Submission to the Senate Inquiry on Australia's relationship with China from the Australian Fair Trade & Investment Network

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Prepared for AFTINET by Jemma Bailey and Dr Patricia Ranald

Public Interest Advocacy Centre

Level 1, 46-48 York Street

Sydney NSW 2000

Phone: (02) 9299 7833

Fax: (02) 9299 7855

jbailey@piac.asn.au

pranald@piac.asn.au

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1. Overview

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 90 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. The Public Interest Advocacy Centre is a member organisation of AFTINET and has prepared this submission on AFTINET's behalf. AFTINET welcomes this opportunity to make a submission to the Senate Inquiry into Australia's relationship with China.

AFTINET notes that this Senate Inquiry has broad terms of reference and advises that this submission will focus specifically on term of reference (a)(iii): *The Australia-China Trade and Economic Framework and the possibility of a Free Trade Agreement (FTA) with China*. This submission will raise a number of concerns about the human rights, labour rights, environmental and developmental impacts of the proposed China Free Trade Agreement ('the Agreement'), and about the need for improved community consultation mechanisms. China is already Australia's second largest export market and third largest source of imports (DFAT, 2004a) and, given the strength of this existing trade relationship, AFTINET is sceptical about the need for and value of a preferential trade agreement while human rights issues are unresolved.

AFTINET supports the development of 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 framework that provides protection to weaker countries and is founded upon respect for democracy, human rights, labour standards and environmental protection. In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to bilateral negotiations that discriminate against other trading partners. AFTINET is particularly concerned about the recent proliferation of bilateral preferential agreements pursued by the Australian Government.

AFTINET believes that the following principles should underpin trading relations, and should guide Australia's approach to any trade agreement with China:

- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate in the public interest.
- Australia's trade negotiations with developing countries should be consistent with Australia's development goals and trade agreements should allow developing countries the flexibility to make laws and policies that allow them to direct their own development.
- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations.
- Before a decision is made to begin negotiations, comprehensive studies of the likely impacts of the Agreement should be undertaken and made public for debate and consultation. The issues studied should include the impacts on: human rights and labour conditions; employment; the environment; particular demographic groups, particular regions and particular industries; the ability of governments to regulate in the public interest; and the ability of developing countries to direct their own development.

At this stage, the Australian Government has not adequately addressed these principles. The *Trade and Economic Framework* prioritises a framework based on the principles of "equality, complementarity, mutual benefit and respect" but makes no reference to non-economic or development considerations (Trade and Economic Framework between Australia and the People's Republic of China, 2003, p1). The Government should produce a broader public issues paper on the Agreement that will assess the above list of principles recommended by AFTINET and that will indicate how the Government will take these principles into account if the Agreement is negotiated.

This submission is divided into four parts. This first part provides an overview. The second part addresses systemic concerns about the Agreement, being the need for effective community consultation, the relationship that the Agreement has with human rights and with Australia's development goals, and the need for modelling the impact of the Agreement in particular regions. The third part raises concerns about the content of the Agreement should negotiations proceed. Issues of concern include the need for governments to retain the capacity to regulate investment and essential services, the breadth of intellectual property commitments, the need to include chapters on human rights and the environment, and the rejection of an investor-state complaints process. The fourth part lists recommendations.

This submission was prepared in consultation with AFTINET members.

2. Principles underlying the Agreement

2.1 The need for effective community consultation processes

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. Consultation is particularly important in this instance as the Agreement is expected to be comprehensive and to impact on a variety of regional and demographic groups both in Australia and China.

To facilitate effective community debate, it is important that the Department of Foreign Affairs and Trade (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 negotiations (Senate Foreign Affairs, Defence and Trade Committee, 2003, paragraph 3.91). The key elements of these recommendations are that:

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

Processes such as these should be implemented from the outset for negotiations with China.

As this stage, AFTINET has a number of specific concerns about the community consultation process for the Agreement. Firstly, AFTINET is concerned about the progress of the Australia – China Free Trade Agreement Joint Feasibility Study. The purpose of the Feasibility Study was to assess the opportunities and challenges of the Agreement as a basis for the decision whether to proceed with negotiations (DFAT, 2004a). AFTINET is concerned that this study has been fast-tracked by six months to March 2005, and that the Trade Minister has been indicating since November 2004 that the Government will proceed with the Agreement (see, for example, Lewis, 2004). Further, it is AFTINET's understanding that the Feasibility Study was to be publicly released to allow for community debate of the results before the decision was made on whether or not to proceed with negotiations. There are now reports that the Feasibility Study will not be released until 22 April 2005, when negotiations are expected to be announced (Garnaut, 2005). This timing lacks transparency and allows no time for public consideration and debate of the results before formal negotiations begin.

Secondly, AFTINET is concerned about the timing of this Senate Inquiry. It is expected that the start of formal negotiations will be announced in April and this Inquiry will not report until September. It is unclear how this public submission process will feed into the negotiation process. AFTINET also notes that public

submissions to this Inquiry are due before the Feasibility Study is released and therefore the initial submissions will not be able to comment on the findings of the Feasibility Study. AFTINET eagerly awaits the release of the Feasibility Study and will make a further submission once it is released.

Finally, AFTINET is concerned about the Chinese government's capacity and willingness to undertake community consultation on the Agreement in China. China is not a democracy and there appears to be little opportunity in China for public comment on or scrutiny of trade agreements. AFTINET is unaware of any public consultation process in China on the Agreement to date.

2.2 The relationship between the Agreement and human rights, labour rights and environmental standards

It should be a prerequisite of Australia pursuing trade agreements that parties to the Agreement abide by international standards on human rights, labour rights and environmental sustainability, as defined by the United Nations (UN) and the International Labour Organisation (ILO). Trade agreements should not undermine these standards. AFTINET has serious concerns about China's record on human rights, labour rights and environmental protection.

AFTINET is particularly concerned about China's compliance with the *ILO Declaration on Fundamental Principles and Rights at Work*. China has ratified only three of the eight ILO Conventions that form the basis of the ILO Declaration and there are numerous reports of labour rights abuses, many of which occur in export-oriented industries.

Export processing zones have been established in southern China to produce export products as part of a Government strategy to attract foreign investment. In these zones, transnational corporations sub-contract orders to factories and accept the lowest bid. Workers in those factories are forced to work until the contract is completed, which often means working 14–16 hour days, 6–7 days a week, without proper payments for overtime. The downward pressure on wages and working conditions is maintained by a vast supply of rural labour, decentralised wage setting

and the lack of an independent union movement. Given these conditions, real wages have actually fallen over the past 12 years in these export processing zones (Chan, 2003, p41-43). This means that workers in export processing zones are not receiving a fair share of the enormous wealth from economic growth.

China's low labour standards should be placed in a global context of 'south-south competition'. South-south competition is where competition intensifies between low-wage developing countries to attract transnational investment (Chan & Ross, 2003, p1016-1021). As Greider notes, globalisation "is entering a fateful new stage, in which the competitive perils intensify for the low-wage developing countries … in the 'race to the bottom', China is defining the bottom" (Greider, 2001). Chan uses the example of competition between China and Mexico to illustrate the point that transnational corporations are moving to China, where wages and working conditions are lower than in Mexico (Chan & Ross, 2003, p1021). The negotiation of preferential trade agreements with China will place further downward pressure on working conditions, unless labour standards are enforced effectively.

Following are some examples of China's lack of compliance with labour rights:

- **The right of workers and employers to freedom of association and the effective right to collective bargaining** (ILO Conventions 87 and 98)
  China has not ratified the ILO Conventions 87 or 98 and China's ratification of the International Covenant on Economic Social and Cultural Rights was subject to a reservation that the right to establish and join workers organisations would be dealt with in accordance with China's law. Under China's *Trade Union Law* (adopted in 1950 and amended in October 2001), workers are not free to form or join the trade union of their choice and can only organise through the All-China Federation of Trade Unions (ACFTU). The ACFTU is closely associated with the Chinese Communist Party. The right to strike is not protected under law and attempts to start independent workers organisations are repressed (ICFTU, 2004). The International Confederation of Free Trade Unions (ICFTU) reports that labour activists are often subject to imprisonment or psychiatric detention, for example, when more than 5000 women from Nanchong city textile mill in

Sichuan province went on strike in October 2003 over wage arrears, more than 1000 police were called in and many arrests followed (ICFTU, 2004).

- **The elimination of discrimination in respect of employment and occupation** (ILO Conventions 100 and 111)

  China's Labour Law outlaws all forms of discrimination at work, however there are numerous reports that migrant workers and women are subject to discrimination in export processing zones. Chan notes that, "migrant workers are the main victims of the most serious labour-rights violations" as they provide a cheap flexible source of labour in export processing zones (Chan, 2001, p7). Migrant workers are required to possess a 'temporary residential permit' and are not entitled to the benefits enjoyed by local residents, such as social welfare, schooling or the right to own property. With regard to women, Chan further reports that factories display a systemic preference for single women, which allows factory owners to pay women at rate sufficient only for individual survival (Chan, 2003, p1021). AFTINET also notes that there is no legislation that prohibits gender discrimination in the hiring process (Chen, 2005).

- **Occupational health and safety**

  Article 47 of China's *Work Safety Law* states that workers who encounter a situation at work that directly endangers their personal safety have a right to stop work. Despite this, China's manufacturing and mining industries remain among the most dangerous in the world (ICFTU, 2004). *The Australian Financial Review* recently noted that over 6000 Chinese miners died in 2004 and that China has suffered an average of about one million industrial accidents a year since 2001 (Wyatt, 2005). Watts further provides that miners work "under appalling safety conditions [and] are sacrificed to fuel the factories that make the cheap goods" for export (Watts, 2005b).

AFTINET is also concerned about the lack of effective environmental protection in China. AFTINET understands that waste from industries in export processing zones is a serious human and environmental health problem in Southern China. In a recent interview, China's Deputy Minister of the Environment, Pan Yue, admitted that rapid

economic growth in China has come at a large cost to the environment (Spiegel, 2005). Elsewhere it is reported that:

> … decades of poorly regulated economic growth have left more than two-thirds of cities plagued by acid rain. Most rivers are heavily polluted and the urban air quality has become so bad that respiratory disease are now the leading cause of death (Watts, 2005).

China has introduced stricter environmental laws and regulations since 2000, however there are ongoing concerns that these laws are not enforced. Watts provides that China's state environmental planning agency is subordinate to China's industrial development, evidenced by the fact that only one third of the 586 plans for new power plants have been submitted to the environmental planning agency for assessment, despite this being required by China's law.

In the context of these reported abuses of human rights, labour rights and environmental standards, the Australian government should at the very least conduct a thorough and public study, before any negotiations are commenced, into what the current standards are and what impact preferential trade agreements may have on the conditions of workers and the environment in China. This study should also examine the ability of governments to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.

2.3 Ensuring consistency between Australia's development goals and trade goals

Australia's trade negotiations with developing countries should be consistent with the stated development goals of Australia's foreign and trade policy. DFAT formulates and disseminates development policies as a function of AusAID's work. AusAID defines its objectives as "to advance Australia's national interest by assisting developing countries to reduce poverty and achieve sustainable development" (AusAID, 2004a, p7).

China is recognised as a developing country, according to the Minister for Foreign Affairs (AusAID, 2004b).[1] China is the world's fastest growing economy, however AFTINET notes that China's economic development is not evenly distributed and extreme poverty exists in China. Watkins estimates that the distribution of income between urban and rural areas may be as high as 6:1 (Watkins, 2003, p7) and the Chinese State Council's Poverty Reduction Office recently announced that the number of farmers living in poverty increased by 800,000 in 2003 (Frost, 2004). Similarly, a World Bank study, released on 21 February 2005, reports that China's rural poor have suffered a "sharp 6% drop" in living standards since China's accession to the World Trade Organisation (WTO) (Globe and Mail, 2005). This study, based on surveys of 84,000 households, attributes this fall in living standards to a decrease in real wages and an increase in the prices of consumer durables.

AFTINET notes that the *Trade and Economic Framework* makes no reference to China's status as a developing country. As a developing country, China is entitled to special and differential treatment in the WTO, and AFTINET supports the inclusion of special and differential treatment in the Agreement. For Australia's trade policy to be consistent with development goals, negotiations should address the possible adverse effects of the Agreement on food security and on the livelihoods of poor farmers in China. Accordingly, the Agreement should contain a Special Safeguard Mechanism to ensure that there is not a flood of Australian imports into China that would force small farmers off their land. The Agreement should also include measures that ensure that developing countries have the flexibility to make laws and policies that allow them to direct their own development. For example, the Agreement should not seek to liberalise essential services and China should be allowed to maintain the capacity to regulate foreign investment to ensure that it delivers benefits and supports local industries.

2.4 Ensuring that there are sufficient modelling and impact studies on regional areas and particular demographic groups

[1] Excluding Hong Kong.

Any decision to commence negotiations should be based on comprehensive studies of the potential impact of the Agreement, including modelling in particular regional areas and demographic groups. These studies should seek input from regional and demographic groups in Australia and China that may be adversely affected by the Agreement. These studies should go beyond economic modelling to track the potential impacts on the environment, human rights, regulatory powers of government, and any restrictions on the ability of future governments at all levels to regulate in the public interest.

In this instance, there should be modelling to gauge the impact of the Agreement on employment in regional areas of Australia. DFAT's *China Fact Sheet* (DFAT, 2004b) and the *ANZ Industry Brief* (ANZ, 2004) together report that Australia's main imports from China are in manufacturing industries, such as clothing, textiles, footwear, sporting goods, toys, computers, telecommunications equipment and furniture. For example:

> … the range of Chinese merchandise available on the local market provides competition across a wide range of Australian manufacturing. Those industries will be most adversely affected through price competition… Those industry sectors having the highest import penetration rates are most likely to be significantly adversely affected, notably machinery and equipment and textiles, clothing and footwear (ANZ, 2004, p4).

In Australia, these industries employ large numbers of non-English speaking background workers in regional areas of high unemployment. In sectors such as the textile, clothing and footwear, tariffs are important in maintaining the ongoing viability of these sectors. Australian imports from China in these sectors are growing and regional employment studies are needed to show the impact of tariff reductions in these industries.

In previous agreements, such as the Thai-Australia Free Trade Agreement, DFAT's Regulatory Impact Statement made extensive mention of DFAT's efforts to ascertain the views of industry bodies and manufacturers throughout the negotiations. Any modelling and impact studies should enable regional communities and unions to input into the process regarding the impacts of the agreement and regional employment

studies should be publicly available in time for effective input by members of the public.

There should also be a proper investigation of the impact of awarding China 'full market economy status' in the Agreement. China does not have full market economy status under WTO rules. Paragraph 8 of the *Trade and Economic Framework* makes negotiations contingent on Australia formally granting China full market economy status. Community groups and industry groups are concerned that such recognition may have adverse implications on Australia's capacity to take anti-dumping action against Chinese imports, that are sold at less than their real cost of production (Lewis & Shanahan, 2004).

3. Content of the Agreement

3.1 Protecting the ability of governments to regulate investment and essential services

AFTINET advocates that trade agreements should not undermine the capacity of governments to make laws and policies in the public interest, particularly in regard to essential services and investment. Developing countries have consistently argued that it is critical for them to maintain the capacity to regulate foreign investment to ensure that it delivers development benefits. The Government should support the right of developing countries to continue to have such regulations, and not seek to limit this capacity.

Essential services should be exempt from the Agreement and the Government should not pursue commercial advantage for Australian service companies at the expense of China's future development. The inclusion of essential services, like health, water and education, in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. Governments should maintain the right to regulate to ensure equitable access to essential services and to meet social and environmental goals.

More specifically, public services should also be exempt from the Agreement. To ensure that public services are clearly and unambiguously exempt, it is important that public services are clearly defined. AFTINET is critical of the definition of public services used in 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, telecommunications, energy, and many more.

In past discussion papers relating to GATS, DFAT has asserted that public services will not be caught by such a definition, and it has drawn a distinction, by way of example, between public education services and private education services. Comments from the WTO Secretariat do not support DFAT's interpretation, and instead suggest a narrow interpretation of the GATS definition of public services (WTO, 1998). The Government has given assurances in other negotiations that it does not intend that public services or the capacity of governments to regulate services be diminished. If this is the case, public services should be formally and unambiguously exempted from this Agreement.

To the extent that services and investment are included in any trade agreement, it should be under a positive list rather than a negative list. A positive list allows parties and the community to know clearly what is included in the agreement. It also avoids the problem of inadvertently including in the Agreement future service or investment areas that are yet to be developed. A positive list means that only those sectors specifically intended to be included are included.

3.2 Provisions on intellectual property

AFTINET is concerned that the Australian government may seek to multilateralise the intellectual property (IP) commitments contained in the US Free Trade Agreement.

We are particularly concerned about including in the Agreement any IP commitments that would threaten equitable access to medicines, either in Australia or China.

We are aware that there are high levels of piracy in some manufacturing industries in China and we support the inclusion of measures in the Agreement that seek to enforce China's existing WTO commitments. However, the Agreement should not include IP commitments that are more onerous that the existing TRIPS agreement ('TRIPS-plus'). Such commitments can unduly privilege the rights of the owners of the copyright, trademark or patent over the rights of users, and can result in price rises that restrict equitable access to medicines.

3.3 Provisions on labour and the environment

Given the reported abuses of human rights, labour standards and environmental standards in China (see section 2.2 of this submission), AFTINET advocates that the Agreement should include specific provisions on labour and the environment. In particular, the Agreement should contain a strong labour rights clause, detailing the rights of workers in both countries to freedom of association, collective bargaining, freedom from discrimination in employment and occupational health and safety. A precedent of using labour and environment chapters was set in the US Free Trade Agreement, although AFTINET notes that such provisions are not included in the Singapore or Thailand Free Trade Agreements.

3.4 No Investor-State complaints process

The Agreement should not contain an investor-state complaints process, which gives corporations the right to complain to a trade tribunal and seek damages if a government law or policy harms their investments. AFTINET has consistently opposed this process, as it gives corporations unreasonable legal powers to challenge the laws and policies of another country. Any government–to–government disputes process should be open and transparent and should allow for submissions from public interest groups.

4. Recommendations

AFTINET recommends that the Government not negotiate a preferential trade agreement with China, so long as there abuses of human rights, labour rights and environmental standards in China.

If negotiations commence, AFTINET recommends the following:

- The Government should produce a broad public issues paper, which gives an assessment of the issues raised in this submission and indicates how the Government will take them into account during negotiations. This paper should include an analysis of the current state of compliance by China with human rights, labour rights and environmental standards.
- The Government should set out the principles and objectives that will guide Australia's consultation processes for the Agreement, and should have regular consultations with unions, community organisations and regional and demographic groups that may be adversely affected by the Agreement.
- The Government should establish a Parliamentary review process that gives Parliament the responsibility for monitoring the negotiations. Parliament should vote on the Agreement as a whole, not only the implementing legislation.
- The Government should ensure that negotiations are consistent with Australia's development goals.
- The Agreement should not seek to limit the capacity of governments to regulate foreign investment to achieve social policy.
- Essential services should be clearly exempted from the Agreement and, if services are included, the Agreement should employ a positive list (rather than a negative list) to denote the services to be included in the Agreement.
- The Agreement should not contain intellectual property commitments that are more onerous than existing WTO commitments.
- The Agreement should contain specific provisions protecting human rights, labour rights and environmental standards in Australia and China.
- The Agreement should not contain an investor-state dispute process.

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