Submission to the JSCOT Inquiry on Certain Aspects of the Treaty in Making Process in Australia in respect of Trade Agreements, July, available at: http://aftinet.org.au/cms/sites/default/files/200730%20AFTINET%20JSCOT%20submission%20final.pdf#overlay-context=

and parliamentary scrutiny before it is signed, and that parliament vote on the whole agreement, not just the enabling legislation.

- **Comprehensive independent economic, environmental, health and gender impact assessments should be completed and made public before the enabling legislation and ratification of the A-UKFTA.**
- **During the A-UKFTA implementation process, there should be regular public consultation on any further negotiations. The various working groups, committees, and dialogues established through the agreement must provide stakeholders with proposals and draft texts, allow for public submissions, and recommendations should be published for public and parliamentary scrutiny.**

Labour and Environment chapters less enforceable than the rest of the agreement and new chapters on Gender and Animal Welfare not enforceable at all

We welcome the fact that the agreement has chapters on labour and environment, but note that they have higher barriers to be overcome before access to any process which addresses breaches of commitments though reduction of standards. There is also a long and convoluted consultation process before governments have access to the state-to-state dispute settlement mechanism. These factors mean that those chapters are less enforceable than other chapters in the agreement to which the dispute mechanism applies.

We also welcome the fact that the agreement has new chapters on Trade and Gender Equality and Animal Welfare and Antimicrobial Resistance, but note that these are aspirational only and are not enforceable at all through the disputes process.

Lessons of the pandemic not reflected in the structure of the agreement

Although the agreement was negotiated during the pandemic, there is little evidence that some of the lessons of the pandemic are reflected in the framework of the agreement. The pandemic revealed an overreliance on global production chains and imports, and the need for specific local industry policies to develop capacity for production of essential products, ranging from masks and ventilators to vaccines and medicines.

More broadly recovery from the pandemic and addressing the challenges of climate change require active policies to develop local renewable energy capacity and other low carbon industries to meet emission reduction targets and provide local employment. Although the A-UK FTA mentions the need for renewable energy and other industries, its structure does not encourage more active industry policies, including government support and local procurement policies. In general, the agreement is modelled on the CPTPP, which was negotiated before the pandemic and ignores the need for specific local industry policies to address these issues

Investment Chapter 13

No ISDS in the A-UKFTA, but danger of ISDS in the CPTPP

Most of the clauses in the Investment Chapter are identical to those in the CPTPP with the important difference that after public debate in Australia and the UK there is no Investor-State Dispute Settlement (ISDS). The general state-to-state dispute mechanism for the agreement applies to any disputes arising from breach of rules of the investment chapter.

However, the UK has applied to join the CPTPP, which does include ISDS, and Australia is also a member. The exemptions listed in Annex II of the CPTPP exempt government those sectors and forms of regulation from government-to government disputes, but do not exempt them from ISDS disputes.

ISDS may be used by corporations to gain millions in compensation through an international tribunal if they can claim that a change in law or policy will harm their investment. In the past, claims have been sought on public interest regulation, including environmental protections, public health measures, and workers' rights.

When negotiating the A-UKFTA, both governments claimed that ISDS was unnecessary because of robust legal systems in each country. On its website, DFAT has described the exclusion of ISDS as one of the benefits of the A-UKFTA[3].

The application of ISDS between the UK and Australia in the CPTPP would be risky because it would expose Australia to the disproportionate risk of many more potential ISDS cases. The UK is the second highest foreign investor in Australia, and UK companies are the third most frequent users of ISDS.

The AFTINET submission[4] to DFAT on the accession of the UK to the CPTPP provides detailed evidence and concludes that it would be inconsistent and dangerous for government to exclude ISDS from the A-UKFTA, yet enable ISDS to apply to Australia and the UK in the CPTPP

It recommends that Australia should insist as a condition of support for UK accession that both governments agree that ISDS provisions are not applied to each other. Australia has a similar CPTPP side letter on ISDS with the government of New Zealand.

Recommendation

- **Australia should insist as a condition of support for UK accession to the CPTPP that both governments exchange side letters agreeing that ISDS provisions are not applied to each other, similar to the CPTPP side letter on ISDS with the government of New Zealand.**

Investment negative list, existing regulation frozen, less exemptions for state government regulation

The rules for investment in Chapter 13 are designed to safeguard the interests of international investors and to limit regulation of them. International investment must be treated as if it were local investment ("national treatment"), with full market access and no discrimination, and no requirements for international investors to use local products or transfer technology. There is also a Most Favoured Nation (MFN) clause which ensures that if either government reaches a more

[3] 7 DFAT (2021) Benefits for Australia: Investor Protection, December 2021, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/ukfta-outcomes-documents/benefits-australia

[4] AFTINET, (2022) Submission to DFAT on Australian policy on the application of the UK for accession to the CPTPP http://aftinet.org.au/cms/sites/default/files/220220%20submission%20to%20DFAT.pdf#overlay-context=

favourable agreement on investment with another government, it will extend the same treatment to the other government to this agreement (Article 13.6, p. 13-6)[5]. This is particularly relevant for the EU FTA, for which negotiations continue in 2022.

Governments must provide full protection and security for international investment, and must provide compensation if investments are expropriated directly through nationalisation or indirectly through forms of regulation which could reduce the value of the investment. Regulation is treated as if it were a tariff, to be frozen at current levels and reduced over time. There are also a series of specific limitations on regulations in areas like numbers of enterprises and staff numbers (article 13.4 pages 13-4 to13-.5).

There are some exemptions from, and qualifications of, these rules listed in the chapter, but they share the weaknesses of the exemptions in the CPTPP. There is a statement that the governments have the right to regulate to ensure that investment is undertaken in a manner sensitive to environmental, health or other regulatory objectives (Article 13.17, page 13-18) but this is qualified by the requirement that such regulations must be "otherwise consistent with this chapter."

Chapter 13 has a negative list structure which means that it applies to all areas of investment except those specifically listed as non-conforming measures or exemptions in Annex I and Annex II. These exemptions apply to both investment Chapter 13 and the trade in services Chapter 8. Annex I lists current nonconforming services or forms of regulation, for which existing regulation can be retained, or frozen, but not increased in future. This is known as the standstill and ratchet structure. Annex II lists those areas of investment which governments reserve the right to have any regulation both now and in the future.

This means that governments have to be very careful to list all forms of regulation and investment for which they wish to retain at current levels in Annex I and may wish to increase regulation in future in Annex II.

Changes to Annex I and II exemptions from investment rules

There are two differences with the CPTPP and the RCEP which affect the ability of state government to preserve existing regulations and have new regulations for investment.

The first difference is that the blanket exemption for all existing state government non-conforming measures or exceptions applying to investment in the RCEP and the CPTPP[6] has been removed from the A-UKFTA. This means that all exemptions at state government level have to be listed separately

[5] All references to articles in the A-FTA are to the text published by the Department of Foreign Affairs and Trade (2021) found at https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text

[6] The RCEP blanket exemption for all existing state government measures is found at DFAT (2020) RCEP text Annex iii,entry2, p. 6 https://www.dfat.gov.au/sites/default/files/rcep-annex-iii-schedule-of-australia.pdf

The CPTPP exemption for all existing state government measures is Annex I, p.2 in DFAT (2015) https://www.dfat.gov.au/sites/default/files/annex-i-australia.pdf

in Annex I. There is a danger that not all exemptions applying to investment that should be listed have been listed.

In the absence of a blanket exemption for existing regulation, any new exemptions have to be negotiated with the UK and would require a treaty amendment which would need to be tabled in parliament and be subject to a JSCOT review. This means the A-UKFTA is more restrictive of state government regulation than the CPTPP and the RCEP.

Secondly, Article 13.12 on page 13- 14 prohibits requirements that senior managers or board members be Australian are required to reside in Australia, and article 13.11 h)-k) prohibit government requirements on foreign investors to use local technology, to locate regional or world headquarters in its territory, to conduct research and development locally, or to accept restrictions on royalty payments.

This means that future governments cannot have such requirements, unless they are specifically exempted in Annex I, which refers to exemptions for existing measures, and Annex II, which lists services and types of regulation reserves the right to make new regulation for specific services. Australia has listed in Annex I existing requirements in these areas and has exempted similar existing state government regulation.

Article 13.13.9 commits Australia to negotiate the removal of these exemptions from Annex I and II within nine months of the A-UKFTA coming into force.

This means that the Commonwealth has agreed to work towards removing the exemptions that are listed above. This will be a treaty amendment and will require tabling in parliament and review by JSCOT.

Recommendations

- **That the government further consult with state governments and carefully review whether all existing regulations relating to investment that needed to be exempted in Annex II have been exempted.**
- **That the government further consult with state governments and carefully review whether it is in the national interest to remove exemptions that enable senior managers or board members be Australian or to reside in Australia, and which allow government requirements on foreign investors to use local technology, to locate regional or world headquarters in its territory, to conduct research and development locally, and to accept restrictions on royalty payments.**

Trade in Services Chapter 8

The rules for Services Chapter 8 are designed to open up the services market to UK provision of services and to reduce regulation of services. UK service providers must be treated as if they were local service providers ("national treatment"), and have full market access to provide services, and are not obliged to have a local presence as a condition for the supply of the service (Articles 8.3, 8.5 and 8.6, pp. 8.5 to 8.7). There is also a Most Favoured Nation clause which ensures that if either government reaches a more favourable agreement on services with another government it will extend the same treatment to the other government to this agreement (Article 8.4, p. 8-6). This is particularly relevant for the EU FTA, for which negotiations continue in 2022.

Public services are intended to be excluded from the chapter, but the definition of public services is ambiguous. They are defined as "services carried out in the exercise of governmental authority

neither on a commercial basis nor in competition other service providers." The move to competitive tendering means that many public services are now provided in competition with other service providers.

As in the Investment Chapter, 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, and there are specific restrictions on domestic regulations concerning qualifications, licensing and technical standards.

The chapter has a negative list structure, which means that all services are included, unless they are specifically listed as reservations or exemptions in Annex I, and Annex II, which also apply to the investment chapter. Annex I 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. Annex II lists services or forms of regulation for which governments reserve the right to retain existing regulation or make new regulation in future.

This means that governments have to be very careful to list all services and forms of regulation for which they wish to retain all rights to regulate.

Removal of blanket exemption for all existing state government non-conforming measures

The removal of the blanket exemption for all existing state government non-conforming measures or exceptions also affects services. As discussed above for investment regulation, this means that all services exemptions at state government level have to be listed separately. There is a danger that not all exemptions that should be listed have been listed.

In the absence of a blanket exemption for existing regulation or service areas, any new exemptions have to be negotiated with the UK and would require a treaty amendment which would need to be tabled in parliament and be subject to a JSCOT review. This means the A-UKFTA could be more restrictive of state government regulation than the CPTPP and the RCEP.

Recommendation

- **That the government further consult with state governments and carefully review whether all existing regulations relating to services that needed to be exempted in Annex II have been exempted.**

Changes to Annex I and Annex II exemptions that impact on Aged Care and other services

Aged care was not listed in the exemptions in Annex II in the Regional Comprehensive Economic Partnership agreement (RCEP) that was ratified last year, nor in the CPTPP. We argued that this could present difficulties for government implementation of new regulations required by the Royal Commission on Aged Care.

The government has not addressed this issue by including aged care in the list of specific exemptions, which are identical to the exemptions listed in the RCEP (Annex II, Entry 6, page 7). However new clauses have been added to the introduction to the Annexes. (Annex I p, 2and Annex II p,2).

These clauses state 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 8.3 (National Treatment– Cross Border Trade in Services), Article 13.5 (National Treatment – Investment), Article 8.5 (Market Access – Cross-Border Trade in Services), Article 13.4 (Market Access – Investment), or Article 8.6 (Local Presence – Cross-Border Trade Services). In other words, such regulation is not prohibited but still has to conform with the rules in the investment chapter and the trade in services chapter.

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 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."

The clause states that "while not listed, those measures continue to apply." This appears to mean that the range of regulation listed in the above paragraph can be retained and increased in all services, and that it does not have to be specifically listed as an exemption. This would mean that governments can increase regulation of licensing, qualifications and service standards in any service if required by government policy, including services like aged care or disability services.

Recommendation

- **That the government confirm that the new clauses in Annex I p, 2and Annex II p,2 on licensing, qualifications and service standards are exemptions for those regulations that apply to all services, and enable governments to increase regulation if required by government policy, for example as recommended by the Royal Commission on Aged Care.**

Annex 8B on international maritime transport services

This is an Annex to Chapter 8 on Trade in Services not found in the CPTPP.

It appears to qualify the exemption in Annex II, item 14 page 16 for maritime transport which says that Australia "reserves the right to adopt or maintain any measure with respect to maritime cabotage services and offshore transport services."

Cabotage refers to existing regulations which give preference to Australian ships for traffic between Australian ports, as distinct from international traffic. The current government has devised ways of evading this regulation, but it is still generally exempted from trade agreements.

DFAT's Regulation Impact Statement[7] claims that the A-UKFTA goes "beyond previous FTA practice" in this annex in opening up maritime transport market access in Annex 8B.

The wording is obscure, but Annex 8B appears to permit UK vessels and international maritime transport services suppliers to British vessels to reposition owned or temporary leased empty

[7] DFAT (2022) Regulation Impact Statement. Attachment II to the National Interest Analysis for the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland, Paragraph 206, page 63 found at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/FreeTradeAgreement-UK/Treaty_being_considered

containers that are not being carried as cargo against payment between ports in Australia, subject to authorisation by the competent authority where applicable (article 3.2 b) page 3-4).

It also appears to permit UK vessels and international maritime transport service suppliers of British vessels to provide freight services between ports subject to authorisation by the competent authority (article 3.2 point see, page 4) where applicable.

The Maritime Union of Australia (MUA) is making a submission with more detailed analysis of Annex 8B. AFTINET supports the following recommendations in its submission.

Recommendations

That the Government remove Annex 8B from the FTA and rely on the general provision that maritime cabotage is 'carved out' from the Chapter 8 services provisions in the FTA as provided in Annex II.

That a more complete definition of cabotage is included in footnote 23 in Annex II so that it reads as follows:

> **"*For the purposes of this entry, "cabotage" is defined as the reservation for Australian registered ships, crewed by Australian nationals, in the transportation of passengers or goods between a port located in Australia and another port located in Australia and traffic originating and terminating in the same port located in Australia*".**

That DFAT be required to confer again with the states/NT governments to ensure that state/NT marine or related law regulating the procurement of port services involving ships, be specifically listed for exclusion from the operation of the FTA so that states/NT are permitted to set conditions for the procurement of such port service providers that could include the exclusive use of ships registered under the *Shipping Registration Act 1981*.

Chapter 16 Government Procurement opens up more government entities to international competition for procurement contracts, including TAFE NSW

The general rules of Government Procurement Chapter 16 are that government purchases of goods and services above a certain value (the same vales as in the CPTPP) must be subject to a competitive tendering process which must be open to UK bidders.

There are some general exceptions like defence products and blood products, exceptions for public morals, order or safety, protecting human, animal or plant life or health (including the environment), and goods or services relating to relating to person with disabilities, philanthropic institutions or prison labour. There are also some exceptions for certain providers which include:

- any form of preference to benefit small and medium enterprises
- measures to protect national treasures of artistic historic or archaeological value
- measures for the health and welfare of indigenous people
- measures for the economic and social advancement of indigenous people

The rules in Chapter 16 apply to the schedule or positive list of Commonwealth, state and territory government departments and other government entities which are listed in annex 16-A.

Local government entities are not included. But there is a side letter[8] stating that if the Australian government agrees to give procurement access to local government in another agreement like the EU FTA, then Australia will notify the UK and will enter into consultations with a view to providing the same access. This would be a very significant change to procurement arrangements for local government which have always been exempted from international procurement arrangements because local procurement contributes to local employment.

The positive list schedule follows the general pattern and lists similar entities as the CPTPP Procurement Chapter 15 and Annex 15 – A. The difference is that in the UK FTA the Commonwealth and some state governments have added additional entities to their schedule. Some of these may be changes to names of entities, or result from mergers or demergers of some entities, but some are clearly new entities that have been created or additional ones that were not in the CPTPP.

These additional entities that form the basis of the government statements that Australia has opened up additional market access for UK companies to compete for government procurement contracts. The Commonwealth has listed 26 additional entities. The additional numbers for the states are not very large (the largest are NSW with 8 (including TAFE) and South Australia with 13, and many of the entities are not large, but some are significant, like TAFE in NSW.

Governments have also listed exemptions for the listed entities, either for particular services, like health education and welfare, or particular products like motor vehicles.

ACT, NT, Victoria, Queensland and WA generally have more exceptions especially for health, education, welfare services and motor vehicles and have not listed many extra entities. New South Wales, South Australia and Tasmania have listed more entities.

The most significant of the additional entities is NSW TAFE which has a footnote that provides for an implementation period of 24 months from entry into force of the agreement to allow for changes to technology systems, policies and processes This indicates that the NSW government may be making a decision to contract out more training services, as normal procurement would not require such a long lead time.

If the NSW government does make a decision to contract out more training services and if the terms of this agreement apply to that process, then such an expansion would be locked in under the terms of the agreement, and UK firms could tender for contracts. It would be difficult for a future government with a different policy on public funding of TAFE services to reverse that process, as it would be a reduction in market access. The AEU submission provides more detail on this issue.

In summary, the chapter opens up more federal and state government entities to international competition for government procurement and foreshadows the inclusion of local government. This could restrict local procurement policies as part of local industry capability programs. These are being developed in response to the pandemic and to and the need for local renewable energy capacity and other low carbon industries to meet emission reduction targets and provide local employment.

Recommendations

[8] DFAT (2021) Side letter on local government procurement found at https://www.dfat.gov.au/sites/default/files/aukfta-side-letter_government-procurement.pdf

- **That the government oppose the inclusion of local government in the procurement chapter in future discussion on this issue.**
- **That the government carefully review the additional procurement commitments made in the A-UKFTA chapter to ensure they are consistent with other government policies, including local industry development policies.**

Chapter 21 Labour

AFTINET welcomes the fact that a chapter on labour rights has been included in the agreement. However, we note that penalties only apply if a government reduces labour rights in order to gain a trade advantage, and there is a very high barrier to prove breaches, which must be "sustained and recurring in a manner affecting trade and investment". These conditions are not required in other chapters. There is also a long and convoluted consultation process before any resort to the state to-state dispute settlement process, which is not included in other chapters. This means the chapter is effectively less enforceable than other chapters in the agreement

The Labour Chapter is closely modelled on the CPTPP but with some additional articles, which are aspirational and not legally binding.

Like the CPTPP, the commitments made by the governments are to the 1998 ILO Declaration of Fundamental Principles and Rights at Work, not to the full ILO conventions to which these principles refer (Article 21.1 page 21-1).

Each government retains a sovereign right to have and modify its own labour laws consistent with the commitments made to international labour principles (Article 21.1 page 21-1). This is a stronger statement of the right of each country to have to have its own labour laws than in the CPTPP, acknowledged in the government's National Interest Assessment (NIA) [9].

The principles include freedom of association, the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and a prohibition on the worst forms of child labour, the elimination of discrimination in employment or occupation, and acceptable conditions of work with respect to minimum wages hours of work and occupational safety and health (Article 21.4 page 21-2).

Governments are prohibited from weakening or reducing the protections afforded in each government's labour laws in order to encourage trade or investment. However, this article only applies if the weakening of labour law occurs through a "sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties" (Articles 21-4, 21.5. 21.6 page 21-2 and 3. T)

These two provisions mean that the prohibition on weakening labour laws only applies to some parts of the workforce, creating a two-tier workforce for commitments made to labour rights. For example, governments would not be violating the agreement if it reduced the rights of workers in

[9] DFAT (2022) National Interest Analysis for the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland, Paragraph 50, p.11 found at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/FreeTradeAgreement-UK/Treaty_being_considered

non-trade related areas like the public sector or the construction industry, which have both been subjected to reduced labour rights in Australia.

There are new provisions on modern slavery which are not in the CPTPP. However, the language is aspirational rather than legally binding. Each government affirms endorsement of international agreements on modern slavery and will "strive to ensure" that private and public entities operating in its territory take appropriate steps to prevent modern slavery in their supply chains and will "to the extent it considers appropriate adopt or maintain measures to this effect" (Article 21.7.2 page 21-4).

There is a separate article acknowledging the importance of gender equality at work and that each government affirms its commitments to non-discrimination employment and to share information about their domestic approaches and cooperate as appropriate. This article is more detailed than the CPTPP but is also aspirational rather than a legally binding commitment (Article 21.8.1 page 21-5).

Both governments pledge to cooperate on effective implementation of the chapter and to provide a labour consultative or advisory body for members of the public including representatives of its labour and business organisations to provide views on matters regarding the chapter (Article 21.15.2 page 21-10.

The dispute settlement process in Article 21.16 is a longer and more convoluted process than in other chapters to which dispute settlement applies. Governments must make every effort to resolve any matter arising through cooperation and consultation. If a request in writing is received, the other government should begin the consultations in 30 days. If the matter is not resolved, a joint committee convenes after another 30 days and seeks to resolve the matter by consulting independent expert experts, or through conciliation or mediation. If the matter is not resolved after 60 days, a dispute panel can be requested under the terms of Article 30.8 in the government-to government dispute settlement chapter. Similar delays before proceeding to lodge a dispute also occur in the Environment Chapter but not in other chapters to which dispute settlement applies.

In summary, we welcome the inclusion of basic labour rights, and new articles on modern slavery and gender discrimination. But the latter are aspirational not legally enforceable. Penalties for reduction of labour rights only apply if there are sustained and recurrent violations affecting trade and investment. These high barriers are not required in other chapters. There is also a long and convoluted consultation process before any resort to the state to-state dispute settlement process, which is not required in other chapters. This means the chapter is effectively less enforceable than other chapters in the agreement.

Recommendations

- **The Labour Chapter should be strengthened as follows to ensure that the chapter is not less legally enforceable than other chapters in the agreement.**
- **All commitments on labour rights, modern slavery and gender discrimination should be hard commitments that are legally enforceable.**
- **The high barrier that reductions in labour rights must be sustained and recurring and must affect trade and investment before disputes apply should be removed.**
- **The lengthy and convoluted consultation processes before recourse to the dispute process should be removed and the chapter should apply the same Dispute Resolution processes that are applied to other chapters of the A-UKFTA under Chapter 30 (Dispute Resolution).**

Chapter 11 Temporary entry for Business Persons

The title is somewhat misleading because the chapter text includes arrangements not only for temporary entry for senior executives, intra-corporate transferees and professionals, but also for installers, contractual service suppliers and other categories which are sponsored by individual employers and include a wide range of occupations.

AFTINET supports Australia's permanent migration scheme which as contributed to our vibrant multicultural society. 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, which can be changed as needed. However, this chapter enables the entry of temporary workers for up to four years without labour market testing to establish shortages. Numerous studies have shown that these workers are vulnerable to exploitation because they are tied to one employer, and can be deported if they lose their employment[10].

Neither government can impose any limitations on the total number of temporary visas to be granted, nor can they require any labour market testing as a condition of entry (Article 11.4.6 a) and b)). These provisions apply to over 400 trades and skilled professional occupations in 70 identified sectors.

In addition to the above provisions the chapter text, there are three other documents which give the details of market access for temporary workers:

1) Annex IV page 6 confirms that contractual service providers are sponsored by employers, can stay a maximum of four years, and include all trades and professions from a list of up to 400 eligible occupations listed on the relevant Australian government website.

2) A separate additional Appendix IVa which applies to those with professional qualifications in 70 identified sectors with at least six years' experience who can stay for a maximum of 12 months (Appendix IVa, tables A and B, pages 11 and 12).

3) A side letter in the form of a Memorandum of Understanding (MOU) on mobility which is less legally binding and can be more easily changed.

[10] There are numerous studies of the exploitation of temporary migrant workers who are tied to one employer and can be deported if they lose their employment. See

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/ModernSlavery/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

Both governments agree to make changes to youth mobility arrangements on a reciprocal basis, with joint commitments to extend opportunities to participate from the ages of 18-35, the possibility of three-year stays, and no specified work requirements on participants (MOU pp. 1-2, paragraphs 1-5). This is an uncapped expansion of the existing Working Holiday Maker scheme, which could also result in exploitation of workers. This will come into force within two years of entry into force of the agreement.

Australia has also committed in the same side letter/MOU to introduce an Innovation and Early Career Skills Exchange pilot for UK citizens to access streamlined visa opportunities to Australia, capped at 1,000 in the first year of operation and rising to 2,000 in the second year. In the second year, the pilot will be reviewed and considered for future implementation by both sides (MOU pp2-3, paragraphs 9-18).

Australia also invites the UK to discuss participation in the Australian Agriculture Visa for seasonal agricultural work, while the UK identifies similar opportunities for Australians to work in agriculture in the UK (MOU p.2, paragraphs 6-8).

These schemes will be reviewed two years after commencement, and can be amended or suspended by either government in writing, or terminated by giving three months' written notice (MOU, p. 4 paragraph 22).

AFTINET supports arrangements for temporary overseas workers which are designed to address local labour market shortages based on local labour market testing. But this chapter removes the requirement for labour market testing and expands the number of temporary workers who are dependent on one employer and who are vulnerable to exploitation because they can be deported if they lose the job. It also foreshadows further expansion of these schemes.

Recommendations:

1. **That the entry of temporary workers should be based on the principle that they address genuine labour shortages evidenced by local labour market testing.**
2. **That the government revoke the removal of labour market testing for uncapped numbers of installers, contractual service providers and other categories of workers who are tied to one employer and vulnerable to exploitation.**
3. **That the government take the opportunity of the review of the chapter in two years to review terms of the side letters and understandings on Youth Mobility, Early Career Skills Exchange and the Australian Agricultural Visa based on the principle of the first recommendation above, and to terminate them if they are not consistent with this principle.**

Chapter 22 Environment

The environment chapter is closely modelled on the CPTPP, with some additional clauses, and a similar long consultation process before any resort to the state to-state dispute settlement process for other chapters in the agreement. This makes it less enforceable than other chapters in the agreement.

For the first time in an Australian agreement, both governments affirm their existing commitments to address climate change under the United Nations Framework Convention on Climate Change 1992 and the Paris Agreement 2015 (Article 22.5.1 page 22-4). However, there is no commitment to

specific targets on emissions reductions. These are 'soft', aspirational commitments that "recognise the importance" of the issues and "acknowledge" the role of governments. Both governments "shall cooperate to address matters of mutual interest."

There are new articles which pledge cooperation about the Circular Economy (article 22.7, page 22-5) Air Quality (Article 22.8 page 22-9), Marine Litter (article 22.11 page 22-10) and Sustainable Forestry (Article 22.13 page 22-14), but these are aspirational, not enforceable.

Governments are also obliged to take measures to implement the same international agreements referred to in the CPTPP, including the Montréal Protocol on hydrofluorocarbons (article 22.8 page 22-7), to operate a fisheries management system (article 22.12 page 22-10), to prevent pollution from ships (Article 22.10.1, p.22-9) and to implement the Convention on International Trade in Endangered Species (Article 22.16 page 22-17).

But each government also recognises "the sovereign right of each party to establish its own levels of domestic environmental protection and its own priorities relating to the environment, including climate change, and to establish adopt or modify its environmental laws and policies accordingly" (Article 22.3.2 page 22-2.)

Both governments recognise that it is inappropriate to encourage trade and investment by weakening or reducing the protections afforded in each party's environment laws, and "shall not reduce or weaken" environmental protections in order to encourage trade and investment (Articles 22.3.6 and 7 page 22-3).

However the process of proving a breach of these commitments has the same high barrier as in the Labour Chapter.

Neither government "shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties. This applies to essential and sub central levels of government law (Article 22.3.4, page 22-3).

Like the Labour Chapter, the process for initiating a dispute through the State-to State disputes process is long and convoluted, compared with other chapters in the agreement. There are four stages, beginning with consultations through designated contact points, consultation through a Joint Committee, consultations through relevant Ministers, before finally proceeding to the state-to-state dispute resolution process in chapter 30. There are no time frames for the first three stages, which could mean indefinite delays (Articles 22.2 to 22.2.26, pp. 22-22 to 22-24)

In summary, the Environment Chapter refers to existing commitments of each government to multilateral environment agreements, including on climate change, and pledges cooperation on this and some other important environmental issues. But there are no commitments to specific emissions reductions targets. There is also very high barrier to proving a breach of commitments not to reduce environmental protections, and the complaints and dispute resolution process is longer and more convoluted than the process in other chapters of the agreement. This makes the commitments in the environment chapter less enforceable than other chapters in the agreement.

Recommendations:

The Environment chapter should be strengthened as follows to ensure that the chapter is not less legally enforceable than other chapters in the agreement:

- **Articles on Climate Change, UNFCCC and the Paris Agreement the Circular Economy, Air Quality, Marine Litter, and Sustainable Forest Management and Trade should hard commitments that are be legally enforceable.**
- **The high barrier that reductions in environmental standards must be sustained and recurring and must affect trade and investment before disputes apply should be removed.**
- **Any consultative mechanisms established under Article 22.18 must include environmental advocacy organisations and environmental scientists and the A-UKFTA Environment Working Group meeting records should be made public.**
- **The lengthy and convoluted consultation processes before recourse to the dispute process should be removed and the chapter should apply the same Dispute Resolution processes that are applied to other chapters of the A-UKFTA under Chapter 30 (Dispute Resolution)**

Chapters on gender equality and animal welfare should be enforceable

Gender equality

AFTINET welcomes the inclusion of a new Chapter on gender equality not previously seen in any Australian bilateral trade agreement. However, as this Chapter does not contain mechanisms for government-to-government enforcement, it remains aspirational and limited to cooperation.

Gender equality activities are limited to cooperation, information sharing, and dialogue through ad hoc meetings between the parties (Article 24.3.1, p.24-3). Such dialogue "may [not 'shall'] engage and facilitate communication with relevant stakeholders which may include women workers, business owners and entrepreneurs" (Article 24.3.3, p.24-3).

Governments commit to "conducting gender analyses of trade policies, incorporating both quantitative and qualitative data and information, and for the monitoring of their effects on women as workers, entrepreneurs, and business-owners" (Article 24.2.4.b, p.24-2).

However, these commitments remain aspirational, and are unenforceable (Article 24.4, p.24-3). There are no gender equality targets, milestones, or metrics – nor even any means by which to develop such metrics – which would serve to assess quality and performance of the A-UKFTA against gender equality criteria.

Instead of laying the foundations for a systemic and critical understanding of how trade agreements impact women, the A-UKFTA reiterates the assumptions of the *WTO Joint Ministerial Declaration on Trade and Women's Economic Empowerment* (Article 24.1.3, p.24-1) that trade agreements are "engines of economic growth"[11] and that the implementation of "inclusive trade policies"[12] can improve gender equality without addressing the systemic impact of trade agreements on women as workers, carers, consumers, and citizens.

Animal welfare

[11] The World Trade Organisation (2017) "WTO Joint Ministerial Declaration on Trade and Women's Economic Empowerment", December, available at: https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

[12] Ibid.

Likewise, the inclusion of a chapter on Animal Welfare and Antimicrobial Resistance (Chapter 25) is a welcome addition to the A-UKFTA, but it fails to provide the necessary enforcement mechanism required to make a meaningful impact.

A-UKFTA is first Australian bilateral free trade agreement to include provisions on animal welfare. Following EU practise on trade negotiations, the A-UKFTA recognises that "animals are sentient beings" (Article 25.1.1, p.25-1) and that there is a "connection between improved welfare of farmed animals and sustainable food production systems" (Article 25.1.1, p.25-1).

However, each party merely commits to "endeavour to ensure**"** that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its laws, regulations and policies in a manner that weakens or reduces its level of animal welfare protection as an encouragement for trade or investment between the Parties" (Article 25.1.3, p.25-1).

During the A-UKFTA negotiations, animal welfare organisations called for stronger provisions requiring that in the event of different animal welfare standards between Australia and the UK, the higher of the two standards become the required standard[13]. The A-UKFTA does not meet this high standard. Instead, parties merely "endeavour to continue to improve their respective levels of animal welfare protection" (Article 25.1.4, p.25-1).

Recommendations:

- **Commitments to gender equality and animal welfare should be hard commitments that are legally enforceable**
- **Targets, standards, and metrics, and means of establishing them, should be included in the Trade and Gender Equality and Animal Welfare Chapters to ensure that an enforcement mechanism has performance measures to uphold.**
- **The same Dispute Resolution processes that are applied to other chapters of the A-UKFTA under Chapter 30 should be applied to the chapters on Trade and Gender Equality and Animal Welfare and Antimicrobial Resistance.**

Chapter 15 Intellectual Property and access to medicines

Intellectual property rights should provide for a balance between the rights holders and the rights of consumers to essential products like medicines.

The A-UKFTA includes articles not found in the CPTPP which support the position argued by the UK against a temporary waiver of COVID-related intellectual property rights to increase global production and address the serious inequity in access to vaccines in low-income countries. This appears to question Australia's claimed support for the temporary waiver, which is also supported by over 100 WTO member countries. See detailed analysis below.

Also of concern is that the A-UKFTA includes some clauses which were suspended from the original Trans-Pacific Partnership (TPP) text, when the text was incorporated into the CPTPP after the United States left the agreement in 2016. These were clauses which favoured the rights of IP holders, supported by industry lobbyists in the US, which were not supported by most other governments. They include patent term extensions on medicines and technological protection measures. The remaining 11 governments agreed to suspend them in the final version of the CPTPP. The inclusion

[13] World Animal Protection (2020) "Submission to DFAT on the Australia UK Free Trade Agreement", July, available at: https://www.dfat.gov.au/sites/default/files/aukfta-submission-world-animal-protection.pdf

of these clauses in the A-UKFTA is a bad precedent for balanced intellectual property rights provisions in both the A-UKFTA and for future debate about intellectual property rights provisions in the CPTPP.

Access to medicines for low income countries during the pandemic

The agreement includes Articles 15.6.2 and 15.6.3, not found in the CPTPP, which "recognise the importance of contributing to the international efforts to implement Article 31*bis* of the WTO TRIPS agreement and the Annex and Appendix to the Annex in the TRIPS agreement" in the context of the COVID-19 pandemic. The side letter on medicines and medical devices also promotes cooperation with the UK on pandemic-related issues[14].

This may appear innocuous, but raises questions in the context of the current debate on the WTO TRIPs waiver. Under current TRIPs rules a few global companies have 20-year monopolies. on vaccines and other COVID-related products, which give them control of quantities and prices. Most vaccines have been sold to high income countries. Vaccination rates in many high-income countries have reached seventy eighty per cent for two or three doses, but in many low -income countries are still less than ten per cent, and in some less than five per cent[15]. Millions are dying while new variants like Omicron develop. The low rates of vaccinations in low-income countries are prolonging the global pandemic. Access is even lower for COVID-19 treatments and tests. For example, after claiming it would share its new COVID-19 treatment Paxlovid, Pfizer filed patent applications in 61 countries to block affordable generic versions[16].

Australia has claimed that it is supporting the proposal initiated by India and South Africa, also supported by over 100 WTO members, for a temporary waiver for some TRIPS provisions to enable sharing of intellectual property for vaccines and other COVID-related products, to enable increased production of vaccines and other products in developing countries at affordable prices.

This proposal has been blocked by a small group of countries led by the UK, the EU and Switzerland, which claim that there is no need for a waiver and that the provisions of Article 31*bis* of the TRIPs agreement allow voluntary arrangements for intellectual property to be shared. However so far, no developing country has successfully been able to use these provisions during the pandemic, which has prompted the call for the temporary waiver

Before the UKFTA text was released, the UK government made a strong statement opposing the TRIPs waiver [17], opposing further negotiations on the waiver and reinforcing the view that existing TRIPS rules permit ´ voluntary licensing and transfer of technology." On February 23, 2022, the UK made another strong statement[18] against the waiver and said that it would continue to block the

[14] A-UKFTA Side letter on Medicines and Medical Devices found at https://www.dfat.gov.au/sites/default/files/aukfta-side-letter_uk-medicines-medical-devices.pdf

[15] Oxfam international (2022) *Pandemic of Greed.* found at https://app.box.com/s/4bctx6sbh831r6cp1fu1y1sdytzdapbm

[16]Ann Danalya Usher (2022) The Global COVID-19 Treatment Divide, *The Lancet*, February 26, found at https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)00372-5/fulltext

[17]UK Government (2021) WTO TRIPS Council December 2021: UK statement, December 16, found at https://www.gov.uk/government/news/wto-trips-council-december-2021-uk-statement

[18] UK Government (2022) WTO General Council February 2022 : UK statement, February 24, found at https://www.gov.uk/government/speeches/world-trade-organization-general-council-february-2022-uk-statements

waiver and oppose further negotiations. The insertion in the A-UKFTA of a specific reference to article 31*bis* in the TRIPS agreement appears to reinforce the UK position. The Australian government should reaffirm its support for the WTO TRIPS waiver in this context.

Patent term extensions on medicines

Article 15.47 on page 15 – 22 permits patent term extensions to compensate for time taken to authorise medicines before they can go to market. This can effectively extend patent terms to more than 20 years, thus delaying the availability of cheaper generic medicines which become available when patents have expired. This clause is closely based on a clause in the original Trans-Pacific Partnership Agreement which was suspended from the CPTPP. Other governments, especially developing country governments, did not support it, because it could delay the availability of cheaper medicines.

The inclusion of this article will not affect Australia directly because Australia already has patent term extensions. However, it could harm the interests of developing countries in the CPTPP in future debates about whether the suspended clause should be reinstated.

Even for wealthy countries, patent term extensions come at a considerable cost and have caused debate in Australia. An independent review of pharmaceutical patents[19] commissioned by the (former) Australian Government in 2012 found that patent term extensions were costing the Pharmaceutical Benefits Scheme [PBS] approximately AUD$240 million in the short term and AUD$480 million in the long term. This article will further entrench patent term extensions in Australia.

The fact that the UK and Australia have agreed to this clause in a bilateral agreement creates a bad precedent. If the UK joins the CPTPP, and the US reapplies for membership, it could influence the balance of debate about whether patent term extension should be reinstated in the CPTPP in future.

Protection of undisclosed test or other data for pharmaceutical products

Article 15.49 commits to at least five years data protection for the protection of undisclosed test or other data for pharmaceutical products. This is a separate and additional monopoly from the 20-year patent monopoly which can delay the availability of cheaper generic medicines.

Australia already has this provision but some developing countries in the CPTPP do not. As with patent term extensions, this is a bad precedent that entrenches data protection as a longer medicine monopoly in yet another international agreement.

Enforcement of patents of goods in transit from low-income countries

Section J of the agreement on enforcement closely reflects the CPTPP which allows both civil and criminal penalties for breaches of all types of intellectual property rules specified in the agreement.

Australia has already agreed to such provisions in the CPTPP. But these clauses pose problems particularly in the context of the pandemic for developing countries, as they permit the seizure in high income countries of suspected goods which may breach the more stringent intellectual property rules of high-income countries when in transit from third countries. These provisions can be used by high income countries which have such rules and penalties to seize shipments of generic

[19] Harris, T., Nicol, D., Gruen, N. (2013) Pharmaceutical Patents Review Report, IP Australia, Canberra. found at https://www.ipaustralia.gov.au/sites/default/files/2013-05-27_ppr_final_report.pdf?acsf_files_redirect

medicines from countries which do not conform to their domestic intellectual property rules when the goods are in transit from some low-income countries to other low-income countries which do not have such rules and penalties.

Recommendations:

- **That the government should publicly affirm its support for the WTO TRIPs waiver and disassociate itself from the UK opposition to the TRIPs waiver.**
- **That the government should oppose any re-instatement of suspended CPTPP clauses like patent term extensions in the CPTPP.**

Conclusion

The A-UKFTA was negotiated in haste, with limited consultation and the text was not revealed until after it was signed. Many articles remain unfinished and have been postponed for later negotiations There has been no independent assessment of its economic, environmental, health or gender impacts. Its framework is modelled on the CPTPP, and is not informed by the lessons of the pandemic about overdependence on global production chains and the need to develop local industry capability for recovery from the pandemic and development of local renewable energy industries to reduce emissions.

The services and investment chapters are more restrictive of state government regulation, and the government procurement provisions could impact on the use of government procurement for local industry development. The movement of people provisions remove labour market testing and expand the numbers of temporary workers who are tied to one employer and are vulnerable to exploitation,

The Labour and environment chapters are not legally enforceable in the same way as other chapters in the agreement, and the gender and animal welfare provisions are not enforceable at all. The intellectual property chapter shifts the balance in favour of corporate intellectual property rights rather than equitable access to medicines.

Recommendation

That recommendations 1-26 should be implemented before the passage of the enabling legislation and ratification of the A-UKFTA.