

**Submission to the Department of Foreign Affairs and Trade on
Australia – Japan Free Trade Agreement Negotiations from the
Australian Fair Trade & Investment Network (AFTINET)**

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Prepared for AFTINET by Michele Freeman and Dr Patricia Randal

Level 6, 3 Smail St Broadway

Sydney NSW 2007

Phone: (02) 9212 7242

Fax: (02) 9211 1407

campaign@aftinet.org.au

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. AFTINET welcomes this opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) on the negotiations for an Australia – Japan Free Trade Agreement.

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 guide Australia's approach to a feasibility study for a possible trade agreement with Japan:

- 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 negotiations begin, comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation.
- 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.

This submission raises AFTINET's concerns regarding these negotiations. Specifically, this submission raises the need for effective community consultation and transparent negotiations, questions the need and benefits of the proposed Free Trade Agreement (FTA) with Japan, and notes the potential for the FTA to undermine the ability of governments to regulate in the public interest.

2 Responding to the Australia – Japan Feasibility Study

2.1 Public consultation and debate

AFTINET has a number of specific concerns about the community consultation process for the Australia - Japan FTA. AFTINET is concerned about the effectiveness and the transparency of the community consultation process employed in the Joint Feasibility Study.

The purpose of the Feasibility Study was to analyse the possible implications of a comprehensive FTA to enable both countries to consider whether they will proceed to formal FTA negotiations (DFAT, 2006). It was AFTINET's understanding that the Feasibility Study would be published to allow for public scrutiny of the results before the formal announcement that negotiations would begin. However, the Feasibility Study was only released once the decision to go ahead with negotiations had been made.

Delaying the release of the Feasibility Study meant that there was no opportunity for community or parliamentary debate about the reliability of the claims in the Feasibility Study and about the impacts of the Australia – Japan FTA on our national interest and sovereignty.

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 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, ‘Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement’, 26 November 2003 at 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.

Recommendation: That the Government set out the principles and objectives that will guide Australia’s consultation processes for the FTA with Japan 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 FTA and that Parliament should vote on the agreement as a whole, not only the implementing legislation.

2.2 Flaws in the economic modelling of the Feasibility Study

The Australia - Japan Joint Feasibility Study predicts a net gain for Australia's GDP of \$39 billion over 20 years (DFAT, 2006). AFTINET is concerned that this claimed economic benefit is misleading as it is calculated on the basis that *all* tariffs will be removed across *all* sectors. The Study admits that this economic modelling is a "simplification of reality and relies on numerous assumptions" (DFAT, 2006).

It is unlikely that the FTA will be comprehensive in scope due to Japan's reluctance to liberalise trade in a number of sensitive sectors, particularly agriculture. Japan's reluctance to liberalise agriculture is implied in the Feasibility Study, "it was recognised that agriculture is an especially sensitive area for Japan", and qualified by recent media statements by Japan's former Minister for Agriculture, Tadamori Oshima, "If tariffs on agriculture products were removed, the industry would collapse. We cannot accept that kind of situation. That is our basic position". (AM ABC Radio, Dec 2006).

And although there has been agreement to have 'everything on the table', including agriculture, the Feasibility Study states that "all options for flexibility, including not only 'phasing' but 'exclusion'...should be available to negotiators" (DFAT, 2006).

This not only suggests that the predicted "substantial benefits to both countries from an FTA that liberalised trade in goods" (DFAT, 2006) are unrealistic and misleading, but there is again the danger of 'carve outs' as seen with the USFTA where sugar was left off the negotiating table. This possibility was confirmed by Trade Minister Warren Truss when he stated that "we want negotiations to begin with all issues on the table, (but) its

possible they won't be there in the end..." (as quoted in The Australian, Nov 2006) and that it was "unlikely Australian farm products could be freed from Japan's massive agricultural tariffs, which range from 30 to more than 700 percent" (as quoted in The Australian, Nov 2006).

AFTINET is concerned that negotiations for an FTA are being based on impractical assumptions built into the economic modelling, and that the claimed economic benefits are misleading.

2.3 An Australia – Japan FTA is unnecessary and will not deliver economic benefits

Japan is already Australia's largest trading partner, with two-way trade in goods and services totalling \$53.9 billion in 2005-6. It has also long been Australia's largest export market with Australian exports to Japan totalling \$31.6 billion in 2005 (DFAT, 2006).

Given the flaws in economic modelling and the fact the Australia already has a strong trading relationship with Japan, AFTINET is concerned that substantial government resources are being invested in negotiations that cannot deliver the predicted benefits.

This seems to indicate that the negotiations are an exercise in promoting an extreme ideological agenda in the region, rather than delivering any actual benefits to Australia. Moreover, as with the AUSFTA, the danger is that concessions will be made in areas like services, investments and intellectual property, which could have detrimental social and economic impacts.

3 Issues of concern

3.1 Protecting the ability of governments to regulate investment and public 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.

It is critical for Australia to maintain its capacity to regulate foreign investment to ensure national sovereignty and the delivery of local development benefits. The Feasibility Study suggests that the liberalisation of bilateral investments will ensure increases to economic growth, but fails to consider impacts on local communities and control of key resources. Australia should retain the sovereign right to monitor and regulate foreign investment in key resources and essential community services.

GATS plus

Essential services should be exempt from the Japan FTA. 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 Japan FTA.

AFTINET is particularly concerned about the ‘GATS plus’ commitment outlined in the Feasibility Study - “The (Feasibility) study group concluded it would be important that an FTA be ‘GATS plus’. An ambitious, GATS plus outcome on services would send a strong message to the region and be a model for future trade and economic agreements in the region” (DFAT, 2006).

Australia's commitment to exempt public services under GATS is already ambiguous. Making a commitment *beyond* this is very alarming as it suggests the current Australian government is not prioritising protecting services for the national interest, but rather advocating that they be open to transnational service providers on a profit driven basis.

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.

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 an 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.

Recommendation: Public services should be clearly excluded from trade agreements. In addition, essential services, whether currently publicly or privately owned should be clearly excluded so that Australian governments at all levels retain full powers to regulate these services. These include education, health, water, prisons, energy, postal and telecommunications services.

Recommendation: If services and investments are included, a ‘positive list’ approach should be used.

3.2 Provisions on intellectual property (IP)

The Feasibility Study suggests that both Australia and Japan should “explore commitments beyond existing TRIPS obligations, including measures to enhance cooperation on intellectual property”.

AFTINET believes that an Australia – Japan FTA should not include IP commitments that are more onerous than the existing TRIPS agreement. 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.

Recommendation: An Australia – Japan FTA should not include IP commitments that are more onerous than the existing TRIPS agreement.

3.3 No investor State dispute

There should be no investor-state complaints process in an Australia – Japan FTA giving 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. Furthermore, AFTINET opposes a complaints process model that allows disputes to be arbitrated by panels of trade law experts which are not open to the public and which do not reference public policy considerations. Strong public opposition contributed to the exclusion of such a clause in the AUSFTA

Recommendation: The Japan FTA should not contain an investor-state dispute process.

3.4 Non trade related issues should not be dealt with in an FTA

The Feasibility Study outlines a number of issues that will be dealt with under an Australia – Japan FTA, despite the fact that they are not related to trade, or barriers to trade.

The Study discusses the need for the FTA to secure supplies of food and energy but it is difficult to understand why a trade agreement is needed to address issues of supply security when this is dealt with by supply contracts between companies. These issues cannot be secured through trade agreements.

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

AFTINET is concerned that the Feasibility Study did not include an analysis of the current state of compliance by both Australia and Japan with human rights, labour and environmental standards, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. These standards include:

- the right of workers and employers to freedom of association and the effective right to collective bargaining (conventions 87 and 98),
- the elimination of all forms of forced or compulsory labour (conventions 29 and 105),
- the effective abolition of child labour (conventions 138 and 182), and
- the elimination of discrimination in respect of employment and occupation (conventions 100 and 111).

There is also no reference to UN environmental standards or agreements. Any proposed agreement between Australia and Japan should thoroughly examine these issues and

include legally binding commitments by Australia and Japan to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms and penalties for non-compliance.

It seems inconsistent that the government has agreed to respect these standards in the AUSFTA agreement but would now undermine them by not requiring adherence to them in other agreements, or even investigation of these issues in a feasibility study.

Recommendation: That the Japan FTA should not proceed without binding commitments by both governments to ensure compliance with human rights, labour rights and environmental standards, including effective monitoring mechanisms and penalties for non compliance.

References:

Alford P, “*All foods on the table in trade talks with Japan*”, The Australian, 15/11/06.

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McLeod S, “*Australia – Japan trade deal on hold*”, AM ABC Radio, 11/12/06.