

**Submission to the Joint Standing
Committee on Treaties on the
ASEAN/Australia/New Zealand Free Trade
Agreement on behalf of the Australian Fair
Trade and Investment Network (AFTINET).**

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1. Overview

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 70 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Joint Standing Committee on Treaties regarding the ASEAN/Australia/New Zealand Free Trade Agreement (AANZFTA).

This submission addresses general principles and issues of common concern to our members. Member organisations will also make more detailed submissions in areas of particular concern.

2. Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation

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

To facilitate effective community debate, it is important that DFAT develop a clear structure and principles for consultation processes that can be applied to all proposed trade agreements. The Senate Foreign Affairs, Defence and Trade Committee made detailed recommendations for legislative change in its November 2003 report, *Voting on Trade*, which, if adopted, would significantly improve the consultation, transparency and review processes of trade negotiations¹. The key elements of these recommendations are that:

- Parliament will have the responsibility of granting negotiating authority for particular trade treaties, on the basis of agreed objectives;

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

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

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

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

AFTINET eagerly anticipates the implementation of this policy and the inclusion of social, cultural and environmental impacts into the assessment of any proposed trade agreements, including the proposed ASEAN/Australia/NZ FTA.

AFTINET also welcomes the bipartisan recommendations the Joint Standing Committee on Treaties made regarding the need for wider impact assessment in regards to the Australia/Chile FTA. Recommendation 3 states that:

The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

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

AFTINET welcomes the policy put forward by the ALP and the recommendations from JSCOT to table any trade agreements in Parliament with any implementing legislation. However, AFTINET still believes that to properly increase transparency and democracy the Parliament should be the body that decides on whether or not to approve a trade agreement, not just its implementing legislation.

Recommendation: That the Government set out the principles and objectives that will guide Australia's consultation processes for the ASEAN/Australia/New Zealand FTA and that the Government will have regular consultations with unions, community organisations and regional and demographic groups which may be adversely affected by the agreement.

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

3. Lack of Social, Environmental, and Cultural Impact Assessment

For governments to make informed choices about any treaty that they enter into it is important to be informed of the full spectrum of its impacts. There is yet to be any government commissioned assessment of the social, environmental, cultural or regional impacts of this proposed agreement. The agreement has been labelled as Australia's "largest" yet and includes the removal of tariffs on 96 per cent of Australia's exports to the region and across every tariff line in Australia. Given the depth of this agreement it is even more important to analyse the non-economic impacts that it will have.

Employment

The global financial crisis is resulting in significant job losses across the world. Government action is encouraged that would work to create employment as opposed to undermine it. Sadly the later is what the AANZFTA will do.

The United Nations Conference on Trade and Development (UNCTAD) has reported that under an ambitious tariff reduction scenario job losses in ASEAN countries are projected for non-ferrous metals (6.4%), other manufacturing (2.3%), motor vehicles (6.6%) and electronics (1.7%)³. So significant are the concerns around the impacts on job losses in Asia, the Head of Research and Development Division of the Indonesian Ministry for Industry, Mr Dedi Mulyadi stated that the AANZFTA should be postponed for one or two years out of fears that it would destroy the Indonesian manufacturing sector.

The proposed AANZFTA requires Australia to move more tariff lines to zero sooner than the majority of the other participants. Most of the impact will be felt in Australian manufacturing which, according to the Australian Bureau of Statistics (ABS 6291.0.55.003, Feb. 2009) has lost 58,300 jobs in the twelve months to February 2009. Many of these jobs are in regional areas of high unemployment.

While further tariff liberalisation occurs in ASEAN countries over the 2013-2025 period, the early and disproportionate exposure of Australian manufacturing to zero tariffs in the midst of the worst economic crisis since the great depression is unacceptable.

The table below shows the decline in Australian manufacturing exports and rise in imports over the last decade.

³ UNCTAD report sourced from Purugganan, J. *Closer Ties, Larger Markets: Examining the ASEAN FTAs*, Focus on the Global South, December 2008, available at http://www.bilaterals.org/article.php3?id_article=14394

Australia's Elaborately Transformed Manufacturing Trade with ASEAN : \$Million			
	<i>1997</i>	<i>2007</i>	<i>Change</i>
Exports	\$3,899	\$3,530	- \$369
Imports	\$5,124	\$14,629	+ \$9,505

This trade relationship in ETMs represents tens of thousands of lost job opportunities for Australian manufacturing workers, a trend which will be continued under the proposed AANZFTA .

For more detail on these issues, see the submission from the Australian Manufacturing Workers Union.

Poverty

Income distribution and access to essential services varies between countries across Asia. Throughout the ASEAN region, on average 30 per cent of the population live below national poverty threshold levels and the richest 20 per cent of the population corner close to 50 percent of the national income⁴. The economic growth is also unevenly spread within the region with Singapore being the predominant beneficiary from merchandize exports and foreign direct investment⁵. Despite the AANZFTA recognising the different development needs of ASEAN countries, there are still concerns that this FTA will in fact exacerbate poverty and inequality, creating further social and economic divides between countries.

Environment

There have been no government or independent studies into the environmental impacts of the AANZFTA. This is alarming particularly in relation to climate change, since coal, petroleum and aluminium products

⁴ UNCTAD report sourced from Purugganan, J. *Closer Ties, Larger Markets: Examining the ASEAN FTAs*, Focus on the Global South, December 2008, available at http://www.bilaterals.org/article.php3?id_article=14394

⁵ UNCTAD report sourced from Purugganan, J. *Closer Ties, Larger Markets: Examining the ASEAN FTAs*, Focus on the Global South, December 2008, available at http://www.bilaterals.org/article.php3?id_article=14394

feature in the list of goods that will benefit from reductions in tariffs from ASEAN countries. There is currently no analysis on the impacts that this will have on the climate, countries' emissions, and what governments would need to do to further incorporate these added emissions into their responses to climate change.

Further to this there is a dearth of analysis on the impacts on environmental regulation that the AANZFTA will have. Whilst these agreements aim to foster economic activity and investment there is no assessment on its impact on the right of governments to regulate in the public interest in regards to the environment.

In response to these concerns about the lack of broader assessment, the Australian Labor Party outlined a process in its policy platform that would involve Parliament considering independent assessments of environmental, social, regional, cultural, and regulatory impacts prior to undertaking negotiations for a trade agreement. The ALP Policy states:

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

Given the lack of environmental assessment as well as other non-econometric assessment, it is deeply concerning that the platform taken to the election is not being upheld in the case of the proposed AANZFTA.

Recommendation: Independent assessments commissioned by the government of the cultural, regional, social, regulatory and environmental impacts be concluded and considered prior to the signing of any trade agreement.

4. The relationship between the agreement and human rights, labour and environmental standards

We note that the Australia-US Free Trade Agreement contains labour and environmental chapters that refer to ILO and UN standards on labour rights and the environment. It would therefore be consistent with this for any agreement between Australia, ASEAN and New Zealand to thoroughly examine these issues. There is increasing concern in the community about the inconsistency of the policy which allowed these issues to be included in the AUSFTA but not in other bilateral agreements such as AANZ FTA.

Before signing any agreement there should be an analysis of the current state of compliance by Australia, ASEAN countries and New Zealand with human rights, labour and environment standards, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

Labour Rights

Across all ASEAN countries, there are numerous reports of abuses of the core labour rights in the ILO Declaration and many of these abuses occur in export-oriented industries. Some examples include:

- **The right of workers and employers to freedom of association and the effective right to collective bargaining** (conventions 87 and 98):

In Burma, which is a military dictatorship, there is no freedom of association or right to collective bargaining and forced labour is widespread (see below).

In Malaysia, many of the approximately 400,000 primarily Indonesian domestic workers in Malaysia experience withheld wages, forced confinement, and excessively long work hours without days off; some face physical and sexual abuse. Domestic workers are excluded from key provisions of Malaysia's 1955 Employment Act and their work permits tie them to a particular employer, making it difficult to report abuse for fear of

deportation⁶.

In Malaysia, until recently, the electronics sector was 'carved out' from national labour regulation. There was no national union to represent workers in the electronics industry and investors granted 'pioneer status' by the Malaysian Government could not grant conditions in employment agreements that are more favourable than the legal minimums.⁷ It remains to be seen whether recent changes will result in full rights for workers in this sector.

In Vietnam, workers can only join state-recognised unions and strikes are prohibited in public services⁸.

- **The elimination of all forms of forced or compulsory labour** (conventions 29 and 105):

Burma has one of the world's worst records in use of forced labour. In Burma, it is estimated that over 800 000 people are conscripted to work with little or no pay. Richard Horsey, the ILO's liaison officer in Burma notes that "forced labour remains a very serious problem ... [i]t is a practice that continues across the country particularly on local infrastructure projects."⁹

Thailand has ratified ILO conventions 29 and 105. However forced labour remains prevalent in the informal economy and in particular there are reports of forced labour and exploitation of workers from Burma, Cambodia and Laos in sweatshops producing garments for export. Bonded labour

⁶ Human Rights Watch, *World Report 2009*, 2009, available at <http://www.hrw.org/world-report-2009>

⁷ International Confederation of Free Trade Unions, *ICFTU Annual Survey of Violations of Trade Union Rights 2006* at <http://www.icftu.org/displaydocument.asp?Index=991223942&Language=EN>

⁸ International Confederation of Free Trade Unions, *ICFTU Annual Survey of Violations of Trade Union Rights 2006* at <http://www.icftu.org/displaydocument.asp?Index=991223937&Language=EN> (accessed 6 April 2009).

⁹ Online Pioneer, June 8, 2004, available at: <http://ins.onlinedemocracy.ca/index.php?name=News&file=article&sid=2842>

also exists in Thailand. In 2008 migrant workers at B.B. Top garment factory were forced to work overtime and paid less than half the minimum wage¹⁰.

- **The abolition of child labour** (conventions 138 and 182):

Child labour is also prevalent in many ASEAN countries. Thailand has not ratified the Convention on Minimum Age and the ICFTU estimate that 173 400 children between 13 – 14 years and almost 2 million children between 15 – 19 years were economically active in 2000. Most underage workers in urban areas work in the services sector, in particular petrol stations, restaurants and the tourism industry¹¹.

- **The elimination of discrimination in respect of employment and occupation** (conventions 100 and 111):

Women earn significantly less than their male counterparts in most ASEAN countries, and face discrimination in many occupations. For example, Singapore has not ratified the Convention on discrimination and many women work in low-wage, low-skilled sectors and earn less than their male counterparts¹².

Human Rights

There has been extensive documentation of breaches in human rights from Parties to the AANZFTA. In its annual report of human rights for the globe Human Rights Watch identified the following breaches of human rights:

- Burma- Burma is a military dictatorship which since 1990 has detained Aung San Suu Kyi, and other leaders of the party which won the election held before her detention. The dictatorship continues to repress all

¹⁰ International Confederation of Free Trade Unions, *ICFTU Annual Survey of Violations of Trade Union Rights 2006* at <http://www.icftu.org/displaydocument.asp?Index=991223932&Language=EN>

¹¹ International Confederation of Free Trade Unions (2003), 'Report for the WTO General Council Review of the Trade Policies of Thailand', 12 November 2003 at <http://www.icftu.org/displaydocument.asp?Index=991218613&Language=EN>

¹² International Confederation of Free Trade Unions, *Internationally Recognized Core Labour Standards in Singapore*, available at <http://www.icftu.org/displaydocument.asp?Index=991219358>

democratic opposition movements through arrest, torture and killing of dissidents.

- Philippines – extra-judicial killing and enforced detention of people critical of the government including trade union organisers; and summary executions of petty criminals and street youth.
- Indonesia - In March 2008 police jailed nine Papuan activists for displaying the Papuan "Morning Star" flag. They remain in detention charged with rebellion (*makar*), a crime punishable by life imprisonment. In July 2008 police assaulted 46 protesters and charged six with rebellion for raising the Morning Star flag in Fakfak, West Papua. In August 2008 police fired live ammunition into a crowd, killing a peaceful demonstrator after protesters raised the Morning Star flag in Wamena.
- Cambodia - The Cambodian government controls all television and most radio stations and regularly suspends, threatens, or takes legal action against journalists or news outlets that criticize the government. Freedom of speech is hampered by provisions in Cambodian laws that allow individuals to be criminally prosecuted for peaceful expression of their views. Cambodian human rights organization Licadho uncovered abusive conditions including lack of food, medical care, and physical mistreatment at government-run "social rehabilitation centers" where sex workers, homeless children and families, beggars, and drug addicts are detained after arbitrary police round-ups.

Environmental Standards

There should also be an analysis of the current state of compliance by member countries with environmental protection legislation, particularly as it relates to export-oriented industries. For example, waste from export manufacturing plants is a massive human and environmental health problem in many ASEAN member countries. Similarly, in the South East Asia region, the entire Mekong River system is under enormous stress from the demands of industry. In the Philippines, hundreds of people have died as a result of over-logging which has led to landslides and in Indonesia, the over-logging of

tropical rainforests and subsequent burn-offs has created an environmental disaster.

We note that there was no environmental assessment included in the feasibility study on a potential ASEAN – CER Free Trade Area by the Centre for International Economics. It is important to assess the current environmental standards in member countries and to project potential impacts of the Agreement before a decision to sign the agreement is made.

Australia must be aware of the relationship that the AANZFTA will have with human rights, labour and environmental standards. This should include an analysis of how the trade agreement would impact on the ability of Australia, ASEAN and New Zealand to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.

5. Protecting the Right of Governments to Regulate in the Public Interest

It is important that a proposed FTA does not undermine the ability of ASEAN, Australian or New Zealand Governments to regulate in the public interest. AFTINET is concerned that the Government's capacity to regulate may be compromised in two ways. Firstly, by limiting the ability of governments to regulate investment and essential services, and secondly, by using an investor-state complaints process.

5.1 Exclusion of public services

Public services should be explicitly exempt from the AANZFTA. To clearly and unambiguously exempt public services, it is important that public services are defined clearly. AFTINET is highly critical of the definition of public services used in this agreement, the Chile Free Trade Agreement, the Thai Free Trade Agreement, the US Free Trade Agreement and the WTO's agreement on trade in services (GATS), which defines a public service as "a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". This definition results in ambiguity about

which services are covered by the exemption. In Australia, as in many other countries, public and private services are provided side by side. This includes education, health, water, prisons, energy and many more.

Even when essential services are not publicly provided, governments need to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

Since services were included in the agreement, AFTINET welcomes their inclusion on a 'positive-list' basis, that is only those services explicitly named for inclusion are incorporated into the agreement. This is far preferable to use of a 'negative list' for trade in services in an FTA, but AFTINET still maintains concerns regarding the restrictions that are placed on governments through the inclusion of services in FTAs.

5.2 Regulation of Standards

Governments should have the right to regulate the provision of services through ensuring adequate standards as well as the role that services play in supporting domestic goals.

The AANZFTA states that “measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.” This is accomplished by such regulations being “not more burdensome than necessary to ensure the quality of the service”. This definition is highly problematic as it is undefined and leaves regulation open to challenge, or open to the threat or challenge. This ambiguity surrounding the protection for regulatory measures and their openness to be challenged can act as a chilling effect on government regulation. Governments which don't wish to face a trade disputes panel may re-think applying regulation that *may* breach the trade agreement. This undermines the right of governments to adopt regulation that they believe necessary for the provision of a service.

Further to this is the removal of regulation that can ensure local content is included in foreign services investment. The article on Services Market Access (8.4) outlines that there can be no limitations imposed on investment through the provision of numerical quotas for the number of domestic workers employed in order to provide the service. This removes the ability of governments to ensure that local workers benefit from the increased investment in the services industry. Article 8.4 further outlines the restrictions on requiring joint-ventures for the provision of services. Whilst joint ventures may not be appropriate in every case, the removal of the policy space for governments to be able to require them restricts future governments from ensuring that domestic firms have access to technologies and investment opportunities.

5.3 Investor-State Disputes Process

All trade agreements contain State – to – State dispute processes to resolve disagreements arising between the countries involved. Investor-State disputes processes are additional disputes processes which allow investors to directly challenge government actions and sue for damages if they believe their investments have been harmed. Both the Thailand/Australia FTA and the Singapore/Australia FTA include such a clause. Investor-State dispute processes in other agreements like the North America Free Trade Agreement (NAFTA) have seen a range of government regulation aimed at protecting public health and the environment overturned in the interests of trade¹³. This allows unaccountable investors to challenge the democratic powers of governments to enact legislation that is in the public interest.

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

¹³ See Public Citizen's Report on all the cases included under the Investor-State Disputes Process in NAFTA at http://www.citizen.org/documents/Ch11cases_chart.pdf

Recommendation: Public services should be clearly and unambiguously exempted from trade agreements, including the AANZFTA and there should be no restrictions on the right of governments to regulate services in the public interest.

Recommendation: Australia should continue with the example set by the AUSFTA and not include investor-state dispute processes in the AANZFTA.

6. Ensuring Governments can Regulate Investment in the Public Interest

Chapter 11 on Investment outlines the commitments that both countries are making to open up domestic markets for investment. This chapter aims to facilitate investment in both countries by removing barriers or restrictions that may prevent individuals or companies from investing.

The chapter outlines the provision of both “National Treatment” and “Most-Favoured Nation Treatment”. National Treatment ensures that ASEAN and New Zealand companies are offered the same treatment as Australian companies in regard to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in Australia, and vice versa for Australian companies in ASEAN nations and New Zealand. Most-Favoured Nation Treatment ensures that any conditions granted to other countries that are more favourable are also granted to the countries under this agreement.

Under this chapter Australia is signing away its ability to ensure that foreign investment can be regulated in the public interest. Article 11.5 on Performance Requirements ensures that governments cannot specify that investment meet certain domestic goals. Article 11.5 states that measures must be consistent with the *Agreement on Trade-Related Investment Measures* in the WTO agreement. These include measures which are mandatory or enforceable under domestic law or under administrative rulings,

or compliance with which is necessary to obtain an advantage, and which restrict:

- (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
- (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

AFTINET is particularly concerned about the constraints that this places on governments ensuring that foreign investment supports domestic policy goals. These goals include the hiring of domestic workers, leaving Australian workers vulnerable to losing the opportunity to benefit from the investment.

There is a clause that allows for governments to not be constrained by the above in relation to implementing environmental measures. The general exceptions included in this agreement reflect those included in the WTO General Agreement on Trade in Services. These environmental measures must not be applied in an arbitrary or *unjustifiable* manner or constitute a disguised restriction to trade. The GATS exception clause covers measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; or
- (ii) necessary to protect human, animal, or plant life or health;

Whilst this provides some flexibility for governments to ensure that environmental measures won't be over ridden it is still far from certain. The term *unjustifiable* is yet to be defined and leaves itself open to broad interpretation. As has been mentioned above, there has also been a long history within the North American Free Trade Agreement (NAFTA) of exception clauses similar to the above being overruled by trade tribunals. Of

the eleven times that the exception clause has been used within the NAFTA it has been upheld only twice¹⁴.

The exception used in this agreement also fails to cover action taken by governments in order to protect exhaustible natural resources. As was noted by the Queensland Government in its JSCOT submission on the Australia/Chile FTA, the expropriation clause jeopardises its ability to regulate on future policy. The submission states: “Of particular concern is that there are insufficient guarantees to ensure the Queensland Government's future strategy for sustainable natural resource management will be unimpeded by the obligations imposed”¹⁵. Many of the concerns about the Australia/Chile FTA text are still present in the proposed AANZFTA.

Recommendation: There should be no restrictions on the right of governments to regulate investment in the public interest.

Recommendation: Measures taken to protect the environment should unequivocally take priority over measures taken to promote trade.

7. Economic Cooperation

The AANZFTA contains for the first time in an Australia FTA a chapter on “Economic Cooperation”. The Work Programmes for economic cooperation must be trade or investment-related and assist in the implementation of the Agreement.

Whilst it is encouraging that Australia and New Zealand are recognising the differing levels of development in the countries included in this agreement, it is unfortunate that this support is only coming in the form of aiding this FTA. What is lacking is economic cooperation to address the many social,

¹⁴ See Public Citizen's Report on all the cases included under the Investor-State Disputes Process in NAFTA at

http://www.citizen.org/documents/Ch11cases_chart.pdf

¹⁵ Premier of Queensland Submission to the Joint Standing Committee on Treaties, available at: <http://www.aph.gov.au/house/committee/jsct/4june2008/subs.htm>

environmental, labour, human rights, and regional impacts that remain unnoticed by this FTA. Australia and New Zealand should be committing to support the implementation of programs aimed directly at addressing these issues as opposed to only funding trade facilitation.

Recommendation: Australia ensure that any inclusion of “Economic Cooperation” is geared specifically to addressing the social, regional, economic, cultural, and environmental issues that are prevalent in FTA Partner countries.

8. Movement of Natural Persons

Australia’s commitments in Annex 4 on Movement of Natural Persons of the AANZFTA include commitments on “contractual service suppliers, being natural person with trade, technical or professional skills” (Annex 4, p.8).

This includes entry under subclass 457 visas, which have attracted widespread controversy following the abuse of workers by employers under the scheme. The justification of these arrangements was the need to address temporary skill shortages at a time of high economic growth.

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

The Rudd Labor Government recognised these serious issues, and conducted a review of Visa 457 conditions, (the Deegan Review) which reviewed employment conditions, protection from exploitation, health and safety, and English language requirements. On April 1, 2009 the government announced changes to Visa 457 conditions to address some of these issues. The general

directions of the proposed new conditions is welcome. However, they have yet to be finalised and converted into enforceable regulations¹⁶.

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

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

The inclusion of such arrangements in trade agreements, can mean they are effectively 'locked in', and extremely difficult for future governments to change. If, for example, a future government made further changes, Australia might have to compensate other trading partners or could be subject to legal action under the disputes process, resulting in trade sanctions.

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

We note that Australia's commitments under Annex 4 were made before the announcement of the proposed changes to Visa 457 arrangements, and that it is not clear whether the proposed changes will be in place before the final ratification processes for the AANZFTA are completed.

¹⁶ Senator Chris Evans, Minister for Immigration and Citizenship, "Government announces changes to 457 visa programme", April 1, 2009, found at www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm

We further note that the wording of Australia's commitments on Contractual Service Suppliers include that the natural person must be assessed as having the necessary qualifications, skills and work experience for his or her occupation, which must be listed as an occupation in high demand. The commitment also specifies that "Employer sponsorship requirements may change from time to time". It further specifies that "Labour market testing may be required for some occupations, to the extent that this is not inconsistent with Australia's commitments under the WTO and other international trade agreements to which it is a party as at entry into force of the Agreement". The Agreement is expected to come into force on January 1, 2010.

AFTINET welcomes the flexibility implied by the possibility that employer sponsorship requirements may change from time to time, and that labour market testing may be required for some occupations. Labour market testing is important because it would ensure that genuine skills shortages were being addressed. However the qualification that labour market testing will be included "only to the extent that it is not inconsistent with WTO commitments to which Australia is a party as at the time of entry into force of this agreement" means that the precise nature of the commitment is not clear

The commitment is dependent on WTO negotiations which may take place before the entry into force of the AANZFTA. The Australian Government offer in the WTO GATS negotiations made in 2005, which is the last published Australian offer in the negotiations, did not include labour market testing, and the DFAT explanation of that offer referred to "Australia's commitment to respond to demand for skilled temporary entrants without recourse to the overly burdensome requirements of labour market testing"¹⁷

The Deegan Inquiry and the Government's response have shown that it is essential for the Australian Government to be able to change the conditions for visa 457 entry in order to protect workers from being exploited. The details of the changes to these conditions have not yet been finalised. AFTINET

¹⁷ Department of Foreign Affairs and Trade, "WTO General Agreement on Trade in Services (GATS) Revised Offer 2005, Explanatory Guide", pp2-3.

submits that the wording of the AANZFTA is therefore unclear, because it refers to a WTO negotiation which has not yet been finalised, and which may or may not include labour market testing.

Recommendation: That arrangements for the movement of temporary workers who are vulnerable to exploitation should not be included in trade agreements.

Recommendation: If such arrangements are to be included, there should be absolute clarity that the Australian government has the right to change the conditions of those arrangements and introduce measures like labour market testing to prevent those workers from being exploited. The wording of the AANZFTA, which depends on the unknown outcome of another negotiation, does not provide this clarity.