# AFTINET Submission to the Joint Standing Committee on Trade and Investment Growth Inquiry into the Australian Government's approach to negotiating trade and investment agreements September 2023

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# Contents

# Introduction

The Australian Fair Trade and Investment Network (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 and recognises 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 protection. In general, AFTINET advocates that non-discriminatory multilateral rules-based trade negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

AFTINET has consistently advocated over the last 23 years for a more transparent and democratically accountable trade agreement process, and for exclusion of aspects of trade agreements which can restrict governments from regulating in the public interest. Community concerns about this process have been demonstrated by successive parliamentary inquiries which have made recommendations for change.

AFTINET welcomes the opportunity to make this submission to the Joint Standing Committee on Trade and Investment Growth.

# Summary of recommendations

***The government's whole-of-government negotiating mandate***

- *The trade negotiating framework should be consistent with the government's whole-of-government policies for equitable and environmentally sustainable economic development, including strategic industry development and development of renewable energy industries and other policies to meet carbon emissions reduction targets.*
- *The framework should also be consistent with government policies for equity and social inclusion in UN and ILO declarations and conventions on human rights, women's rights, rights of Indigenous Peoples and workers' rights in Australia and in other countries.*
- *Trade negotiations should ensure that governments retain the right to regulate to achieve these broader goals.*

***The trade agreement negotiating and decision-making process***

- *Prior to commencing trade negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of how the agreement relates to other whole-of-government priorities and the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts, and impacts on First Nations Peoples.*
- *There should be regular public consultation during negotiations, with business, unions, First Nations groups, women's, environment and other relevant civil society groups, and reports to JSCOT and parliament. Consultation should include access to negotiating texts.*
- *The final negotiated text should be released before signing, together with an independent evaluation of its economic, employment, environmental, gender, and public health impacts.*

- *After the review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing, by voting on the whole agreement. After signing, Parliament should vote on the implementing legislation.*
- *The government should commission independent reviews of the post-implementation impacts of trade agreements 5 years after the agreement comes into force. These should include economic, employment, environmental, health and gender impacts.*

***Implementing a whole-of-government approach on human rights, labour rights and environmental standards***

***Human rights***
*Australia's trade agreements should be consistent with its commitments to human rights. They should not contain trade rules which impact negatively on human rights, for example by reducing access to affordable medicines or by restricting governments from regulating in the public interest.*

*Trade agreements should include enforceable commitments to the UN human rights conventions and declarations, including:*

- *The International Covenant on Civil and Political rights*
- *The International Covenant on Economic, Social and Cultural Rights*
- *The UN Convention on the Elimination of All Forms of Racial Discrimination*
- *The UN Convention on the Elimination of All Forms of Discrimination Against Women*
- *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *the Convention on the Rights of the Child*
- *the Convention on the Rights of Persons with Disabilities*
- *the UN Declaration on the Rights of Indigenous Peoples.*

*Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement these international standards.*

***Labour rights***
*Trade agreements should include enforceable commitments to the International Labour Organisation (ILO) conventions and declarations, including:*

- *The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)*
- *The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)*
- *The effective abolition of child labour (ILO Conventions 138 and 182)*
- *The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)*
- *A safe and healthy working environment (ILO Conventions 185 and 187).*

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

- *The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement in the same way as other chapters and provisions of the agreement, and through enforceable enterprise-specific dispute processes.*
- *Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement international standards on*

*labour rights, including the ILO Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions.*

***Environmental standards and climate change***

*Trade agreements should include enforceable commitments to the UN multilateral environmental agreements, including:*

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

*Australia should work with developing country trading partners and provide resources through its ODA programs to adopt, develop and implement these international standards.*

***Exclusion of Investor-State Dispute Settlement (ISDS) provisions***

*The Australian government should:*

- *Maintain the government policy of excluding Investor-State Dispute Settlement processes (ISDS) in current negotiations and in future trade and investment agreements.*
- *Expedite the review of ISDS in current trade and investment agreements, with a view to removal of ISDS provisions from bilateral agreements with a timeline for reviews.*
- *Implement its policy of review of ISDS provisions in regional trade agreements, or failing that negotiate bilateral side letters excluding the application of ISDS to Australia, as Australia has done with the UK and New Zealand in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and with New Zealand in the Australia-New Zealand-ASEAN Free Trade Agreement (AANZFTA).*

***No extension of Intellectual property rights***

- *There should be no extension of patent monopolies or data protection monopolies on medicines in trade agreements.*

***Trade rules should not undermine the rights of First Nations Peoples***

- *The government should ensure that trade agreements are consistent with protecting the rights of First Nations Peoples. This requires the exclusion of ISDS and guarantees of the right to free prior and informed consent for investment projects on their land.*
- *There should be specific protections in intellectual property rules for indigenous art, culture and use of traditional plants.*

**Trade-in-services rules should not restrict public interest regulation of essential services**

- *Positive list structures are preferable to negative list structures for trade-in-services chapters.*
- *Reservations in trade-in-services with a negative list structure must be comprehensive and allow changes in government regulation to deal with changes in circumstances like the global financial crisis and the climate change crisis.*
- *Reservations should ensure that there can be comprehensive regulation of licensing, qualifications and service standards in services like aged care to meet government policy objectives.*

**Protection of Australian culture should be excluded from trade rules that would undermine local content regulation**

- *All current and future regulation of local content requirements and subsidies for local cultural industries should be completely exempted from trade agreements through a comprehensive cultural exclusion.*
- *The restrictive audio-visual provisions on streaming and other forms of new media in Annex II p.6 of the AUSFTA should be reviewed and renegotiated to ensure that both current and future local content requirements and other supports for local cultural industries are completely exempted and that the government can implement its proposed policy for local content requirements in those forms of media.*

**Digital trade rules should not restrict public interest regulation**

- *Exclude Digital Trade provisions which would prevent the regulation of market power imbalances, prevent regulation of source code, algorithms and artificial intelligence, prevent regulation of cross-border flows of data, prevent regulation of security standards, and prevent regulation of digital platform workers' working conditions.*
- *Include provisions to ensure digital companies do not evade tax and must abide by mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards*.

**Trade agreements should not increase numbers of temporary overseas workers vulnerable to exploitation**

- *Trade agreements should be consistent with a robust permanent migration scheme which protects the rights of migrant workers, with temporary migration based only on genuine temporary need demonstrated by local labour market testing.*
- *Arrangements for genuine temporary or seasonal labour shortages should be separate stand-alone government-to-government agreements, like the Pacific Australia Labour Mobility Scheme. These should include protections of the rights of temporary workers to ensure that they are not exploited and enjoy the same rights as other workers.*

**Trade agreements should not restrict the use of government procurement as part of industry development programs, including renewable energy industries**

- *The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local industry in accordance with government policy, especially the development of local renewable energy industries.*
- *The government should maintain current government procurement exclusions for SMEs, Indigenous enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.*

***These recommendations should be legislated to ensure that trade negotiations are consistent with whole-of-government policy.***

## The government's whole-of-government negotiating mandate

The expansion of trade can improve living standards, but there are always winners and losers from particular trade agreements. These can vary from loss of employment in particular industries resulting from tariff reductions, to higher costs for the Pharmaceutical Benefits Scheme resulting from trade

rules for longer monopolies on medicines, which delay the availability of cheaper medicines, to restrictions on government regulation to reduce carbon emissions and promote local renewable energy industry development.

The disruption of global production chains caused by the COVID pandemic and the war in Ukraine, and the need to address the climate crisis, have prompted some rethinking of the simplistic approaches to trade theory which argued that each country should produce only its most globally efficient export products and import everything else, with no local industry policy development and minimal government regulation. There is now widespread recognition reflected in current government policy that governments need to develop sovereign capabilities in some strategic industries, that government regulation is required to ensure equitable distribution of the benefits of economic growth, and that specific regulation is needed to reduce carbon emissions and develop renewable energy industries for the transition to a low carbon economy.

***Recommendation:***

- ***The trade negotiating framework should be consistent with the government's whole-of-government policies for equitable and environmentally sustainable economic development, including strategic industry development and development of renewable energy industries and other policies to meet carbon emissions reduction targets.***
- ***The framework should also be consistent with government policies for equity and social inclusion in UN and ILO declarations and conventions and on human rights, women's rights, rights of Indigenous Peoples and workers' rights in Australia and in other countries.***
- ***Trade negotiations should ensure that governments retain the right to regulate to achieve these broader goals.***

## The expansion of scope of trade agreements demands more open and accountable processes

Trade agreements are legally binding and have stronger enforcement mechanisms and penalties than United Nations (UN) human rights and environment treaties, which rely on naming and shaming. All trade agreements contain a government-to-government dispute process which can ultimately result in trade sanctions. This means that one government can lodge a dispute with a tribunal if it can claim that another government breaches the terms of the agreement. If the complaint is found to be valid, the tribunal can allow the successful complaining government to ban or tax the products of the other government.

The range of issues in trade agreements includes rights of international investors to sue governments, quarantine and food labelling issues, regulation of finance and investment, regulation of essential services like health, education, water and energy, temporary migration, digital trade, intellectual property, including patents and other monopolies on medicines which affect affordable access to medicines, labour rights, environmental standards, state-owned enterprises, regulatory coherence and small and medium-sized enterprises. Agreements often contain up to 30 chapters and thousands of pages.[1]

[1] Department of Foreign Affairs and Trade (2017) Text of the CPTPP, TPP and associated documents, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents

Since Australia now has very low tariffs, there is a temptation to trade off regulation in order to gain market access for agricultural products and services exports. Trade policy should have red lines to protect public interest regulation.

Decisions about such issues as medicines policy and other forms of public interest regulation should be debated publicly and decided by parliament, not traded off behind closed doors. The secrecy of the trade agreement negotiating process means that these issues are effectively removed from democratic debate and parliamentary scrutiny before the agreement is signed. Parliament does not vote on the whole text, only the enabling legislation for the agreement. Such legislation mostly involves only tariff changes and does not deal with the ways in which other chapters in the agreement may restrict future government regulation.

In short, trade agreements are legally binding, and are difficult to revoke. They have increasingly complex commitments on laws and policy that should normally be decided through open democratic parliamentary processes. This should mean that the process for negotiating, signing and ratifying trade agreements should be subject to the highest levels of public debate, scrutiny and democratic accountability to ensure that the benefits outweigh the costs. But this is not the case. The current trade agreement process is secretive and lacks democratic accountability.

## Flaws in the current trade agreement process

The current process is as follows:[2]

- Cabinet makes the decision to initiate trade negotiations and receives reports on the progress of negotiations.
- The text remains secret until after the agreement is completed. There is limited consultation by DFAT with business, unions and other community organisations which is described in more detail below, but there is no access to the negotiating text.
- Cabinet makes the decision to sign the completed agreement, which is then done by the Federal Executive Council, comprising the Governor-General and all serving Ministers and Parliamentary Secretaries. Signing of the text usually takes place before the text becomes public and without independent evaluation of costs and benefits of the text.
- Only after the agreement is signed is the text tabled publicly in Parliament and reviewed by the Joint Standing Committee on Treaties (JSCOT).
- There is no independent assessment of the economic costs and benefits of the agreement, nor of health, environmental, gender or regional impacts, before it is signed.
- The National Interest Assessment and Regulatory Impact Statement are done by DFAT, the department which negotiated the agreement, and always give a favourable assessment.
- The JSCOT reviews the agreement but it cannot make any changes to the text. It can only make recommendations which are not binding on the government.
- Parliament does not vote on the text of the agreement, only on the enabling legislation, which is mostly confined to changes in tariffs. Parliament does not debate or vote on the thousands of pages of text which can impact on the regulatory capacity of future governments.
- After Parliament has adopted the enabling legislation, the agreement is ratified through the exchange of letters between governments and comes into force at a specified date.

[2] Department of Foreign Affairs and Trade (2013) *The Treaty making process,* http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx

Since the *Trick or Treaty Report* in 1996, which resulted in the establishment of the current process, the trade agreement process has been the subject of continuous debate and four parliamentary inquiries, in 2003, 2012, 2015 and 2021, all of which recommended increased transparency and accountability. The 2015 report was aptly called *Blind Agreement.*[3] The 2021 report made bipartisan recommendations for stakeholder access to the text of trade agreements during negotiations and independent assessments of the impacts of trade agreements.[4] The current government has a policy supporting a more open process, stakeholder access to texts during negotiations and independent assessment of the final text of agreements.[5]

## How the Australian approach compares with other, similar countries

### *The WTO and the EU*

Over the last two decades there has been growing global public opposition to secrecy in trade negotiations. There are now a growing number of international examples of more transparent trade negotiations. Some WTO multilateral negotiations, the EU process and some aspects of the US process are markedly more transparent than current practice for Australian trade negotiations.

The WTO has published proposed texts, offers and background papers on its public website for multilateral trade negotiations since 2003.[6] Following high levels of controversy over WTO plurilateral Anti-Counterfeiting Trade Agreement (ACTA),[7] which dealt with the extension of intellectual property rights, WTO member governments agreed to release the text in 2011 before it was signed.[8]

The EU Commission, which negotiates trade agreements on behalf of the 27 EU member countries, has a policy to release its own initial negotiating proposals[9] and the full text of the trade agreements at the end of the negotiations for public and parliamentary debate before the text is signed. The EU also commissions independent studies of the likely economic, social and environmental impacts of

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[3] Senate Foreign Affairs, Defence and Trade References Committee (2003) *Report: Voting on Trade, Joint Standing Committee on Treaties (2012) Report on the Inquiry into the Treaties Ratification Bill 2012,; Senate Foreign Affairs, Defence and Trade References Committee (2015) Blind Agreement: Report on the Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements,* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

[4] Joint Standing Committee on Treaties (2021) Report 193 Certain aspects of the treaty making process in Australia, August, pp. xvii-xviii, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Report_193

[5] Australian Labor Party (2023) ALP Draft National Platform, August https://laborconference.org.au/files/ALP%20Draft%20National%20Platform%2049th%20Annual%20Conference%202023.pdf The trade section of the draft pp. 78- 85 was not amended at the conference. See pp. 83-85 for the policy for a more open trade negotiation process.

[6] World Trade Organisation (2023) WTO Documents Online https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S005.aspx

[7] Swiss Federal Institute of Intellectual Property (2012) Anti-Counterfeiting Trade Agreement (ACTA), web.archive.org/web/20120303063036/www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html

[8] European Commission (2012) Everything You Need to Know about ACTA. https://www.europarl.europa.eu/RegData/presse/pr_gran/2012/EN/03A-DV-PRESSE_FCS(2012)02-20(38611)_EN.pdf

[9] EU (2023) Transparency in EU trade negotiation. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/transparency-eu-trade-negotiations_en

trade agreements during negotiations and an assessment of the economic impacts of the final negotiated agreement before it is signed.[10] The EU released its initial negotiating texts for the current Australia-EU free trade negotiations[11] and will release the completed text before it is signed.

The WTO and EU processes provide examples of release of negotiating texts, release of the final negotiated text before it is signed and in the case of the EU, independent evaluation of proposed texts for economic, environmental and social impacts, and independent economic evaluation of the final negotiated text before it is signed.

### *The United States (US)*

Under the US Constitution, trade agreements are negotiated by the Executive through the office of the US Trade Representative, but the Congress must approve the aims and objectives of the negotiation before they commence, can request regular reports on the negotiations, and must see and vote on the whole text of the trade agreement before signing, legislation and ratification.

Congress can also amend the text unless it has passed specific legislation, known as "fast track" or Trade Promotion Authority, in which it gives up its right to amend the text and can only vote for or against the agreement. Currently there is no Trade Promotion Authority in place, so Congress can exercise its full rights in relation to trade negotiations.[12]

The US has a system of industry-based and some issue-based trade consultation committees, consisting of about 600 industry advisers and a small number of non-business community representatives.[13] Members of these committees are permitted to see those aspects of the text which are relevant to each committee but must keep the contents confidential. Members of Congressional committees are also permitted to see text on the same confidential basis.

The US model provides an example of access by stakeholders to negotiating texts, a greater role for elected representatives in Congress to approve and set the parameters of trade negotiations, to be informed of the progress of negotiations, to see the text before it is signed and to vote on the full text of the agreement.

### *Current community consultation practice has improved, but more change needed*

Wider community consultation will result in better quality trade agreements which are less likely to have unintended consequences in the areas discussed above.

The current government has signalled its intention for a wider community consultation process on trade policy by establishing consultation groups for business, unions, civil society and First Nations Peoples, but these have only met once, in November 2022.

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[10] EU (2021) Fact Sheet on the transparency policy in EU trade, https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/ebae888d-6243-48a2-a766-e21923793a71/details

[11] EU (2020) EU proposal for the EU-Australia FTA Intellectual Property Chapter Article X.45. p.28 https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/documents_en

[12] US Congressional Research Service (2015) Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. https://sgp.fas.org/crs/misc/RL33743.pdf

[13] Dayen, D. (2023) Corporations dominate trade advisory panels. *The American Prospect*, https://prospect.org/trade/2023-03-30-corporations-dominate-trade-advisory-panels/

The current consultation process is still one-sided. Stakeholders can present their views to the DFAT, but, since negotiations are confidential, they are given very little information about the detail of negotiations or whether their views have had any impact.

For some but not all trade agreements, meetings are held by request from stakeholders on particular topics of interest, but discussion is limited by lack of access to the text.

For some trade negotiations, DFAT also holds more specific briefing meetings with a range of stakeholders, where more detailed questions can be asked, but answers are limited by lack of access to the text.

DFAT also has opened to a wider range of groups its monthly briefings (called Deep Dives) on specific trade topics, which sometimes include reports on current trade negotiations. These were previously available only to business groups but are now open to other community organisations. This is welcome, but there is limited time for questions and answers are limited by lack of access to the negotiating text.

## How the economic, social and environmental impacts of an agreement are considered and acted upon

The National Interest Analysis and Regulatory Impact Statement which are tabled for the JSCOT review of each trade agreement are prepared by DFAT, which is the Department responsible for negotiating the agreement. This means they inevitably recommend in favour of the agreement. There is no independent assessment of the costs and benefits of the agreement.

The JSCOT report almost always recommends that the implementing legislation should be passed. The fact that the agreement has been signed before release of the text to the Committee gives momentum to the process. The one exception was the report on the very controversial Anti -Counterfeiting Trade Agreement, for which the Committee recommended a delay in implementation, following the rejection of the agreement by the European Parliament.[14]

The current process does not provide adequate information to the Committee about the agreement. After the text is completed and released, but before it is signed, comprehensive independent studies of the likely economic, employment, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and review by JSCOT.

## Post-implementation reviews of trade agreements

Evidence-based trade policy should include access to independent post-implementation assessments of the impacts of trade agreements.

Currently there is an internal DFAT Post-Implementation Review process five years after trade agreements come into force, conducted by DFAT under guidelines of the Office of Best Practice Regulations.[15] This is an internal government process with little public involvement. In the past the

[14] Joint Standing Committee on Treaties (2012) Report 126 on the Anti-Counterfeiting Trade Agreement, file:///C:/Users/patri/Downloads/https%20__aphref.aph.gov.au_house_committee_jsct_21november2011_report_fullreport.pdf.

[15] Office of Best Practice Regulation (2020) Post-implementation guidance note, March, Department of Prime Minister and Cabinet, https://www.pmc.gov.au/resource-centre/regulation/post-implementation-reviews-guidance-note

reviews have not been well-publicised and submissions have not been published. We welcome the current government practice to publish the submissions on the DFAT website.[16]

However, the process is not independent, since the reviews are conducted by the department that negotiated the agreements. The report is not published by DFAT, but by the Office of Best Practice Regulations and is very difficult to find.

The government should commission and publish independent reviews of the post-implementation impacts of trade agreements 5 years after the agreement comes into force. These should include economic, employment, environmental, health, gender impacts.

The following recommendations summarise improvements for greater transparency and accountability in the trade agreement process based on practice in the WTO, the EU and the US.

## Recommendations on the trade agreement process

- ***Prior to commencing trade negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include assessments of how the agreement relates to other whole-of-government priorities, including local industry development and sovereign capability development in strategic industries, the transition to a low carbon economy to meet the government's carbon reduction emissions strategies, and the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts, and impacts on First Nations Peoples.***
- ***There should be regular public consultation during negotiations, including submissions from and meetings with business, unions, First Nations groups, women's, environment and other relevant civil society groups, and reports to JSCOT and parliament. Consultation should include access to negotiating texts.***
- ***The final negotiated text should be released before signing together with an independent evaluation of its economic, employment, environmental, gender, and public health impacts.***
- ***After parliamentary review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing, by voting on the whole agreement. After signing, Parliament should vote on the implementing legislation.***
- ***The government should commission independent reviews of the post-implementation impacts of trade agreements 5 years after the agreement comes into force. These should include economic, employment, environmental, health, gender impacts.***

[16] Department of Foreign Affairs and Trade (2023) CPTPP Post Implementation Review: Call for submissions, https://www.dfat.gov.au/trade-and-investment/cptpp-post-implementation-review-call-submissions

# Implementing a whole-of-government policy approach to trade policy on human rights, labour rights and environmental standards

Trade Minister Senator Don Farrell has reiterated that "the benefits of trade must be shared among the community… Trade must be a driver of inclusive economic growth and greater economic wellbeing for all Australians."[17]

Australia's trade policy should be consistent with the government's general approach to human rights, labour rights and environmental standards, and the transition to a low carbon economy.

## Human rights

Australia is a party to the core international human rights treaties and supports the non-binding UN Declaration on the Rights of Indigenous Peoples. The current government has reiterated its commitment to these universal rights, and trade policy should reflect that commitment.

***Recommendations***

***Australia's trade agreements should be consistent with its commitments to human rights. They should not contain trade rules which impact negatively on human rights, for example by reducing access to affordable medicines or by restricting governments from regulating in the public interest.***

***Trade agreements should include enforceable commitments to the UN human rights conventions and declarations, including:***

- ***The Universal Declaration of Human Rights***
- ***The International Covenant on Civil and Political rights***
- ***The International Covenant on Economic, Social and Cultural Rights***
- ***The UN Convention on the Elimination of All Forms of Racial Discrimination***
- ***The UN Convention on the Elimination of All Forms of Discrimination Against Women***
- ***The UN Declaration on the Rights of Indigenous Peoples***

***Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement thee international standards.***

## Labour Rights

Australia's trade agreements should be consistent with its commitments to labour rights through International Labour Organisation (ILO) conventions and declarations. They should not contain trade rules which impact negatively on labour rights, for example by intensifying competition without guarantees of labour rights to protect workers from exploitation.

***Recommendations***

***Trade agreements should include enforceable commitments to the ILO conventions and declarations, including:***

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***

[17] Farrell, D. (2022) Trading our way to greater prosperity and security, November 13, https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182)***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)***
- ***A safe and healthy working environment (ILO Conventions 185 and 187).***

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

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

***Australia should work with developing country trading partners and provide resources through its ODA programs to progressively adopt, develop and implement international standards on labour rights, including the ILO Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions.***

## Environmental standards and climate change

The Australian Government has moved to address the climate crisis by adopting the global target of net zero emissions by 2050 and interim targets of 43 percent reduction by 2030. The government has adopted strategies to reduce carbon emissions and develop renewable energy and other strategies towards a low carbon sustainable economy. In addition, it has committed to the development of regional carbon reduction and renewable energy initiatives in cooperation with trading partners.

We support investment in renewable energy and other projects to address the challenge of climate change and to meet targets for reduction of carbon emissions. Trade agreement should not restrain the ability of governments to develop local industry policies to achieve these goals.

Meeting the challenge of climate change is also interlinked with other forms of environmental protection - protection of the marine environment; biodiversity conservation; combating wildlife trafficking and illegal logging.

Australia's trade agreements should be consistent with its commitments to these UN international environmental agreements. They should not contain trade rules which impact negatively on environmental standards by intensifying competition without commitments to those standards.

***Recommendations:***

***Trade agreements should include enforceable commitments to UN multilateral environmental agreements, including:***

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

***Australia should work with developing country trading partners and provide resources through its ODA programs to adopt, develop and implement these international standards.***

# How to ensure trade agreements protect and advance Australia's national interests, including the ability to regulate in the public interest

Trade agreements can negatively impact on the ability of government to regulate in the public interest. This includes through provisions which allow Investor-State Dispute Settlement (ISDS), longer monopolies on medicines, trade-in-services and digital trade rules which restrict regulation, increased numbers of temporary migrant workers who are vulnerable to exploitation, and restrictions on regulation of government procurement.

## Trade agreements should exclude Investor-State Dispute Settlement (ISDS)

### *ISDS legitimacy crisis*

All trade agreements have government-to-government dispute processes. ISDS is controversial because it is an optional, separate dispute process that gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for compensation. ISDS gives increased legal rights to international corporations, enabling them to bypass national courts and sue governments for millions and even billions of dollars in international tribunals over changes in law or policy, even if the changes are in the public interest.

Australia has 15 bilateral investment treaties and 10 out of a total of 17 broader trade agreements which include ISDS. However, governments have been moving against the inclusion of ISDS in trade agreements. More recent Australian agreements negotiated by the previous government with the UK, India, and the Regional Comprehensive Economic Partnership (RCEP) with 14 Asia-Pacific countries have excluded ISDS. Previous agreements with New Zealand, the US, Malaysia, Japan, the Pacific Islands and a previous agreement with India have also excluded ISDS.[18]

The Labor government elected in May 2022 has a policy against ISDS in new trade agreements, and to review it in existing agreements, recognising that ISDS provisions reduce government scope to regulate in the public interest.[19]

ISDS has already been excluded from the proposed Australia-EU Free Trade Agreement (A-EUFTA), and the India-Australia Comprehensive Economic Cooperation Agreement (AICECA) currently under negotiation. While this is welcome, ISDS provisions in existing agreements remain a serious threat to the ability of Australia to regulate in the public interest.

The claimed benefits of ISDS are not proven. For example, there is no conclusive evidence that ISDS increases levels of foreign investment.[20]

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[18] Department of Foreign Affairs and Trade, Australia's Bilateral Investment Treaties, https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties and DFAT Australia's Free Trade Agreements, https://www.dfat.gov.au/trade/agreements/trade-agreements

[19] Trade Minister Don Farrell (2022) Trading our Way to Greater Prosperity and Security. https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

[20] Bonnitcha, J. et al. (2017) *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford, p. 159

Scholars have identified that ISDS has suffered a legitimacy crisis, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments. Structural and process issues have been acknowledged by the reviews conducted by the two institutions which oversee ISDS arbitration systems.[21]

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

Criticisms of the ISDS *process* include: a lack of transparency; lengthy proceedings; high legal and arbitration costs; inconsistent decisions caused by a lack of precedent and appeals; third-party funding for cases as speculative investments; and excessively high awards based on dubious calculations of expected future profits. Furthermore, arbitrators are not independent judges, but instead remain practising advocates with potential or actual conflicts of interest.[22]

The decreasing confidence in the legitimacy of ISDS is evidenced by the declining number of agreements with ISDS provisions. In 2022, 15 countries terminated investment agreements, meaning that for the third consecutive year, more investment agreements were terminated than were created.[23]

### *ISDS and public interest regulation, including regulation of carbon emissions*

Increasing evidence is emerging that ISDS cases are being used to claim compensation for legitimate public interest regulation.

The number of reported ISDS cases has been increasing rapidly, reaching 1,257 as of December 2022.[24] In addition to previous claims for compensation for public interest regulation such as public health measures like tobacco regulation, medicine patents, environmental protections and regulation of the minimum wage, there has been an increase in claims against government action to reduce dependence on fossil fuels and regulate carbon emissions.

For example, the recent second ISDS case lodged by Clive Palmer's company, Zeph Investment, against Australia claimed $41.3 billion in compensation for the refusal of coal exploration permits for the Waratah coal mine in Queensland. The license was refused for environmental reasons, including its contribution to increased carbon emissions.[25] Clive Palmer had previously moved ownership of assets to Singapore to claim to be a Singaporean investor in order to utilise the ISDS mechanism in the Australia-New Zealand-ASEAN Free Trade Agreement (AANZFTA). He has used these provisions to lodge this ISDS claim and a previous $300 billion claim for a decision of the Western Australian government about a mining lease. He made this claim after losing a High Court Appeal against Western

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[21] Langford, M, Potesta, M, Kaufman. G. (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment & Trade.* https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

[22] Ibid, p.1.

[23] UN Committee on Trade and Development (2023) *World Investment Report*, p. 10. https://unctad.org/publication/world-investment-report-2023

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

[25] Queensland Department of Environment and Science (2023) Waratah Galilee Coal Mine EA refused. www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused

Australia's decision. His latest case means he is currently suing the Australian government for $341.3 billion.[26]

Palmer has also foreshadowed a potential third case,[27] most likely to claim compensation for Federal and Queensland government decisions to refuse a license for a second coal mine in Queensland because of impacts on the local environment, local waterways and run-off affecting the Great Barrier Reef.[28]

Even if these cases are not successful, the Australian government may have to spend years of effort and tens of millions defending them. A previous ISDS case between the Phillip Morris tobacco company and the Australian government over Australia's plain packaging law cost Australia $12 million in legal fees and took over 5 years to resolve.[29]

The fact that an Australian investor can restructure assets to use ISDS in an existing trade agreement to sue the Australian government over environmental regulation of mining leases underlines the urgency for reviewing ISDS clauses in existing agreements to prevent other future cases.

In the context of the deepening climate crisis, a 2022 study published in the journal *Science* shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels.[30] There have also been cases threatened against other forms of regulation of fossil fuels. For example, the previous Australian government was warned of possible ISDS cases from international energy companies when it was considering gas price regulation 2022. [31]

The Westmoreland Coal Company[32] sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in the North American Free Trade Agreement

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[26] Karp, P. (2023) Clive Palmer sues Australia for $41.3bn over alleged free trade rule breach, *The Guardian*. Retrieved from www.theguardian.com/australia-news/2023/jul/10/clive-palmers-second-case-against-australia-is-413bn-claim-it-broke-trade-deal

[27] Greber, J. (2023) Plibersek kills Clive Palmer's coal mine, February 8, *Australian Financial Review,* https://www.afr.com/companies/mining/plibersek-kills-clive-palmer-s-coal-mine-20230208-p5cizd

[28] Australian Broadcasting Corporation (2023) Environment Minister Tanya blocks Clive Palmer's Central Queensland coalmine, *ABC News*, February 8, https://www.abc.net.au/news/2023-02-08/tanya-plibersek-blocks-clive-palmer-central-qld-coal-mine/101945208

[29] Ranald, P. (2019) When even winning is losing, the surprising cost of defeating Philip Morris over plain packaging, *The Conversation*, https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279

[30] Thrasher, R *et al.* (2022) How treaties protecting fossil fuel investors could jeopardize global efforts to save the climate – and cost countries billions, *The Conversation*, https://theconversation.com/how-treaties-protecting-fossil-fuel-investors-could-jeopardize-global-efforts-to-save-the-climate-and-cost-countries-billions-182135

[31] Ghori, U., (2022) Hey minister, leave that gas trigger alone – it may fire up a fight with foreign investors, *The Conversation*, August 1, https://theconversation.com/hey-minister-leave-that-gas-trigger-alone-it-may-fire-up-a-fight-with-foreign-investors-185710

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

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(NAFTA). Its case was unsuccessful[33] but only due to technicalities regarding changes in the company's ownership.

In Europe, German energy companies RWE and Uniper launched ISDS cases[34] against the Netherlands (using ISDS in the Energy Charter Treaty) over its moves to phase out coal-powered energy by 2030.[35] The RWE case is ongoing. The Uniper case was withdrawn as a condition of German government support when Uniper sought assistance when it was adversely affected by the energy crisis resulting from Russia's invasion of Ukraine.[36]

Following these and other cases, after a comprehensive review and debate, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the Energy Charter Treaty because its ISDS provisions are being used by fossil fuel companies to claim compensation for government laws and policies to reduce carbon emissions. The EU Executive Vice-President for the European Green Deal Frans Timmermans said:

> "With the European Green Deal, we are reshaping our energy and investment policies for a sustainable future. The outdated Energy Charter Treaty is not aligned with our EU Climate Law and our commitments under the Paris Agreement."[37]

The ISDS cases against government policies to reduce carbon emissions and the increasing numbers of governments withdrawing from ISDS arrangements provide increasing evidence to support the Australian government's policy of excluding ISDS from future trade agreements and reviewing ISDS in existing agreements.

***Recommendations:***

***The Australian government should***

- ***Maintain the government policy of excluding investor-state dispute settlement processes (ISDS) in current negotiations and future trade and investment agreements.***
- ***Expedite the review of ISDS in current trade and investment agreements, with a view to removal of ISDS provisions from bilateral agreements, with a timeline for reviews.***
- ***Implement its policy of review of ISDS provisions in regional trade agreements, or failing that negotiate bilateral side letters excluding the application of ISDS to Australia, as Australia has done with the UK and New Zealand in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and with New Zealand in the Australia-New Zealand-ASEAN Free Trade Agreement (AANZFTA).***

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

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

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

[36] Camilla Hodgson and Joe Miller (2022) Uniper drops coal case as tensions rise over treaty on fossil fuel projects, *Financial Times*, August 15, https://www.ft.com/content/0a1406f7-4338-478c-ab11-b0c2c12faac8

[37] European Commission (2023) European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty, News Announcement, 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

## Trade agreements should exclude longer monopolies on medicines

Intellectual property rights as expressed in patent and other intellectual property law are monopolies granted by states to patent holders, including for medicines. They are intended to provide incentives for innovation, but there must also be a balance between monopoly rights and access to essential medicines. Intellectual Property rules were initially brought into trade rules in 1995 through the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which set a minimum patent monopoly period of 20 years for WTO Member States, with some limited exceptions for least developed countries and for medical emergencies.

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented products, the extension of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading partners, especially for developing countries' access to medicines. Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of stronger intellectual property provisions in regional and bilateral trade agreements.[38]

### *'TRIPS-Plus' provisions create additional costs for Australian taxpayers and for developing countries*

Provisions to extend medicine monopolies and intellectual property rules beyond the WTO TRIPS, described as 'TRIPS-Plus' provisions, have progressively strengthened patent rights on medicines, to the detriment of access to affordable medicines.[39] TRIPS-Plus provisions have increasingly been included in recent trade agreements, including the CPTPP, and bilateral FTAs initiated by the UK and the US. These provisions include rules to extend monopoly rights beyond 20 years, strengthen patent enforcement measures, and reduce the WTO flexibilities for developing countries. These provisions are associated with increased drug prices, delayed availability and increased costs to consumers and governments.[40] An example is the 'evergreening' of patents by allowing pharmaceutical companies to indefinitely make minor changes to the form of the same drugs to extend their patents.

Studies indicate there are significant additional costs to government which have resulted from longer medicine monopolies in bilateral and regional agreements.[41] Extensions to medicine monopolies allow pharmaceutical companies to dictate pricing on their products to an even greater extent. The average profit margin for large pharmaceutical companies is significantly greater than other large public companies. From 2000-2018 profitability was on average nearly 40% higher even than those with similar research and development costs.[42]

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[38] Productivity Commission (2010) Bilateral and Regional Trade Agreements Final Report, Productivity Commission. https://www.pc.gov.au/inquiries/completed/trade-agreements/report

[39] Lopert, R. and Gleeson, D. (2013) The high price of "free" trade: US trade agreements and access to medicines, *Journal of Law, Medicine and Ethics*, 41(1): 199-223. https://onlinelibrary.wiley.com/doi/abs/10.1111/jlme.12014 and Medicins Sans Frontieres (2015) Statement by MSF on the official release of the full text of the Trans-Pacific Partnership. http://www.msfaccess.org/about-us/mediaroom/press-releases/statement-msf-official-release-full-text-trans-pacific

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

[41] Gleeson, D., and Labonté, R. (2020) Trade Agreements and Public Health, Palgrave Studies in Public Health Policy Research, Chapter 3.

[42] Ledley, F. et al (2020) Profitability of Large Pharmaceutical Companies Compared With Other Large Public Companies, *PubMed Central*, https://pubmed.ncbi.nlm.nih.gov/32125401/

### *Trade agreements should exclude extensions of data protection on costly biologic medicines*

Biologic products, which include many new treatments for cancer and immune conditions, account for significant and growing Australian pharmaceutical spending. They include some of the most expensive medicines on the market. Monopolies on just ten biologic drugs listed on Australia's Pharmaceutical Benefits Scheme (PBS) cost Australian taxpayers over $205 million in 2013-14.[43] The original provisions of the CPTPP (then the Trans-Pacific Partnership Agreement (TPP)) included an additional 3-year data protection extension for biologic medicines, proposed by the US on behalf of its pharmaceutical companies. Data protection is a separate monopoly which applies in addition to the twenty-year patent monopoly on medicines, delaying the introduction of low-cost versions of these expensive medicines by delaying access to the data needed to produce the low-cost versions. This proposal was predicted to cost the PBS several hundred million dollars per year for each year of delay.[44] Following the USA's exit, these provisions were suspended but not removed from the CPTPP. But similar extensions to biologic medicines monopolies have also been proposed in other agreements, including in the proposed EU-Australia FTA.[45]

The stated intention of intellectual property rights is to promote innovation, research and investment. However, the 2013 Pharmaceutical Patents Review report concluded that extensions to patent rules for biologic medicines had little impact on the levels of pharmaceutical investment and recommended against extending data protections for biologics.[46] Similarly, research has shown that intellectual property was not a significant driver of innovation during COVID, since most research and development of vaccines was publicly funded. However patent and other monopolies enabled pharmaceutical companies to control both quantities and prices of COVID vaccines which were sold mainly to high income countries at high prices. This significantly delayed access to vaccines in low-income countries. [47],[48]

Extensions of data protection would further delay the production of cheaper medicines, costing the PBS hundreds of millions of dollars per year. Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade[49] and impose huge and needless costs on our public health system, which is already under pressure.

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[43] Gleeson, D., Lopert, R., and Moir, H. (2014) Proposals for extending data protection for biologics in the TPPA: Potential consequences for Australia. Submission to the Department of Foreign Affairs and Trade, http://dfat.gov.au/trade/agreements/tpp/negotiations/Documents/tpp_sub_gleeson_lopert_moir.pdf

[44] Gleeson, D. *et al* (2017) Financial Costs associated with monopolies on biologic medicines in Australia, *CSIRO Publishing,* https://www.publish.csiro.au/AH/AH17031

[45] Townsend, B., Gleeson, D., and Moir, H. (2018) Planned trade deal with Europe could keep medicine prices too high, https://theconversation.com/planned-trade-deal-with-europe-could-keep-medicine-prices-too-high-102836

[46] Harris, T., Nicol, D., and Gruen, N. (2013) Pharmaceutical Patents Review report. www.ipaustralia.gov.au/pdfs/2013-05-27_PPR_Final_Report.pdf (p. 160).

[47] Herder, M., Gold, E.R. and Murthy, S (2022) University Technology Transfer Has Failed to Improve Access to Global Health Products during the COVID-19 Pandemic, *Healthcare Policy* 17(4), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9170050/

[48] Gold, R. (2022) What the COVID pandemic revealed about intellectual property*, Nature Biotechnology*, https://www.nature.com/articles/s41587-022-01485-x

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

***Recommendation:***

- ***There should be no extension of patent monopolies or data protection monopolies on medicines in trade agreements.***

## Trade agreements should not undermine the rights of First Nations Australians

As outlined above, there should be comprehensive consultations with First Nations Australians during negotiation of trade agreements. Moreover, trade agreements should ensure that the rights of First Nations Australians are protected and not undermined by trade rules. First Nations Australians' basic rights are enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which Australia endorsed in 2009.[50] The Declaration includes the right to non-discrimination, cultural recognition, protection of land rights and affirms the minimum standards for the survival, dignity and well-being' of Indigenous peoples. These are fundamental rights that should not be compromised by trade agreements.[51]

### The right to free, prior and informed consent to projects on Indigenous land

As discussed above, Australia is a party to some trade and investment agreements that include ISDS provisions. A 2016 report of the UN Special Rapporteur on the Rights of Indigenous Peoples noted the significant impacts on indigenous peoples' rights as a result of the international investment regime, notably ISDS.[52] This includes negative impacts on Indigenous peoples' right rights to free, prior and informed consent about investment projects on traditional lands.

One example is the ISDS case Bear Creek Mining Corporation v. Peru (2017).[53] The ISDS tribunal ordered the government of Peru to pay Bear Creek Canadian mining company $18.2 million in compensation and $6 million in legal costs because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous landowners about the mine, leading to mass protests. A dissenting minority judgement about the costs noted that Bear Creek had failed to implement provisions of the ILO Convention on Indigenous Peoples to which Peru is a party, and which it had implemented through national laws.[54]

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[50] Australian Human Rights Commission (2007) UN Declaration on the Rights of Indigenous Peoples, https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1

[51] Australian Human Rights Commission (2023) Human Rights and Aboriginal and Torres Strait Islander Peoples, https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_ATSI.pdf

[52] UN Human Rights Special Rapporteur (2016) Report to the UN Human Rights Council on the rights of Indigenous Peoples and International Investment Agreements, August 11, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/84/PDF/G1617884.pdf?OpenElement

[53] International Centre for Settlement of Investment Disputes (2017) Bear Creek Mining Corporation v. Republic of Peru. Case No. ARB/14/2, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

[54] International Labour Organisation (1989) Indigenous and Tribal Peoples Convention (No. 169), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

More generally, Bear Creek's ISDS case is part of a pattern of cases[55] that seek to bypass international human rights and environmental commitments by using a flawed forum that favours transnational investors. In the ISDS case Von Pezold and Border Timbers v. Zimbabwe (2015),[56] arbitrators refused to consider an amicus submission on Indigenous peoples' rights related to the case, citing a number of grounds including that the tribunal lacked the competence to interpret Indigenous peoples' rights.[57] The failure of ISDS arbitrators to consider international human rights commitments means that investor rights are routinely privileged over all other obligations.

While there are some exemptions in Australian trade agreements for laws relating to Aboriginal and Torres Strait Islander communities, there is no general exemption which would totally exclude a similar ISDS case.

## Recognition of indigenous art and culture and use of traditional plants in intellectual property rules

Intellectual property rules in the WTO TRIPS agreement have been used to the detriment of Indigenous Peoples' rights because they do not account for collective ownership or development of traditional culture and knowledge of indigenous peoples.[58]

There are numerous examples of companies trying to patent products that have long had traditional uses. For example, in the late 1900s, international companies attempted to patent various Indian products including basmati rice, turmeric and products of the neem tree.[59] The neem tree had long been used for medicinal purposes in India, and the attempts to patent it were met with mass protests in Bangalore in 1994 over perceived intellectual piracy. The European Patent Office did eventually revoke the patent in 2000, recognising the traditional knowledge of the neem tree's properties.[60]

There have been numerous examples of exploitative practices regarding traditional knowledge, art and culture which fail to adequately compensate indigenous peoples. Megan Davis states in her article on FTAs and Indigenous issues: "indigenous culture contributes millions of Australian dollars to the Australian economy annually but because of intellectual property laws and inertia in law reform much of this income does not return to Indigenous communities."[61] Experts have commented that

[55] Terra Justa, *et al* (2022) Summary of Amicus Curiaw to the Constitutional Court of Colombia, https://ips-dc.org/wp-content/uploads/2022/09/Summary-of-Amicus-Curiae-to-the-Constitutional-Court-of-Colombia.docx.pdf

[56] Von Pezold and Border Timbers v. Zimbabwe (2015) International Centre for Settlement of Investment Disputes, Von Pezold v. Zimbabwe Case ARB/10/15. https://www.italaw.com/cases/1472

[57] Human Rights Council (2016) Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42, https://digitallibrary.un.org/record/847079?ln=en

[58] Davis, M. (2007) Parliamentary Inquiries into Free Trade Agreements and Indigenous Issues, *Journal of Indigenous Policy*, 7. http://www5.austlii.edu.au/au/journals/JIIndigP/2007/10.pdf

[59] Ismail, Z., and Fakir, T. (2004) Trademarks or Trade Barriers?, *International Journal of Social Economics* 31 (1/2), 173–94, https://doi.org/10.1108/03068290410515493

[60] The Times of India (2005) India Wins Neem Patent, *The Times of India*, April 1, https://timesofindia.indiatimes.com/business/international-business/india-wins-neem-patent/articleshow/1067104.cms

[61] Davis, M. (2007) Parliamentary Inquiries into Free Trade Agreements and Indigenous Issues, *Journal of Indigenous Policy*, 7, http://www5.austlii.edu.au/au/journals/JIIndigP/2007/10.pdf

international agreements like the Convention on Biological Diversity (1992), do not function as intended in protecting indigenous intellectual property.[62]

***Recommendation***

- ***The government should ensure that trade agreements are consistent with protecting the rights of First Nations Peoples. This requires exclusion of ISDS and guarantees of the right to free prior and informed consent for investment projects on their land.***
- ***There should be specific protections in intellectual property rules for indigenous art, culture and use of traditional plants.***

## Trade in services rules should not restrict public interest regulation of essential services

The objective of trade-in-services rules in trade agreements is to open services to international investment, and to reduce regulation of them. These can reduce to Australia's ability to regulate in the public interest. It is preferable for trade-in-services chapters to have a positive list structure, which lists those services covered by the chapters. This means that governments know exactly which services are covered by the rules.

Many trade agreements use a negative list structure, which means that *all* services, including those which may be developed in future, are included in the rules of the agreement, except those which governments list as specific exclusions or reservations.

This means that governments have to be very careful to list all reservations, including for emerging new services. Public services are intended to be excluded, but a public service is defined as "a service supplied in the exercise of governmental authority which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."[63] This definition can result in ambiguity about which services are covered by the reservations. In Australia, as in many other countries, some public and private services are provided side-by-side.

Without such reservations, trade-in-services rules can restrict new forms of regulation needed when circumstances change, as has occurred with the need for increased financial regulation following the Global Financial Crisis and the Royal Commission into the Banking and Financial Services Industry,[64] the Royal Commission into Aged Care Quality and Safety discussed below, and governments' responses to climate change through regulation of energy services' carbon emissions discussed above.

Trade-in-services rules use a 'ratchet' mechanism which treats the regulation of services as if it were a tariff, to be frozen at current levels and not raised in future, unless particular services are specifically reserved from this structure. This can prevent governments from addressing the failures of privatisation or deregulation. For example, the deregulation and privatisation of vocational education services in Australia resulted in failures in service delivery for students and fraudulent use of public

[62] MacGonigle, I.V. (2016) Patenting nature or protecting culture? Ethnopharmacology and indigenous intellectual property rights, *Journal of Law and the Biosciences,* 3, https://doi.org/10.1093/jlb/lsw003
[63] Department of Foreign Affairs and Trade (2020) *Text of the CPTPP*, Chapter 10, Article 10.1. p. 10.2, https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf
[64] United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf

funds, and the Turnbull government had to reregulate to address these failures in 2016.[65] The increased regulation of vocational education could have been contrary to trade-in-services rules in the Trans-Pacific Partnership (TPP) which was then still under negotiation.

The government responded to this unintended consequence and the need for re-regulation in trade agreements including the CPTPP, the RCEP and the Australia-UK FTA, by including a new reservation retaining the right to regulate the funding and standards of education services.[66]

The inclusion of essential services, like health, education, energy, water and aged care in trade agreements also limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that, unless these services are reserved, governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. This can reduce the right to regulate to ensure equitable access to essential services, to regulate service standards and staffing levels, and to meet social and environmental goals.[67]

Another example of possible unintended consequence occurred in aged care services in 2021, when a debate emerged about whether aged care services were specifically excluded from trade-in-services rules in the RCEP and other trade agreements. Aged care is funded by the federal government but managed largely by private providers. The Royal Commission into Aged Care Quality and Safety[68] exposed multiple scandals caused by a lack of qualified staff and poor-quality care, and recommended increases in staffing levels, increases in qualifications of staff and changes to licensing arrangements. Many of these recommendations are now being implemented, including measures to increase staffing levels through legislation requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes per resident. Reform of the aged care sector is ongoing.

These increases in regulation could have been prevented by the market access and national treatment rules listed above, unless aged care was specifically reserved from Australian trade agreements. Aged care was not listed in the specific reservations with other specific services like childcare in the RCEP.[69] The government argued that aged care was excluded under the more general category of social services, but the Joint Standing Committee on Treaties noted the ambiguity and recommended that "such inconsistencies give rise to public concern, and it would be better if they were avoided".[70]

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[65] Conifer, D. (2016) Parliament Passes Bill to Overhaul Vocational Education Sector. *ABC News*, December 1, https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860

[66] Department of Foreign Affairs and Trade (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Annex !!, p. 1. https://www.dfat.gov.au/sites/default/files/annex-ii-australia.pdf

[67] Ranald, P. (2021) How a New Trade Deal Could Make It Harder to Improve Life for Australians in Aged Care. *The Conversation*. July 27, https://theconversation.com/how-a-new-trade-deal-could-make-it-harder-to-improve-life-for-australians-in-aged-care-164947

[68] Royal Commission into Aged Care Quality and Safety (2021) A Summary of the Final Report, https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf

[69] Joint Standing Committee on Treaties (2021) Report 196 Regional Comprehensive Economic Partnership Agreement, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024720/toc_pdf/Report196.pdf;fileType=application%2Fpdf

[70] Joint Standing Committee on Treaties (2022) Report 196 on the Regional Comprehensive Economic Partnership, p.27, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Report_196

It should be noted that these reservations or exclusions only exempt governments from government-to-government disputes about these services in trade agreements. These reservations do not apply to the separate ISDS dispute processes if ISDS is included in the agreement. This provides yet another argument for excluding ISDS from trade agreements.

***Recommendations:***

- ***Positive list structures are preferable to negative list structures for trade-in-services chapters.***
- ***Ensure that reservations in trade-in-services with a negative list structure are comprehensive and allow changes in government regulation to deal with changes in circumstances like the global financial crisis and the climate change crisis.***
- ***That reservations ensure that there can be comprehensive regulation of licensing, qualifications and service standards in services like aged care to meet government policy objectives.***

## Protection of Australian culture should be excluded from trade rules that would undermine local content regulation

Many countries including Australia have local content requirements for audiovisual and other cultural media to preserve local culture and ensure that local stories can be told. The UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* has recognised the right of governments to exempt such regulation to preserve national culture in the context of trade agreements.[71]

Trade-in-services rules treat regulation to ensure local content in audiovisual or other cultural media as a barrier to trade. This includes local content requirements and subsidies or other special arrangements for local production. Australia and other countries have excluded all of these forms of regulation from trade-in-services rules to ensure preservation of local culture, including Indigenous culture.

There was strong public opposition during the negotiations for the Australia-US Free Trade Agreement (AUSFTA) in 2003-4 when US negotiators claimed that Australia's local content regulation was a barrier to trade. The US is the world's largest exporter of audiovisual products and relying on market forces without local content regulation would have resulted in Australian content being swamped by US imports.

The result of the negotiations was that the AUSFTA exempted existing local content regulation from trade-in-services rules but froze it at current levels. It reduced the flexibility for local content requirements for what were then future forms of media like the streaming services which exist today. Local content requirements for subscription television were limited to 10-20 percent, with requirements for consultation before going beyond 10% "with any affected parties including the United States".[72] There is no local content provision for interactive audio or video services. Such

71. Guèvremont, V. (2022) Protecting diversity: still room to pursue a legitimate public policy objective outside the framework of the Convention, in UNESCO (2022) Reshaping policies for creativity, addressing culture as a global public good, Chapter 7, https://unesdoc.unesco.org/ark:/48223/pf0000380501?posInSet=4&queryId=N-EXPLORE-123c7656-0265-4fd9-92c9-a8db712616db

72 Department of Foreign Affairs and Trade (2004) Text of the Australia-US Free Trade Agreement Non Conforming Measures (Chapters 10, 11 & 13) Annex II, p. 6, https://www.dfat.gov.au/trade/agreements/in-force/ausfta/official-documents/Pages/official-documents

provisions can only be developed "through a transparent process permitting participation by any affected parties, be based on objective criteria, be the minimum necessary, be no more trade restrictive than necessary, not be unreasonably burdensome, and be applied only to a service provided by an enterprise that carries on business activities in Australia in relation to the supply of that service."[73]

Current government policy is to develop local content rules for all forms of media including streaming services.[74] This could be restricted by the requirements of the AUSFTA.

Subsequent trade agreements have not included the restrictions on local content described in Annex II of the AUSFTA.

The only way to ensure that the government has the right to regulate all forms of current and possible future media and cultural expression in these areas is to have a comprehensive cultural exclusion from such regulation in trade agreements.

***Recommendations:***

- ***That the government ensure that all current and future regulation of local content requirements and subsidies for local cultural industries are completely exempted from trade agreements through a comprehensive cultural exclusion.***
- ***The audio-visual provisions on p. 6 of Non Conforming Measures (Chapters 10, 11 & 13) Annex II of the AUSFTA should be reviewed and renegotiated to ensure that both current and future local content requirements and other supports for local cultural industries are completely exempted and that the government can implement its proposed policy.***

## Digital trade rules should not restrict public interest regulation

Digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade-in-services. As the digital economy developed, it has been necessary for governments to develop new regulatory frameworks and techniques that ensure the digital economy is consistent with human rights, particularly privacy rights and rights against discrimination. However, the incorporation of some digital trade rules in digital trade negotiations threatens to restrict governments from implementing public interest regulation.

The digital trade agenda is highly influenced by the US digital industry lobby, which seeks to codify rules that suit the dominant digital industry companies. The aim of this digital trade agenda, which has been dominant in TPP and IPEF negotiations, [75] is to maximise the free flow of cross-border data and to establish a framework that restricts governments from regulating the digital domain and the operations of big tech companies.

This is particularly concerning given the 2019 Australian Competition and Consumer Commission's (ACCC) digital platforms report which identified the need for regulatory reform in Australia to address

[73] Ibid, p. 6.
[74] Kelly, V. (2023) Streamers to be subject to local content quotas from next year, *Variety Australia*, January 30, https://au.variety.com/2023/tv/news/local-content-quotas-streaming-8448/
[75] Kelsey, J. (2017) E-commerce - The development implications of future proofing global trade rules for GAFA, Paper to the MC11 Think Track, 'Thinking about a Global Governance of International Trade for the 21st Century; Challenges and Opportunities on the eve of the 11th WTO Ministerial Conference', Buenos Aires, Argentina, 13 December 2017, https://bestbits.net/wp-uploads/2017/12/Kelsey-paper-for-MC11-Think-Track.pdf

concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.[76]

In this context, it is vital that there are no digital trade provisions that restrict the government's ability to regulate in the public interest.

### *Digital trade rules and the need to regulate concentration of market power*

The need to regulate the market power of large digital platform companies was confirmed when, following advice from the ACCC, the Australian government passed legislation for the News Media Bargaining Code in 2021, a mandatory code of conduct which governs commercial relationships between Australian news businesses and digital platforms which benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of news media information.[77] Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy.

US digital companies Google and Meta strongly objected to this regulation and claimed it violated the non-discrimination rules in the Australia-US Free Trade Agreement by discriminating against US companies.[78] The government argued that the legislation was not discriminatory but addressed power imbalances, and persisted with the legislation without adverse trade consequences.

### *Digital trade rules and government responses to anti-competitive and discriminatory practices*

The use of algorithmic systems to collect and analyse data is a fundamental aspect of the digital economy. However, there is growing evidence that demonstrates that algorithms can be used by companies to reduce competition[79] and that algorithmic bias can result in race, gender, class or other discrimination.[80]

For governments and regulators who are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, access to algorithms and source code is an important tool in determining a contravention of competition law or detection of discriminatory algorithms.[81] Digital trade rules that prevent government access for algorithms and source code can undermine government efforts to identify and respond to anti-competitive practices and algorithmic bias.

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[76] Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report

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

[78] Disruptive Competition Project (2019) The Dangers of Australia's Discriminatory Media Code, https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/

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

[80] Mittelstadt, B. *et al*. (2016) The ethics of algorithms: Mapping the debate. *Big Data & Society. 1(21)*, https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679

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

*Digital trade rules and privacy rights, consumer protections and cybersecurity*

The risk of digital trade rules to privacy rights, consumer protections and cybersecurity has been widely documented.[82] Privacy rights and data security are undermined by rules, such as in the CPTPP, that restrict the regulation of electronic transmissions and requirements for cybersecurity measures, such as the encryption of personal data and other security measures.[83] This could reduce security, impacting privacy rights, across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others.[84]

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively allowing the evasion of privacy legislation. The inclusion of privacy and consumer protections in digital trade chapters, which require parties to have/enact privacy and consumer laws, is not enough to ensure privacy is upheld. Without a minimum standard for this privacy and consumer legislation there is no guarantee that once data is moved and stored offshore it will be subject to the same privacy standards as in Australia.[85]

For example, in March 2020 it was revealed that Chow Tai Fook Enterprises (CTFE), the Hong Kong company that owned the privatised Australian Alinta Energy company, was storing sensitive personal data from Australian customers in Singapore and New Zealand without adequate privacy protections. The company had breached promises made at the time of privatisation to store the data in Australia.[86]

Another example is the massive hacking of personal data of millions of Australians held by the Singapore-owned Optus telecommunications company and the Medibank Private health insurance company, which revealed the companies' lack of effective data security measures.[87] The government has since flagged that it is reviewing cybersecurity regulation.[88]

It is clear that governments must retain the ability to regulate security standards in order to reduce cybersecurity risks that threaten privacy rights and consumer protections. The rapid emergence of new technologies could create new cybersecurity risks requiring new regulatory frameworks.

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

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

[84] Reid Smith, S. (2018) Preliminary note: Electronic authentication: some implications, http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf

[85] Reid Smith, S. (2018) Preliminary note: Electronic authentication: some implications, http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf

[86] Ferguson, A. and Gillett, C. (2020) Credit cards, addresses and phone numbers vulnerable: More than one million energy customers' privacy at risk, *Sydney Morning Herald*, March1, https://www.smh.com.au/business/companies/credit-cards-addresses-and-phone-numbers-vulnerable-more-than-one-million-energy-customers-privacy-at-risk-20200228-p545bw.html

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

[88] Varghese, S. (2022) O'Neil hammers Coalition over 'useless' cyber-security laws, October 2, https://itwire.com/business-it-news/security/o-neil-hammers-coalition-over-useless-cyber-security-laws.html

### *Digital Trade Rules and Artificial Intelligence (AI)*

The recent emergence of AI has prompted broad public debate about the impact of AI in workplaces and society, especially on public debate and the creation of fake news. Many governments including the Australian government are contemplating forms of regulation to protect the public interest, which may require regulation of source codes and algorithms.[89] Digital trade rules should not prevent such public interest legislation.

### *Digital trade rules and workers' rights*

Trade rules that enable global corporations, including those operating in the gig-economy, to access Australian markets without a local presence, could restrict the government's ability to implement regulation of labour rights and working conditions for digital platform workers and worsen the situation for workers and undermine Australian employment law.

The ITUC argues that "without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged."[90] Concerns have also been raised about the impact that new technologies and artificial Intelligence can have in recruitment practices and on work conditions.[91]

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

The report of the Victorian Government's Inquiry into the Victorian On-Demand Workforce made recommendations in 2020 for changes in regulation to both the Commonwealth and Victorian governments.[92] The current Australian government has introduced "Closing the Loopholes" legislation that seeks to ensure that digital platform-based companies cannot evade these responsibilities and that gig economy workers have the same rights as other workers, through seeking to establish "minimum wages and conditions for '*employee-like*' workers."[93]

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[89] Department of Industry Commerce and Resources (2023) Supporting responsible AI: discussion paper, June, https://consult.industry.gov.au/supporting-responsible-ai

[90] International Trade Union Confederation (2019) E-commerce push at WTO threatens to undermine labour standards, https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers

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

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

[93] Haar, E., and Setwart, A. (2022) The Secure Jobs, Better Pay Bill is here: What are the proposed changes to Australia's industrial relations landscape? https://piperalderman.com.au/insight/the-secure-jobs-better-pay-bill-is-here-what-are-the-proposed-changes-to-australias-industrial-relations-landscape/
See also the recent Fair work Legislations Amendment (Closing Loopholes) Bill 2023, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7072

**Recommendations:**

- ***Exclude Digital Trade rules which prevent the regulation of market power imbalances, prevent regulation of source code, algorithms and artificial intelligence, prevent regulation of cross-border flows of data, prevent regulation of security standards, and prevent regulation of digital platform workers' working conditions.***
- ***Include provisions to ensure digital companies do not evade tax and must abide by mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards***.

## Trade agreements should not increase numbers of temporary overseas workers vulnerable to exploitation

AFTINET supports Australia's permanent migration system which has contributed to our vibrant multicultural society. Permanent migrants have the same rights as other workers in Australia because they have permanent residency and cannot be deported if they lose their employment.

Trade and investment agreements impact on labour rights through provisions on temporary overseas workers. Increases in numbers of temporary overseas workers have been included as legally binding commitments in trade agreements. The removal of the requirement for local labour market testing and/ or increases in the numbers of specific categories of temporary workers are found in the China-Australia Free Trade Agreement,[94] the Korea-Australia Free Trade Agreement,[95] the CPTPP with 10 other countries[96] and the Indonesia Free Trade Agreement.[97]

For example, the CPTPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of occupations, and removes labour market testing to establish whether there are local workers available.[98]

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[94] Department of Foreign Affairs and Trade (2015) China-Australia Free Trade Agreement. Chapter 10, annex 10; Two Memoranda of Understanding dealing with temporary visas are attached to the agreement: Memorandum of Understanding on an Investment Facilitation Arrangement; Memorandum of Understanding on a Work and Holiday Visa Arrangement, https://www.dfat.gov.au/trade/agreements/in-force/chafta/Pages/australia-china-fta

[95] Department of Foreign Affairs and Trade (2014) Korea-Australia Free Trade Agreement. https://www.dfat.gov.au/trade/agreements/in-force/kafta/korea-australia-fta

[96] Department of Foreign Affairs and Trade (2016) Trans-Pacific Partnership Agreement (incorporated into the Comprehensive Progressive Trans-Pacific Partnership Agreement). Chapter 12, annex 12A, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership

[97] Department of Foreign Affairs and Trade (2019) Indonesia-Australia Comprehensive Economic Partnership. Chapter 12, art. 12.9. See also the following side letters dealing with temporary visas: Indonesia-Australia Comprehensive Economic Partnership Side Letter on Work and Holiday Visas; Memorandum of Understanding on the Indonesia Australia Skills Development Exchange Pilot Project; and Memorandum of Understanding on a Pilot Workplace- Based Training Visa Arrangement, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Indonesia-AustraliaCEPA/Treaty_being_considered

[98] Department of Foreign Affairs and Trade (2016) Trans-Pacific Partnership Agreement (incorporated into the Comprehensive Progressive Trans-Pacific Partnership Agreement). Chapter 12, annex 12A,

The COVID pandemic disrupted migration trends, but in 2018 temporary migration increased to over 800,000 and permanent migrants decreased as a proportion of total migrants.[99]

Temporary migrant workers are more vulnerable to exploitation than permanent migrant workers. The fact that they are tied to one employer and face deportation if they lose the job means that these workers have no effective rights in the workplace.

Academic studies comparing various recent trade agreements have shown such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation.[100] A survey of temporary overseas workers in Australia published in 2017 by University of New South Wales academics found temporary overseas workers experienced widespread wage theft.[101] Similar evidence was provided in 2017 to the Joint Parliamentary Committee Inquiry into a Modern Slavery Act 40 and by a 2019 study of the horticultural industry.[102] The evidence from these studies shows gross violations of Australian minimum work standards including failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries, as well as lack of effective freedom of association and collective bargaining rights.

During the COVID pandemic, thousands of temporary workers were excluded from government support payments and were told to leave but many could not return to their homelands because of travel restrictions, leaving them with no work and no income.[103]

**Recommendations:**

- ***Trade agreements should be consistent with a robust permanent migration scheme which protects the rights of migrant workers, with temporary migration based only on genuine temporary need demonstrated by local labour market testing.***
- ***Arrangements for genuine temporary labour shortages should be separate stand-alone government-to-government agreements, like the Pacific Australia Labour Mobility Scheme. These should include protections of the rights of temporary workers to ensure that they are not exploited and enjoy the same rights as other workers.***

https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership

[99] Fels, A. and Cousins, D. (2020) The Migrant Workers' Taskforce and the Australian Government's Response to Migrant Worker Wage Exploitation. *Journal of Australian Political Economy*. https://128f2a8c-7e2b-db29-c5ed-c863dde6f97c.filesusr.com/ugd/b629ee_e19802d05ca44b0ea1f58cbdce9b5c88.pdf

[100] Stuart, R. (2015) Free Trade Agreements Driving Labour Market Reform by Stealth, *The Conversation*, 20 January, http://theconversation.com/free-trade-agreements-driving-labour-market-reform-by-stealth-36124.

[101] Berg, et al.(2017) Wage Theft in Australia, https://apo.org.au/sites/default/files/resource-files/2017-11/apo-nid120406.pdf

[102] Howe at al. (2019) Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry, www.sydney.edu.au/Content/Dam/Corporate/Documents/Business-School/Research/Work-And-Organisational-Studies/Towards-a-Durable-Future-Report.pdf

[103] Gibson, J., and Moran, A. (2020) As coronavirus spreads, "it's time to go home" Scott Morrison tells visitors and international students, *ABC News*, April 3, https://www.abc.net.au/news/2020-04-03/coronavirus-pm-tells-international-students-time-to-go-to-home/12119568

## Trade agreements should not restrict the use of government procurement as part of industry development programs, including renewable energy industries

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

There has been much debate in Australia about both Commonwealth and State government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more flexibility to consider broader definitions of value for money, which recognise the economic value of supporting local firms in government contracting decisions.[104]

Several Australian states have developed such policies, and the Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework 2017 recommended in its report, *Buying into Our Future*, that the government should not enter into any commitments in trade agreements that undermine this ability to support Australian businesses.[105]

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

***Recommendations:***

- ***The government should not make any commitments on government procurement that undermine its ability, or the ability of state governments, to use government procurement to support local industry in accordance with government policy, especially the development of local renewable energy industries.***
- ***The government should maintain current government procurement exclusions for SMEs, Indigenous enterprises, national treasures, ethical standards, environmental standards, and for local government procurement.***

[104]Thurbon, E., (2014) Australia's procurement policy leaves our exporters behind, October 17, https://theconversation.com/australias-procurement-policy-leaves-our-exporters-behind-32569 October 17

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[105] Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework (2017) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Report