



AFTINET
Australian Fair Trade
& Investment Network Ltd

128 Chalmers Street
Surry Hills, NSW, 2010
Phone: 02 9699 3686
Fax: 02 9699 3717
Email: campaign@aftinet.org.au
ACN 097 603 131
ABN 83 659 681 462
www.aftinet.org.au

**Submission to the Senate Foreign Affairs, Defence and Trade
References Committee Inquiry into the Commonwealth's treaty-
making process, particularly in light of the growing number of
bilateral and multilateral trade agreements**

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Contact Dr Patricia Ranald

AFTINET

128 Chalmers Street Surry Hills NSW 2010

Phone: (02) 9699 3686

Fax: (02) 9699 3717

Email: campaign@aftinet.org.au

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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 human rights, labour rights and environmental sustainability. We have been involved in this advocacy for 15 years, and so have long experience of the trade agreement process.

AFTINET welcomes this opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Commonwealth's treaty-making process, particularly in light of Australia's growing number of bilateral and multilateral trade agreements.

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, provided these are conducted within a transparent framework that provides fairness to less powerful countries and is founded upon respect for democracy, human rights, labour standards and environmental sustainability.

AFTINET recognises that the treaty-making process involves treaties other than trade agreements. Since the focus of this Inquiry is on trade agreements, this submission will mostly confine itself to the treaty-making process as it affects trade agreements. However the recommendations could apply to all treaties.

We would be pleased to appear at the Inquiry to discuss this submission.

The specific case for more open and democratic processes for trade agreements

The negotiation process for trade agreements differs in important ways from the negotiation of other treaties, particularly those negotiated through the United Nations, in areas like human rights or climate change. These treaties have a more public process, since they are debated through public UN forums, and the text of the agreement is publicly available before governments make the decision to sign it. The Department of Foreign Affairs and Trade (DFAT) only refers to this kind of treaty in its information about the treaty process, claiming that

“Negotiations for major multilateral treaties are generally lengthy and quite public, parliamentary debate often takes place as the issues become publicly known. For example, as the Climate Change Convention was negotiated over a period of years, issues associated with the draft convention were the subject of questions without notice, questions on notice, and debate” (DFAT, 2013b).

However, this open process of negotiations does not apply in the case of trade agreements. The negotiation process for multilateral, regional and bilateral trade agreements is not subject to public scrutiny. Historically trade negotiations and negotiating texts have been secret, and the final text of the trade agreement is not released until after governments have made the decision to sign it. This has been justified on the grounds of commercial confidentiality. However, as this submission will demonstrate, this justification is increasingly under challenge, and there are increasing numbers of cases in which trade agreement negotiating documents and final texts are being released for public and parliamentary decision before they are signed.

Trade agreements are legally binding and have stronger enforcement mechanisms than United Nations treaties. 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. Some trade

agreements also have a separate process by which a single foreign investor can sue a government for damages if they can claim that a change in law or policy harms the company's investment. This is known as Investor-State Dispute Settlement or ISDS.

The enforcement of trade agreements through economic sanctions contrasts with complaints processes governing most UN treaties, which do not have any penalties for lack of implementation, except naming and shaming. As DFAT comments:

“One such treaty body is the United Nations Human Rights Committee, which is responsible, among other things, for monitoring States Parties' implementations of their obligations under the *International Covenant on Civil and Political Rights (ICCPR)*. But any assessments such treaty bodies make are of an advisory nature only. They are not binding and the Human Rights Committee has no enforceable legal jurisdiction over nation states which have acceded to the ICCPR or its First Optional Protocol” (DFAT, 2013b).

Trade agreements are also difficult to withdraw from, especially if they involve more than one party. The terms of most trade agreements require that any government wishing to withdraw from them must compensate the other parties for loss of market access. This economic penalty has proved a very effective deterrent for governments from withdrawing from trade agreements.

Again this contrasts with DFAT's summary of the ability of governments to withdraw from UN treaties:

“The Government also retains the right to remove itself from treaty obligations if it judges that the treaty no longer serves Australia's national and international interests” (DFAT, 2014).

In summary, the official DFAT descriptions of the current decision-making process for treaties overwhelmingly use examples from multilateral UN treaties. For these treaties, the negotiating process is a public UN debate, the text is available before it is signed, there are no enforceable penalties and it is relatively easy for governments to withdraw from them without penalty.

In contrast, the trade agreement process is secret. There is no public and parliamentary access to the text until after it is signed. Trade agreements are enforced through economic sanctions, and governments cannot withdraw from them without facing economic penalties.

As discussed below, trade agreements also deal increasingly with a wide range of issues which would normally be debated and legislated through the democratic parliamentary process. All of these factors lead to the conclusion that the texts of trade agreements need full public and parliamentary scrutiny before the decision is made to sign them.

The recommendations of this submission therefore deal specifically with trade agreements, but can also be applied to other treaties.

Trade agreements increasingly deal with domestic law and policy, resulting in a democratic deficit

Since the *Trick or Treaty Report* in 1996, which resulted in the establishment of the current process, the role of Parliament and the Executive in the trade agreement process has been the subject of continuous debate and two parliamentary Inquiries, in 2003 and 2012, both of which recommended increased public and parliamentary scrutiny¹.

This debate has grown because trade agreements increasingly deal not only with traditional trade issues like reduction of tariffs and quotas on goods and agriculture, but with a wide range of regulatory issues which would normally be debated and legislated through the democratic parliamentary process.

¹ Senate Foreign Affairs, Defence and Trade References Committee, (2003) *Report: Voting on Trade*, Canberra and Joint Standing Committee on Treaties, (2012b) *Report on the Inquiry into the Treaties Ratification Bill 2012*, Canberra.

For example, at the beginning of the Australia-US Free Trade Agreement negotiations, the US government made it clear that it was pursuing changes to Australian domestic regulation on behalf of its largest export industries, including the pharmaceutical, media, information technology and other industries (Zoellick 2002). These goals were pursued in the interests of these US industries, regardless of the rights and interests of Australians.

The negotiations resulted in changes to Australian law or regulation in the following areas:

- Strengthening of monopoly patent rights on medicines, through changes to the Therapeutic Goods Act, which contribute to delay the availability of cheaper generic medicines (Lopert and Gleeson, 2013).
- Extensions of Copyright terms and conditions, which meant longer payment periods for royalties on creative works, from life of the author +50 years to life of the author +70 years, and stronger penalties for breaches of Copyright. This has meant extra costs for consumers, libraries and educational institutions. Australia is a net importer of copyrighted goods. The Productivity Commission quoted a 2004 study which showed that these changes increased net royalty payments to overseas copyright holders by 25% or \$88 million per year (Productivity Commission 2010:166).
- Reductions and restrictions on Australian content for digital media (DFAT, AUSFTA text 2004).
- Reductions in the ability to have local content provisions in government procurement (DFAT, AUSFTA text 2004).

Several studies of the economic outcomes from AUSFTA have shown little or no economic benefits for Australia. The latest analysis of economic data from the ANU Crawford School of Public Policy shows that after 10 years, the preferential AUSFTA agreement diverted trade away from other trade partners. Australia and the United States have reduced their trade with the rest of the world by \$68 billion and are worse off than they would have been without the agreement (Armstrong, 2015).

This begs the question of why Australia would make significant changes to its own domestic legislation which increase costs for government and consumers for an agreement which did not deliver economic benefits. It can be argued that the fact that the text of the agreement was not available until after Cabinet authorised it to be signed, and the limited Parliamentary scrutiny only of the implementing legislation in a compressed time frame, meant there was no full and independent evaluation of the costs and benefits of the agreement before it was signed.

We know from leaked documents in the current Trans-Pacific Partnership Agreement (TPP) negotiations that there are US proposals in the TPP for additional changes to Australian law and regulation in all of the areas listed above in AUSFTA. In addition, DFAT has reported that the TPP has chapters or topics dealing with regulatory transparency, regulatory coherence, including food regulation, application of patents to living organisms and genetic materials, regulation of information technology, including electronic data privacy, and financial regulation (DFAT 2013a).

All of these have public interest implications, and have been the subject of public debate in Australia. Proposals for change would normally take place through open democratic parliamentary processes.

The Trans-Pacific Partnership Agreement (TPP), under negotiation at the time of writing, also contains a proposal for Investor-State Dispute Settlement (ISDS). This is a separate process from the government-to-government dispute process found in all trade agreements. ISDS allows a single foreign investor to sue a government for damages in an international tribunal if a change in law or policy can be claimed to harm their investment. This proposal was so controversial that the Howard Coalition government did not agree to include it in the AUSFTA in 2004, and the Productivity Commission recommended against its inclusion in trade agreements in 2010 (DFAT 2004, Productivity Commission 2010).

Three Australian parliamentary Inquiries held in 2014 revealed increasing numbers of cases and mounting evidence that ISDS tribunals lack the basic principles of fairness and consistency enshrined in domestic legal systems. There is no independent judiciary, and there are no precedents or appeals. Australian High Court Chief Justice French has commented that ISDS decisions can undermine domestic court systems (JSCOT 2014, Senate Foreign Affairs Defence and Trade References Committee 2014, Senate Foreign Affairs Defence and Trade Legislation Committee 2014, French 2014).

The European Union paused negotiations for the Transatlantic Trade and Investment Partnership (TTIP) with the US in order to conduct a public enquiry into ISDS, which received 150,000 submissions, 88% of which were opposed to it (Schepel, *et al*, 2014 EU, 2014).

All of this evidence supports the argument that the text of the agreement, including any provisions for ISDS, should be released for public and Parliamentary scrutiny before it is signed, and should be voted on by Parliament.

Indeed it can be argued that some governments see trade agreements as an opportunity to lock in changes to domestic law and policy which would not survive democratic parliamentary scrutiny. For example, a recent Review of Pharmaceutical Patents criticised the strengthening of patents on medicines at the expense of consumers and government revenue, and reviews of Copyright law have consistently criticised the strengthening of Copyright law at the expense of consumers (IP Australia 2013, Burrell and Weatherall, 2008).

Processes for public and stakeholder consultation

The current consultation process is very one-sided. Stakeholders can make their views known to the Department of Foreign Affairs and Trade (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.

After Cabinet has made the decision to commence trade negotiations, invitations for submissions are placed on the DFAT website. For some but not all trade agreements, meetings are held on request with 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 general briefing meetings with a range of stakeholders, where questions can be asked. However departmental officers are not permitted to reveal details of any text being negotiated, so the answers to questions are often limited.

DFAT has also held one meeting per year in Canberra, at which there were very brief summaries of the state of all current negotiations. Such meetings deal with up to 10 or more negotiations in two hours, which gave very little time for questions and discussion.

In the cases of the negotiations for the Korea FTA, the Japan FTA and the China FTA, community organisations were not informed of DFAT briefings on any of these agreements after September 2013, although we understand some business organisations were consulted about some issues.

In the case of the TPP involving Australia and 11 other governments, still under negotiation at the time of writing, general briefings for Australian stakeholders were held twice a year in several cities, with briefings on particular issues held more often when requested by stakeholders.

Negotiations themselves were held in a variety of locations hosted by the TPP governments. Until September 2014, stakeholders were permitted to attend negotiations and present papers to negotiators on particular issues.

However after September 2014, there were no more arrangements for stakeholder presentations to negotiators and the dates and location of negotiating meetings have been kept secret until only two weeks before the negotiations take place.

This means the TPP negotiations have essentially gone underground and access to negotiators has been reduced in the last stages of the process when key decisions are being made. Most community organisations do not have the resources to attend negotiations in other countries at such short notice when there are no formal opportunities to meet with negotiators. However large business organisations with more resources have continued to attend and presumably have met informally with negotiators.

The secrecy of the TPP negotiations and the refusal to release the final text before it is signed has meant that stakeholders have so far had to rely on leaked documents for detailed information (TPP 2011, 2012, 2013, 2014).

Trade agreements are very complex legal documents, where the devil is in the detail. Without access to the text, we are heading for an AUSFTA scenario, where the agreement will be signed before the text is released, and there will be no opportunity for independent evaluation and decision-making about the text by Parliament.

The European Union is currently negotiating a Trans-Atlantic Partnership (TTIP) with the US which is frequently described as the Atlantic equivalent of the TPP. It has announced in response to community debate that it will release for public discussion its own proposals and discussion papers in the negotiations and will release the final text of the agreement for public and parliamentary discussion before it is signed (EU, 2015).

If this can be done for the TTIP, why not for the TPP and other agreements?

The role of the Executive and Parliament

The current process for the negotiation and signing of trade agreements is essentially a Cabinet process. Cabinet makes the decision to enter into trade negotiations, which is then reported to Parliament but cannot be changed.

The negotiations and negotiating documents are generally secret, and the final text remains secret until after Cabinet has authorised the text to be signed. The formal signing is done by the Federal Executive Council, which comprises the Governor-General and all serving Ministers and Parliamentary Secretaries. A meeting of the Executive Council requires the presence of the Governor-General plus two Ministers and/or Parliamentary Secretaries (DFAT 2013b).

After signing, the text becomes public, is tabled in Parliament for up to 20 sitting days, (depending on the status of the agreement) together with a National Interest Analysis and a Regulatory Impact Statement and examined by the Joint Standing Committee on Treaties (DFAT 2013b).

The Committee cannot change the text of the agreement, and can only make recommendations about the legislation needed to implement the agreement. After the implementing legislation is passed, the final ratification process can occur between the parties to the agreement.

The National Interest Analysis (NIA) is prepared by DFAT, which is the Department responsible for negotiating the agreement. This means that NIAs inevitably recommend in favour of the agreement. There is no independent assessment of the costs and benefits of the agreement.

Professor George Williams has commented:

“NIAs often do little more than outline basic information about a treaty and the consultation processes the government has used in considering becoming party to the treaty. NIAs typically lack depth of analysis and often do not provide an effective platform for the parliamentary or public debate that many treaties might provoke” (Williams, 2012:3).

The Parliamentary debate and voting process on trade agreements are also limited by the fact that Parliament only votes on those aspects of the agreement which require immediate changes to Australian law, not on the whole text of the treaty.

This usually includes changes to tariff levels, and other legislation for those parts of the agreement which require immediate change. However there are many aspects of trade agreements which can have profound effects on the ability of future governments to legislate or regulate, which do not require legislation. For example, ISDS does not require any change to Australia's domestic legislation. All of the ISDS processes are simply contained in the text of the agreement and apply when the agreement comes into force. Parliament cannot debate or vote on this aspect of the agreement. Yet many kinds of future regulatory change could be challenged through ISDS.

In addition to ISDS, trade agreement chapters often have regulatory "standstill" provisions in which governments undertake not to introduce new laws or regulation which could be seen as "more burdensome" for business. This treats regulation as if it were a tariff, to be frozen at current levels and reduced in the future.

But circumstances change, and governments have to respond to these changes. For example, in the wake of the Global Financial Crisis, most governments agreed that new regulation of financial institutions and services was required to prevent future crises (United Nations Stiglitz Report 2009).

In the area of food regulation, there is an ongoing debate about the adequacy of nutritional information on food labels. In February 2015, the contamination of frozen berries imported from China has led to calls for improved health testing of imported food, and for clearer country-of-origin labelling (Choice 2015). Public health organisations are advocating for mandatory warnings against alcohol use by pregnant women (O'Brien and Gleeson, 2013).

All of these areas of future regulation could be restrained by obligations in trade agreements without Parliament being able to debate or vote on them.

In short, the practice of secret trade negotiations conducted by Cabinet without release of the final text before it is signed is becoming increasingly unacceptable as trade agreements include many areas of public policy which would normally be debated through the public parliamentary process. Parliamentary voting only on the implementing legislation does not address this problem because many aspects of the text of trade agreements which can constrain future legislation or policy are not debated or voted on.

Recommendations:

1. Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.
2. There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. The Australian government should follow the example of the European Union and release proposals and discussion papers during trade negotiations.
3. The Australian government should follow the example of the European Union and release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.
4. The current NIA process is inadequate. After the text is completed but before it is signed, comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.

The role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation

As discussed above, after trade agreements have been authorised for signing by Cabinet, the text is tabled in Parliament for up to 20 joint sitting days and reviewed by the Joint Standing Committee on Treaties (JSCOT). There are three categories of treaties:

- **Category 1** major treaties which the Committee is required to report on within 20 joint sitting days;
- **Category 2** treaties which the Committee is required to report on within 15 joint sitting days; and
- **Category 3** treaties are considered to be 'Minor treaty actions' which the Committee generally approves without a full inquiry.

Because the JSCOT has the task of reviewing all treaties, it has a very heavy work schedule and has to review several treaties at the same time. This means that in many cases it receives very few submissions and holds only one hearing in Canberra. It can only justify holding hearings outside Canberra if it receives many submissions and there is evident public interest in the agreement.

The committee is therefore hard pressed to thoroughly analyse trade agreements, which are highly technical documents of 1000 to 2000 pages each.

The National Interest Analysis and Regulatory Impact Statement 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 government of the day has a majority of members of this joint committee, which means the committee 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, as Prof George Williams has observed.

The one exception to this momentum 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 (JSCOT 2012a).

There have been JSCOT minority reports which were more critical, and in some cases have recommended that changes to the trade agreement text be negotiated, or have recommended against some or all of the implementing legislation (JSCOT 2004, 2014).

JSCOT itself has also made recommendations for greater transparency in trade agreement negotiations (JSCOT 2012b:15).

Given the complexity and the differences between trade agreements and other treaties summarised above, AFTINET recommends that the joint committee have two subcommittees, one dealing with trade agreements and the other dealing with all other treaties.

If there were a subcommittee dealing specifically with trade agreements, it would have more time and capacity to play a greater role in the parliamentary process.

Recommendation:

5. That there be a separate subcommittee of JCSOT to deal with review of trade agreements. This subcommittee should review the text of a trade agreement which has been released before signing with an independent assessment of its costs and benefits, and make a recommendation to Parliament.

Changing international practice and examples of greater transparency in trade negotiations

Over the last decade the growing public opposition to secrecy in trade negotiations has resulted in increasing numbers of examples of greater transparency.

Since 2003, World Trade Organisation proposed texts, offers and background papers have been placed on the WTO public website (WTO 2003). In the case of the Anti-Counterfeiting Trade Agreement (ACTA), which dealt with the extension of intellectual property rights, there was so much controversy that governments agreed to release the text in 2011 before it was signed. These are precedents for both the release of negotiating documents and the release of final text before it has been signed by governments (ACTA 2011).

Most recently, as discussed above, the European Union has been involved in a public debate about the lack of transparency in its negotiations with the US for a Trans-Atlantic Trade and Investment Partnership, described as the Atlantic equivalent of the TPP. The EU Commission announced in January 2015 that it would release its own negotiating proposals, and would release the full text of the agreement at the end of the negotiations for public and parliamentary debate before it was signed. This is a very significant precedent for all trade negotiations (EU 2015).

The US Congress trade agreement process

Under the United States Constitution, trade agreements are negotiated by the Executive 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.

The US has a system of industry-based and some issue-based trade consultation committees, consisting of about 600 industry advisers and a very small number of non-business community representatives. Members of these committees are permitted to see those aspects of the text which are relevant to each committee. They are not permitted to take away copies of the text, and are sworn to keep the contents confidential. Some members of Congressional committees are also permitted to see text on the same basis, of no copies permitted and sworn confidentiality (US Congressional Research Service 2010).

Because of its different constitutional arrangements, the US model is difficult to translate directly into the Australian context. However the US model does provide an example of a greater role for elected representatives of Congress to approve and set the parameters of trade negotiations, to be informed of the progress of negotiations and to see and vote on the text of the agreement before implementing legislation and ratification. The constitutional issues for Australia in using aspects of this model will be discussed in the next section.

Constitutional issues: experts say that greater Parliamentary role is compatible with the Constitution

It has been argued that Parliament cannot play a greater role in the trade agreement process because the Australian Constitution, based on the Westminster system, gives treaty-making powers to the Executive.

However constitutional experts Prof George Williams, University of New South Wales, and Prof Anne Twomey, University of Sydney, have argued in submissions to a previous Parliamentary Inquiry that a greater role for Parliament could be consistent with the Australian Constitution.

Based on the historical development of treaty-making in Australia, Professor Twomey argues that it would be constitutional for the treaty-making power of the Executive to be limited by a provision of the approval of both Houses of Parliament. She quotes Professors Winterton’s

and Campbell's opinions that the power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. This would be the case if the Parliament did not purport to exercise the power to ratify treaties, but instead made the approval of its two Houses a condition precedent to the exercise by the Government of its executive power (Twomey 2012: 2).

Professor Twomey notes that there are several examples in the Westminster system in which the decisions of the Executive on international agreements are subject to Parliamentary approval in the way outlined above. These include the United Kingdom and Ireland. In both cases the treaty is tabled in Parliament before signing and Parliament has the ability to accept or reject it (Twomey 2012:2).

Professor George Williams has described the democratic deficit in the process of treaty-making, particularly in relation to trade agreements like the AUSFTA. He says JSCOT should have a clearly mandated role early in the process of inquiring into treaty actions, before such instruments are signed by the executive (Williams 2012: 5).

He also stated in evidence to the JSCOT:

"I have also looked at the submission of Professor Twomey and I agree with her conclusions and the statements made. I think it is possible for parliament to legislate to not take over the ratification function but to make it subject to a decision of parliament" (JSCOT 2012:18).

Based on these expert opinions, the JSCOT 2012 inquiry concluded that making the Executive decisions on treaties subject to a decision of Parliament would not be unconstitutional (JSCOT 2012:19).

Recommendations:

6. Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text, the JSCOT review of the text and of the independent assessment of the costs and benefits of the agreement, Parliament should then decide whether the Cabinet should approve the agreement for signing.
7. If the agreement is approved by Parliament, and following Cabinet approval and signing by the Federal Executive Council, Parliament should then vote on the implementing legislation.

Incorporating Fair Trade Principles into Trade Agreements

Trade should not be seen as an end in itself. Trade agreements should contribute to rising living standards for all and support the development of human rights, labour rights and environmental sustainability. Without commitment to these principles, intensification of global competition can result in downward pressures on living standards and a race to the bottom on labour rights and environmental standards.

Trade agreements should not contain provisions which undermine the ability of governments to regulate in the public interest.

Support for and implementation of Internationally-recognised labour rights

The Australian government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. These include:

- 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), and
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation:

8. Trade agreements should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

Support for and implementation of Internationally-recognised Environmental Standards

Protection of the environment is a critical trade policy objective. Trade agreements should require full compliance with an agreed-upon set of Multilateral Environmental Agreements, with effective sanctions for noncompliance.

At the same time, trade agreements must ensure that other provisions, such as investor-state dispute processes, do not undermine the ability of governments to regulate in the interest of protecting the environment.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should not restrict governments' ability to adopt measures to address climate change.

The implementation of environmental standards should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation:

9. Trade agreements should require the adoption and implementation of applicable international environmental standards including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.

Trade agreements should not contain provisions for Investor-State Dispute Settlement (ISDS)

The growing public, academic, Parliamentary and government criticism of ISDS provisions is summarised in the section in the submission on the democratic deficit in trade agreements on pages 5-6.

Recommendation:

10. Trade agreements should not contain provisions for Investor-State Dispute Settlement (ISDS).

Trade agreements should not undermine the ability of governments to regulate services in the public interest

Trade agreements should not undermine the ability of Governments to regulate in the public interest, particularly in regard to essential services like health, education, social services, water and energy.

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. Positive lists are used in the GATS and AANZFTA agreements. A positive list allows parties and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas, which are yet to be developed. A positive list means that only that which is specifically intended to be included is included.

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. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, employment and training of local people, transfer of technology or relationships with local industry. Governments should maintain the right to regulate to ensure equitable access to essential services, local employment and industry development and to meet social and environmental goals.

Public services should be clearly excluded from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in many trade agreements 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, some public and private services are provided side by side.

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.

Recommendations:

11. Trade agreements should use a positive list to identify which services will be included in an Agreement.
12. Public services should be clearly and unambiguously excluded, and there should be no restrictions on the right of governments to provide and regulate services in the public interest.

Trade agreements should not include extensions of monopoly intellectual property rights at the expense of consumers

As discussed on pages 4-5, trade agreements should not contain provisions for extension of monopoly rights on medicines which would delay the availability of cheaper generic medicines, and should not contain provisions which extend Copyright provisions to benefit Copyright holders at the expense of consumers. Such provisions extend monopoly rights at the expense of consumers and have no place in what are claimed to be free trade agreements. Since Australia is a net importer of patented and copyrighted products, they also contribute to the trade deficit and represent a loss to the Australian economy.

Recommendation:

13. Trade agreements should not contain provisions which extend monopoly rights for patents on medicines, or which extend Copyright provisions to benefit Copyright holders at the expense of consumers.

Summary of recommendations

The Trade agreement Process

1. Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic regional, social, cultural, regulatory and environmental impacts which are expected to arise.
2. There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders. There should be regular reports to Parliament. To enable meaningful and informed consultation, the Australian Government should follow the example of the European Union and release proposals and discussion papers during trade negotiations.
3. The Australian government should follow the example of the European Union and release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.
4. The current NIA process is inadequate. After the text is completed and released for public discussion before signing, comprehensive independent studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and review by JSOT and other relevant parliamentary committees.
5. Given the complexity and length of trade agreements, there should be a separate sub-committee of JCSOT to deal with review of trade agreements. This subcommittee should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.
6. Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text, the JSCOT review of the text and of the independent assessment of the costs and benefits of the agreement, Parliament should then decide whether the Cabinet should approve the agreement for signing.
7. If the agreement is approved by Parliament, and following Cabinet approval and signing by the Federal Executive Council, Parliament should then vote on the implementing legislation.

Incorporating Fair Trade Principles into Trade Agreements

8. Trade should not be seen as an end in itself. Trade agreements should contribute to rising living standards for all and support the development of human rights, labour rights and environmental sustainability. Without commitment to these principles, intensification of global competition can result in downward pressures on living standards and a race to the bottom on labour rights and environmental standards.
9. Trade agreements should require the adoption and implementation of agreed international standards on labour rights, enforced through the government to government dispute processes contained in the agreement.

10. Trade agreements should require the adoption and implementation of applicable international environmental standards including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement.
11. Trade agreements should not contain provisions for Investor-State Dispute Settlement (ISDS).
12. Trade agreements should not undermine the ability of government to regulate essential services. A positive list should be used to identify which services will be included in an Agreement. Public services should be clearly and unambiguously excluded, and there should be no restrictions on the right of governments to fund and regulate services in the public interest.
13. Trade agreements should not contain provisions which extend monopoly rights for patents on medicines, or which extend monopoly Copyright provisions to benefit Copyright holders at the expense of consumers.

References

- Anti-counterfeiting Agreement (ACTA) Text (2011) found at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf [accessed November 10, 2013].
- Armstrong, S. (2015) "The economic impact of the Australia-United States free trade agreement", *Australia-Japan Research Centre*, Working Paper 01-2015, January found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558855 [accessed February 9, 2015].
- ACTU (2014) Submission to the Review of the 457 visa program, Melbourne 30 April 2014 found at <http://www.actu.org.au/Publications/Submissions/ACTUSubmissionReviewofthe457visaprogram.aspx> [accessed February 20, 2015].
- Australian Manufacturing Workers Union (2008) *Submission to the Review of export policies and programs*, Melbourne found at <http://www.dfat.gov.au/trade/topics/review-of-export-policies-programs/Documents/AustralianMetalWorkersUnion.pdf> [accessed February 20, 2015].
- Burrell, R., and Weatherall K, (2008) 'Exporting Controversy? Reactions to the Copyright Provisions of the U.S-Australia Free Trade Agreement: Lessons for U.S. Trade Policy', *The Journal of Law, Technology and Policy* 2008, p.p.259-317.
- Choice (2015) "Australians can't be sure where their frozen fruit and veggies come from" found at <http://www.choice.com.au/media-and-news/consumer-news/news/country-of-origin-labelling-on-frozen-fruit-and-veg-210215.aspx> accessed February 20, 2015].
- Department of Foreign Affairs and Trade (2004) AUSFTA Text found at <http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/table-of-contents.aspx> [accessed February 20, 2015].
- Department of Foreign Affairs and Trade (2013a) Overview of the Trans-Pacific Partnership agreement, found at <http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf> [accessed February 20, 2015].
- Department of Foreign Affairs and Trade (2013b) *The Treaty making process*, found at <http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx> [accessed February 19, 2015].
- Department of Foreign Affairs and Trade (2014a) *Text of the Korea Australia Free Trade Agreement*, February found at <http://www.dfat.gov.au/fta/kafta/> [accessed March 27, 2014].
- Department of Foreign Affairs and Trade (2014b) *China-Australia Fact Sheet: movement of natural persons*, November, Canberra, found at <http://www.dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-movement-of-natural-persons.aspx> [accessed February 20, 2015].
- European Parliamentary Research Service (2014) "Investor-State Dispute Settlement (ISDS): state of play and prospects for reform," European Parliamentary Research Briefing, Brussels, January found at [www.europarl.europa.eu/.../LDM_BRI\(2014\)130710_REV2_EN.pdf](http://www.europarl.europa.eu/.../LDM_BRI(2014)130710_REV2_EN.pdf) [accessed March 27, 2014].
- European Union (2015) *EU negotiating texts in TTIP*, February, Brussels, found at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [accessed February 12, 2015].
- French, R.F Chief Justice (2014) "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin found at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf> [accessed August 8, 2014].

- Gaukrodger, D., and Gordon, C. (2012) "Investor-state dispute settlement: a scoping paper for the investment policy community", *OECD Working Papers on International Investment*, no. 2012/3, OECD Investment Division, Paris, December found at www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf [accessed March 27, 2014].
- IP Australia (2013) *Pharmaceutical Patents Review, Draft Report*, April 3, Canberra.
- Joint Standing Committee on Treaties (2004) *Report 61 on the Australia-US Free Trade Agreement*, June, Canberra.
- Joint Standing Committee on Treaties (2012a) *Report 126 on the Anti-Counterfeiting Trade Agreement*, June, Canberra.
- Joint Standing Committee on Treaties (2012b) *Report 128 on the Treaties Ratification Bill 2012*, August, Canberra.
- Joint Standing Committee on Treaties (2014) *Report 142 on the Korea Free Trade Agreement*, September, Canberra.
- 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. DOI: 10.1111/jlme.12014.
- O'Brien, P.L., and Gleeson, D.H. (2013) [Retaining our right to regulate alcohol warnings: The Trans Pacific Partnership Agreement must preserve Australia's options](#). *Medical Journal of Australia*, 199(7): 447.
- Schepel, H., et al, *Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)*, found at https://www.kent.ac.uk/law/isds_treaty_consultation.html [accessed September 20, 2014].
- Senate Foreign Affairs, Defence and Trade References Committee, (2003) *Report: Voting on Trade*, Canberra.
- Senate Foreign Affairs, Defence and Trade References Committee, (2014) *Report on the Korea-Australia Free Trade Agreement*, Canberra.
- Senate Foreign Affairs, Defence and Trade Legislation Committee, (2014) *Report on the Protecting the Public Interest Bill*, 2014, Canberra.
- Trans-Pacific Partnership Agreement (2011) *Leaked Intellectual Property Rights Chapter*, January 10, 2011 found at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.
- Trans-Pacific Partnership Agreement (2012) *Leaked Investment Chapter*, found at <http://tinyurl.com/tppinvestment> [accessed June 30, 2012].
- Trans-Pacific Partnership Agreement (2013) *Leaked Intellectual property Rights Chapter*, WikiLeaks, found at <https://wikileaks.org/tpp/> [accessed November 14,, 2013].
- Trans-Pacific Partnership Agreement (2014) *Leaked Intellectual property Rights Chapter*, WikiLeaks found at <https://wikileaks.org/tpp-ip2/> [accessed October 17, 2014].
- Twomey, A., *Submission to the Joint Standing Committee on Treaties Inquiry on the Treaties Ratification Bill 2012*, May, Sydney.
- Weatherall, K, (2014), *TPP – Section-by-Section Analysis of Some Provisions People Aren't Talking About*, Social Sciences Research Network, October, found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516058 [accessed December 12, 2014].
- 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 (the Stiglitz Commission)* New York.

US Congressional Research Service (2010) *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy* found at <http://fpc.state.gov/documents/organization/152034.pdf> [accessed February 20, 2015].

Williams, G., Submission to the Joint Standing Committee on Treaties Inquiry on the Treaties Ratification Bill 2012, May, Sydney.

Zoellick, R. (2002) "Letter to the US Senate", Washington, 13 November found at http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/USTR_Zoellick_Notifies_Congress_of_Intent_To_Initiate_Free_Trade_Negotiations_With_Australia.html [accessed 1 September 2004].