Supplementary Submission on behalf of the Australian Fair Trade and Investment Network (AFTINET) to the Productivity Commission Review into Bilateral and Regional Trade Agreements

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1. Introduction

AFTINET welcomes this opportunity to make a supplementary submission to the Productivity Commission in response to the Productivity Commission's request for comment on the draft report "Bilateral and Regional Trade Agreements" released on 16th July 2010.

2. Overview

This supplementary submission is in two parts. The first part makes comment on the body of the draft report. The second part makes comment on the specific recommendations made in the draft report and suggests changes based on the findings in the body of the draft report.

As outlined in our original submission AFTINET has been critical of the approach successive Australian Governments have taken in pursuing Bilateral and Regional Free Trade Agreements.

These criticisms include:

- The use of contentious econometric modelling dependent upon inaccurate assumptions.
- The lack of studies and modelling on the environmental, social, labour and human rights impacts of proposed free trade agreements.
- A lack of transparent and democratic processes in decision making for proposed free trade agreements.
- That some free trade agreements have included the negotiation of issues like intellectual property rights on pharmaceuticals and operations of the Pharmaceutical Benefits Scheme, the labelling of genetically engineered food or Australian content in audio visual media. These are important health, social or cultural issues that should be decided through open democratic processes, not through trade negotiations.
- The regular failure to account for Australia's relatively weak position in bi-lateral and regional trade negotiations due to previous unilateral economic liberalisation and removal of many trade barriers, which means that health, social and cultural policies are on the table for negotiation, thus seriously undermining the legitimate rights of governments to regulate in the public interest in these areas.
- The failure to include meaningful commitments by governments to abide by internationally agreed standards on labour rights or protection of the environment.
- The linking of strategic issues such as security alliances to Trade Agreements, at the expense of consideration of the actual economic and social impact of the agreements.
- A focus on bilateral and regional trade agreements at the expense of fair multilateral trade negotiations.

AFTINET welcomes the Commission's recognition of some of these issues in its draft report. However we do not agree with the Report's assertion that that further uniltateral liberalisation and deregulation would benefit Australia economic, socially or environmentally.

AFTINET has consistently maintained that governments need to retain the right to legislate in the public interest, such as environmental standards, health issues like affordable access to medicines, cultural matters, and in response to crises such as the Global Financial Crisis and climate change. We addressed this issue in some detail in our original submission and will provide some additional comments in this supplementary submission.

3 Response to Draft Report

3.1 Economic Benefits:

AFTINET welcomes the findings in the draft report, which support AFTINET's submission that, although we have specific criticisms of WTO processes, we believe in principle that multilateral negotiations are potentially fairer for all trading partners:

> "The benefits of trade liberalisation are greatest if the liberalisation is undertaken on a multilateral basis."[1]

The draft report also finds that the actual gains to the economy and business from bilateral and regional preferential free trade agreements have been minimal:

> "The likely increase in national income flowing from BRTAs is likely to be modest."[2]

> "little evidence from business to indicate that preferential BRTAs have provided substantial commercial benefits."[3]

AFTINET has regularly commented that the potential gains from bilateral and regional free trade agreements have been oversold. We welcome the draft reports findings that :

> "Current processes for assessing and prioritising BRTAs lack transparency and tend to oversell the likely benefits."[4]

> "at a minimum, the economic value of Australia's preferential BRTAs has been oversold."[5]

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[1] Productivity Commission 2010, *Bilateral and Regional Trade Agreements*, Draft Research Report. p.XXI.
[2] ibid. p.XIV.
[3] Ibid.
[4] ibid.
[5] ibid. p.XXII.

3.2 Negotiation Costs:

AFTINET supports the draft report's examination of the true costs of negotiating BRTAs.

> "In considering the overall costs and benefits of BRTAs, the costs of negotiating such agreements need to be taken into account. While in some cases they will be small relative to other costs and benefits, they may be important where agreements are more finely balanced (for example, with smaller countries). An understanding of the costs of negotiations is also important for determining to the extent to which disciplines should be placed on the negotiation process to bring about swifter outcomes."[6]

The provision of information on the real costs of negotiating agreements is an essential component in the transparency of agreement making. AFTINET therefore supports the productivity commission's finding that "Ideally, in the future, the costs of negotiating agreements should be transparent to the government and the public."[7]

3.3 Security and Strategic Aims:

The draft report finds that bilateral and regional trade agreements may not be the best way to obtain strategic, security and other aims. The Commission suggests that strategic and security aims may be best dealt with in other ways such as development agreements or defence treaties.

> "…, the Commission's draft assessment is that it is preferable for trade agreements to be used primarily for economic and trade purposes, and other arrangements to be used for strategic and security purposes."[8]

AFTINET supports this position and welcomes the draft report's findings that alternate arrangements need to be examined to find the appropriate instrument for delivering the security and strategic aims currently attached to trade agreements.

AFTINET believes that the proposed PACER-Plus Free Trade Agreement is an example of a proposed regional free trade agreement being used primarily to deliver development assistance and capacity building as well as fulfilling security and strategic aims.

The Australian Government has on several occasions reiterated that the PACER-Plus agreement is not primarily about trade. In August 2008, Australian trade minister Simon Crean explained that "Australia has embarked on a new era of cooperation with the Pacific, based on shared development

[6] ibid. p.7.15.
[7] ibid. p.7.21.
[8] ibid. p.11.23.

aspirations."[9] This has been reinforced on several occasions, including in the ministerial statement to parliament notifying of the decision to commence negotiations.

> "Quite frankly, from the point of view of trade, Australia is not primarily pursuing the PACER Plus agreement from the perspective of commercial benefit."[10]

Under the Pacific Security Partnerships, Australia has already promised to offer development assistance such as access to clean water, better education, improved economic infrastructure and enhanced security.

AFTINET supports the findings of the draft report that strategic and security aims and goals should not be included in BRTAs or in the rationale for the commencement of negotiations of BRTAs.

On this basis AFTINET believes that the PACER Plus negotiations should not be pursued and that, instead, appropriate development options be explored with Pacific Island Governments.

3.4 Merchandise Trade:

AFTINET welcomes the finding that:

> "Preferential trade agreements are likely to increase trade flows between partner countries, but at the expense of trade flows with other trading partners."[11]

AFTINET also welcomes the draft report's findings that even when trade flows increase as a result of a BRTA that the economic benefits are likely to be small[12].

AFTINET's original submission noted the negative impacts on the Australian economy from BRTAs. These included significant trade deficits, balance of payments deficits, trade diversion, job losses and increased cost to the economy of copyright provisions and higher wholesale prices of medicines under the Pharmaceutical Benefits Scheme.

The draft findings on BRTAs, that there are small or no positive impacts for the Australian economy and that there are many negative impacts suggest that the final report should recommend that Australia cease negotiations of BRTAs.

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[9] Crean, S. McMullen, B (2008) *"International engagement begins in own backyard"* - Letters to the Editor. Canberra Times 26/8/08.
[10] Hansard – Tuesday August 18th 2010 – Ministerial Statement on the Commencement of PACER-Plus, Crean, S – p49.
[11] Productivity Commission 2010, *op.cit*, p.8.26.
[12] ibid. p.8.26.

3.5 Services and Investment:

AFTINET supports the finding that there are significant issues relating to the inclusion of services and investment provisions in BRTAs, including a difficulty in identifying barriers to trade in services and international investment and in identifying any benefits.

> "The difficulties in identifying impediments to services trade and international investment, and in separately identifying the effects of provisions in bilateral and regional agreements, apply both to *ex ante* assessments of what the potential impacts of a BRTA might be and to *ex post* assessments of the impact of provisions once implemented."[13]

At a minimum the Commission should, based on its findings, recommend that government take a very cautious approach to the inclusion of such provisions in BRTAs.

AFTINET believes that the draft report has erred in supporting a negative list approach to BRTAs.

A 'negative list' structure for both services and investment means that all laws and policies are affected by the agreement unless they are specifically listed as reservations. This differs from WTO multilateral agreements like the General Agreement on Trade in Services (GATS), which is a 'positive list' agreement, meaning that it only applies to those services which each government actually lists in the agreement. The negative list is therefore a significantly greater restriction on the right of governments to regulate services than the WTO GATS agreement.

The draft report was unable to quantify any gains from the use of a negative list. However, the draft report was able to identify several concerns and problems expressed in many of the submissions about negative lists.

A 'positive list' approach to Australia's trade negotiations on trade in services and international investment would allow Australia to determine exactly which sectors are going to be included in any agreement. This approach also places Australia's trade strategy more in line with multilateral efforts within the WTO.

AFTINET believes the Productivity Commission should recommend against the use of negative lists and instead recommend the use of positive lists for services and investment.

[13] ibid. p.9.1.

3.6 Intellectual Property Rights

AFTINET welcomes the call by the draft report for caution in consideration of the inclusion of Intellectual Property Rights provisions into Australia's BRTAs and that a template should not be used. This is particularly important in light of the recently commenced Trans Pacific Partnership Agreement and the historic use by the United States of the NAFTA template of Intellectual Property Rights extensions.

> "...many IP measures are likely to result in net costs to the partner country and most of the benefits will flow to third parties.... {these costs} point to the need for Australia to adopt a cautious approach to negotiating IP protections in BRTAs and to avoid an automatic template."[14]

We welcome the finding that there needs to be protection for regulations aimed at the public good and the recognition by the Productivity Commission that the PBS is one such example that needs to be protected.

> "...bringing domestically focused regulation aimed at public-good outcomes, such as the PBS, under the umbrella of trade agreements risks incurring costs that of doing outweigh the potential benefits."[15]

The draft report finds that, "many IP measures are likely to result in net costs to the partner country and most of the benefits will flow to third parties."[16] In addition the draft report accepts that: "In turn, it is probable that further extensions in the term of copyright would add further net costs."[17]

A further set of problems identified in the draft report is that the cost of requiring a partner country to extend copyright terms would involve more in costs to Australia than benefits and that real benefits would primarily flow to a third country, the United States.

> "....a BRTA requirement for partner countries to extend copyright terms would likely impose a net cost on their economies. Moreover, while copyright holders in Australia who export would benefit, Australia as a whole would be unlikely to get value for the 'bargaining coin' it would need to expend to compensate the partner country for incurring those costs. Rather, the main beneficiaries would be rights holders in other countries, particularly the United States."[18]

Given the significant issues and concerns highlighted by AFTINET and others in submissions, as well as being identified in the draft report, the Productivity Commission should recommend:

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[14] ibid. p.13.17.
[15] ibid. p.10.7.
[16] ibid. p.13.17.
[17] ibid p.13.14.
[18] ibid. p.13.15.

- No extension of existing Intellectual Property Rights in trade agreements.
- no agreement to standstill measures on intellectual property rights and innovative medicines before or during negotiations.
- no further changes to the Pharmaceutical Benefits Scheme which would increase the wholesale price of medicines and threaten affordable access to medicines.

3.7 Investor-State Dispute Settlement

AFTINET welcomes the critical examination undertaken of Investor-State dispute processes in the draft report. As stated in AFTINET's original submission, trade policy must not undermine the ability of governments to regulate in the public interest or for protection of the environment. Australia should avoid any mechanism such as the investor-state dispute settlement process which has resulted in rulings against governments trying to regulate in the public interest.

The draft report recognised the high level of usage of investor-state provisions by US businesses and its finding that 'no US business has been unsuccessful in pursuing an ISDS claim against a foreign government'.[19]

The United States has traditionally used the NAFTA 'comprehensive' model which contains an investor-state dispute process. This gives corporations additional rights to take legal action to sue governments for damages and to force changes in domestic law. US corporations have regularly used NAFTA rules to sue Mexican and Canadian governments for hundreds of millions of dollars.

Chapter 11 of NAFTA defines 'investors' widely and grants them broad rights. Only the parties - that is, the governments - to NAFTA may be sued, but they may be sued by investors, that is, corporations. The government 'measures' which can be challenged as infringing on investors' rights, include 'any law, regulation, procedure, requirement or practice' at all levels of government.

AFTINET welcomes the criticisms in the draft report of the arbitral process involved in investor-state dispute processes. These included the potential to shift the balance of investment (p13.18), problematic definitions of investment (p13.19), uncertainty around the international rules of third party arbitration (p13.20), operation without reference to precedents (p13.20) and the lack of appeals mechanisms (p13.20).

> "Cases are generally not appellable and arbitration frequently operates without the benefit of precedents (an important component of legal certainty). Additionally, particular government actions that would

[19] ibid. p.13.20.

> otherwise be non-reviewable to domestic investors may be subject to ISDS actions by foreign investors."[20]

The criticisms in the report also included that these clauses often provide additional rights for foreign investors (p13.20), the differing and sometimes inconsistent approach to the inclusion of such mechanisms in agreements between developed and developing countries (p13.19), and the potential problems for mixed regional agreements such as the proposed Trans Pacific Partnership Agreement (p13.20).

Concerns were recognised in the draft report about the impact of investor-state dispute clauses on the ability of future governments to regulate in the public interest (p9.11 & p13.20).

The draft report also recognised that any likely benefit, should it be able to be measured, is small.

> "Given the above factors, it is likely that the benefits from such provisions in BRTAs (and more broadly) are small."[21]

Some further concerns are identified by UNCTAD in its publication *Investor–State Disputes: Prevention and Alternatives to Arbitration* - UNCTAD Series on International Investment Policies for Development – May 2010. These include the high costs both of defending the matter and the size of any final award, fears of frivolous and vexatious claims, legitimacy of the system, that the focus is on the award of damages rather than ensuring an ongoing relationship.

> "Moreover, the financial amounts at stake in investor–State disputes are often very high. Resulting from these unique attributes, the disadvantages of international investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ISDS cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties."[22]

AFTINET welcomes the draft report's finding that "dispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors."[23]

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[20] ibid. p.13.20.
[21] ibid p.9.11.
[22] Investor–State Disputes: Prevention and Alternatives to Arbitration - UNCTAD Series on International Investment Policies for Development – May 2010, p.p.XXII-XXIII -
[23] Productivity Commission 2010, *op.cit.,* p.13.20.

The following examples of NAFTA cases show the problems of investor-state dispute processes:

> **Ethyl vs Canadian Government 1998-99**: US company Ethyl successfully challenged a Canadian ban on gasoline additive MMT. The Canadian government agreed to withdraw the ban and pay Ethyl $13 million. It appears that the Canadian government settled because it was concerned about the costs of arbitration and the even larger damages it would have to pay to Ethyl if it lost the case.[24]
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> **SD Myers vs the Canadian Government 1998-2000:** US waste treatment company SD Myers challenged a Canadian Government ban on the export of toxic PCB chemicals, despite the fact that the ban was based on a multilateral environmental treaty on toxic waste trade. Ethyl won $6 million in damages.
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> **United Parcel Service vs the Canadian Government 2000-2007:** US company UPS claimed that Canada Post's parcel delivery service was unfairly subsidised because it was part of the larger public postal service. The company did not win this case, but it cost the Canadian government millions in time and legal fees over seven years**.**

The NAFTA dispute process discourages governments from raising standards of public regulation. Between 1994 and January 2009, fifty-nine cases were launched against governments, an average of almost four cases per year. Forty of the cases were launched by US companies against Canada and Mexico. Most of these have not succeeded, but they involved governments in years of expensive litigation, even if damages were not awarded.

A further example is the case of Philip Morris verses the Government of Uruguay, a case being undertaken under the investor-state dispute clause of a bilateral investment treaty.

> Philip Morris International, based in Switzerland and the US, filed a claim against Uruguay in February 2010 challenging tobacco advertising restrictions introduced by Uruguayan health authorities, based on World Health Organisation recommendations. The company claims that the restrictions amount to "expropriation" under the Switzerland-Uruguay bilateral investment treaty by preventing it from displaying its trademark, and claimed "substantial" damages[25].
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> The Australian government also announced in April 2010 that it would introduce similar legislation. Philip Morris immediately threatened legal action against the Australian Government, claiming "expropriation"

[24] Tienhaara, K, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press, 2009, pp. 152-7

[25] International Centre for Trade and Sustainable Development, *Bridges Weekly*, March 10, 2010, http://ictsd.org/i/news/bridgesweekly/71988/.

under Australia's international trade obligations, including the US-Australia Free Trade Agreement[26]. Philip Morris has also made a submission to the USTR which refers to Australia's planned restrictions on cigarette packaging and supports an investor-state dispute process.[27]

Several Australian legal experts responded to these threats by pointing out that the Australian Constitution allows for corporate regulation to protect public health, and that WTO agreements have exceptions for health measures. [28]

The current AUSFTA does **not** have an investor-state dispute process, so legal action from Philip Morris is currently an empty threat. But if the Government agrees to an investor-state dispute process as part of the TPPA it would hand the tobacco companies the weapon to sue it for millions of dollars of damages in a law suits against laws like the proposed plain packaging legislation. US firms could also use the process to challenge laws on the PBS, local content in media and government purchasing, and GE labelling. US companies are far more likely to sue our governments than vice versa because they have vast resources, a culture and record of litigation, and because Australia generally has more public interest legislation than exists in the US.

The AUSFTA does not contain an investor-state dispute process because of strong community concern expressed to the Howard government. This was based on evidence on the claims for damages against governments for environmental, health and other public interest regulation. We also highlighted that the current P4 Agreement does not include an investor-state dispute process.

Investor-State dispute processes are an unacceptable expansion of the rights of corporate investors at the expense of democratic government. Democratic governments are elected precisely to develop laws and policies in the public interest in areas like the environment, health, morals, culture and the economy. These laws and policies are developed through open and accountable democratic parliamentary processes. To enable corporate investors to sue governments for damages before tribunals which can challenge laws or policies and award damages undermines the democratic process and gives disproportionate additional legal powers to investors.

In light of the detailed findings contained in the Productivity Commission's Draft Report and the additional information provided in this submission, it has been well established that an Investor-State Dispute Process should not be

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[26] Philip Morris spokesperson quoted in Nick O'Malley, "Hard Sell in a dark market" *Sydney Morning Herald*, April 24, 2010, features, p. 1.
[27] Philip Morris International, *Submission to the Office of the US Trade Representative*, January 25, 2010, found at http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a81289.
[28] Davison, M, "Big tobacco's huff and puff is just hot air", *The Age*, May 4, 2010, p.11.

included in any current or future BRTAs. The Productivity Commission should alter its recommendation to reflect this weight of evidence.

3.6 Labour Standards

AFTINET is disappointed that the Productivity Commission draft report is cautious in its support for the inclusion of Labour standards in BRTAs and that its recommendation is for caution on the inclusion of labour rights clauses. AFTINET and several submissions to the Productivity Commission identified that a failure to require labour standards in agreements is a pathway to a low standard agreement.

AFTINET argues that the inclusion of labour rights provisions in BRTAs would ensure that the benefits of economic development are shared more equitably by workers in developing countries.

AFTINET recommends that the Productivity Commission support the inclusion of enforceable internationally-recognized labour rights in BRTAs. It should require that governments support and implement international standards on labour rights as defined by the United Nations (UN) and the International Labour Organisation (ILO).

In 1998 the ILO summarized the core rights which are enshrined in ILO Conventions:

a) freedom of association and the effective recognition of the right to collective bargaining;
b) the elimination of all forms of forced or compulsory labour;
c) the effective abolition of child labour; and
d) the elimination of discrimination in respect of employment and occupation.

As a minimum the Productivity Commission recommendation on BRTAs should require that each government adopt and maintain laws and regulations consistent with these core labour rights and effectively enforce those rights, as well as enforcing all domestic laws on wages, hours of work, and health and safety conditions.

Further the final report should recommend that violation of these and other labour obligations should be subject to effective dispute resolution procedures with strong remedies up to and including trade sanctions. The monitoring of these provisions should include workers' and employers' representatives, and the agencies responsible for enforcement must be adequately resourced.

3.7 Environment:

Trade rules should require full compliance with an agreed-upon set of multilateral environmental agreements, with effective sanctions for non-

compliance. At the same time, the agreement must ensure that other rules, 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 recognise the primacy of environmental agreements, and trade rules should not restrict governments' ability to adopt measures to address climate change.

A failure to require environmental standards in BRTAs, particularly when combined with the inclusion of investor-state dispute processes, is a pathway to a low standard agreement and could lead to a downward spiral of environmental standards.

3.8 Audio-Visual Services and Culture:

AFTINET welcomes the Productivity Commission's draft report recognition that cultural exclusions should be considered for BRTAs. This is particularly relevant given the ongoing Trans Pacific Partnership Agreement negotiations involving the United States.

The USTR National Trade Estimate report on Foreign Trade Barriers in Australia in 2010 cites local media content regulation as a trade barrier.[29]

There has long been bipartisan agreement that Australian culture requires government support by subsidy and regulation, and this view has been strongly evident in government policies in the negotiation of free trade agreements. These essentially have sought the exclusion of cultural services in order that the Australian government is not restricted in the nature of its support to Australian culture.

The Rudd government acceded to the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions. The motivation for the development of this Convention was to offer governments an instrument for use in trade negotiations in which they were being pressured to surrender their cultural sovereignty.

The USA is the world's largest producer and exporter of media services and has been very aggressive in multiple international forums to try to remove cultural protections, even apparently organising opposition to the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions.

AFTINET supports the Music Council of Australia's sentiment that Australians cannot contract another country, no matter how efficient its cultural

[29] Office of the United Sates Trade Representative, "National Trade Estimate report on Foreign Trade Barriers in Australia, 2010", found at www.ustr.gov/about-us/press-office/reports-and-publications/2010.

production, "to produce expressions of Australian culture. It is intrinsic to our expression of culture that it is we who do the expressing".[30]

Given the matters outlined above and contained in previous submissions by AFTINET and others, as well as those identified in the draft report, the Productivity Commission should strengthen its recommendation to one ensuring there are cultural exclusions in BRTAs.

3.9 Public Consultation and Parliamentary Involvement:

AFTINET is concerned that the Productivity Commission has failed to recommend greater Parliamentary oversight of BRTAs and multilateral trade agreements by way of requiring parliamentary debate prior to the approval of a BRTA or multilateral trade agreement.

AFTINET supports full transparency and democracy for BRTAs and multilateral trade agreements:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective Parliamentary and public consultation to take place about whether negotiations should proceed and the content of negotiations.

- Before an agreement 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. Parliament should debate and vote on the full text of trade agreements in addition to the implementing legislation.

AFTINET's original submission included the recommendations of the Senate Foreign Affairs, Defence and Trade Committee for legislative change in its November 2003 report, *Voting on Trade*. AFTINET believes strongly that, if adopted, these recommendations would significantly improve the consultation, transparency and review processes of trade negotiations.[31] We restate the key elements of these recommendations:

- 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

[30] Music Council of Australia, Submission 35, p2.

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

- Parliament will be able to vote on the whole trade treaty that is negotiated, not only on the implementing legislation.

AFTINET's submission also supported recommendations by the Joint Standing Committee on Treaties (JSCOT) in its support for transparency mechanisms following examination of the Australia/Chile FTA:

> "The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the costs and benefits. Such assessments should consider the economic, regional, social, cultural, regulatory, and environmental impacts which are expected to arise."[32]

The Productivity Commission should recommend that the Australian Government adopt and implement the recommendations of both Committees. This would allow for greater transparency.

To facilitate effective community debate, it is important that the Government and DFAT develop a clear structure and principles for consultation processes that can be applied to all proposed trade agreements. AFTINET notes that the draft report states:

> "The Australian Government has responded to the JSCOT inquiry, indicating that it is already implementing the recommendation (in relation to the proposed Trans-Pacific Partnership Agreement) through a range of transparency activities including tabling the Government's priorities and an assessment of the potential costs and benefits of the TPP (Australian Government 2010). However, there has been no response to the broader 2003 recommendation of the SFADTC."[33]

AFTINET contends that this statement is inaccurate in relation to the TPP.

Stakeholders had a very limited period of one month, from October to November 2008, to make initial submissions on the Proposed Trans Pacific Partnership Agreement. At consultations held by DFAT on October 30, 2008, it was explained that the Australian Government had been invited by the US government in September 2008 to negotiate a new TPPA with the current P4 governments (Chile, Singapore, Brunei and New Zealand). The Peruvian and Vietnamese governments had also been invited to join the negotiations.

The then Trade Minister, Simon Crean, made the official announcement that Australia had decided to join the negotiations in Parliament on 26th November 2008.[34] In doing so he highlighted that he had made an announcement that

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[32] Joint Standing Committee on Treaties Report 95, 2008, p 35.
[33] Productivity Commission 2010, *op.cit.,* p.14.13.
[34] Hansard – Wednesday November 26th 2010 – Ministerial Statement on the Commencement of Trans Pacific Partnership Agreement, Crean, S – p11535-11538.

Australia would join the negotiations whilst attending APEC on 20th November 2008, some 6 days before telling the Australian parliament and people.

Hansard[35] for that day records Mr Crean's speech, including his outlining of the objectives for the negotiations and that he tabled a document summarising the views expressed, in the very short consultation period, by some organisations which made submissions on the agreement. The record does not contain an independent assessment of the costs and benefits. The time frame involved did not allow for a feasibility study to be conducted. This highlights the need for a process which enables proper parliamentary and public scrutiny of the BRTA process.

AFTINET believes that Parliament should be the body that decides on whether or not to approve a trade agreement, not just its implementing legislation. The Government should set out the principles and objectives that will guide Australia's consultation processes for all trade agreements and negotiations and the Government should include regular consultations with unions, community organisations and regional and demographic groups which may be adversely affected by the agreements.

The Government should establish parliamentary review processes, which give parliament the responsibility of granting negotiating authority for all trade agreements and WTO multilateral negotiations, and Parliament should vote on the agreements as a whole, not only the implementing legislation.

Part 2 – Recommendations:

AFTINET supports some components of the draft recommendations including draft recommendation 7, which requires DFAT to publish estimates of the expenditure incurred in negotiations.

AFTINET is concerned that some of the draft recommendations made by the Productivity Commission do not adequately reflect the findings in the body of the draft report. AFTINET has highlighted the arguments for changing the draft recommendations.

AFTINET therefore recommends the following changes, based on the arguments outlined in this submission, the Productivity Commission's draft report, and the first round of submissions by AFTINET and several others.

Recommendation 1: AFTINET recommends that the following wording should replace the current draft recommendation 1.

In light of the findings that there is a lack of benefits, and the potential for significant costs, flowing from preferential trade agreements, the Australian Government should not pursue bilateral and regional trade agreements.

[35] ibid.

Recommendation 4: AFTINET recommends the following revised recommendation be adopted.

> *The Australian Government should not include matters in bilateral and regional trade agreements that increase barriers to trade, raise industry costs or affect established social policies, without a comprehensive review of the implications and available options for change. It should not:*
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> - *negotiate or include IP protections in agreements, particularly when these involve extensions to current thresholds;*
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> *It should ensure that there are:*
>
> - *effective commitments to core labour rights in agreements;*
> - *effective commitments to International environmental standards in agreements; and*
> - *exclusions for audiovisual and cultural services.*

The proposed recommendation on culture corrects the apparent discrepancy between the findings in the body of the report that culture is an important public policy consideration, the concerns of several submissions and the recommendation that cultural exclusions be treated cautiously. The draft report found that the cultural exclusion provision of the AANZFTA to be acceptable. This provision "aims to preserve the sovereign rights for nations to regulate in such areas of legitimate national interest, but also guards against the introduction of unnecessarily protectionist measures".[36]

Recommendation 5: AFTINET recommends the following revised recommendation be adopted.

The Australian Government should be cognisant of the capacity of legal systems in prospective partner countries to resolve disputes on all relevant aspects emerging from cross border commerce. It should also be cognisant that there is no evidence to support increased FDI flows from the adversarial, non-transparent, inconsistent and undemocratic investor state dispute process. There is however significant evidence of the negative impact on a government's ability to regulate in the public interest and of very significant costs to governments.

- *The Australian Government should ensure that there are no Investor State Dispute processes included in BRTAs.*
- *Where the legal systems of partner countries are relatively underdeveloped, it may be appropriate to examine the inclusion of alternate dispute resolution processes, such as those outlined by UNCTAD (May, 2010) and to examine development and capacity building in relation to legal systems in developing countries.*

[36] Productivity Commission 2010, *op.cit.,* p.13.26.

- *However, such process should not afford foreign investors in Australia or partner countries with legal protections not available to residents.*
- *Alternate dispute settlement procedures should be subject to regular review to take into account changing international best practice and the evolving legal systems in partner countries.*

Recommendation 6:

AFTINET recommends the following revision be adopted.

The Australian Government should institute measures to substantially enhance the scrutiny of the potential impacts and benefits of prospective agreements, particularly those involving preferential arrangements.

- *Before negotiations commence, greater attention should be given to the reasons for seeking to negotiate with a trading partner, the proposed topics for negotiation, potential impacts (including social and environmental impacts) and benefits of a prospective agreement, expected timeframe, resource requirements, relevant exit strategies where negotiations cannot be concluded within, say, 2 years, and the relative merits and feasibility of alternative strategies, including unilateral and multilateral reform options. This should also include initial public comment.*
- *Prior to the commencement of negotiations parliament should be provided with time and information to allow it to determine if the negotiations should commence.*
- *Before negotiations commence and after the provisions for the above information are completed that comprehensive public consultations are held to allow for informed public comment on the rationale for negotiations and its impacts. This goes towards ensuring proper social engagement.*
- *Public consultations should continue throughout the course of negotiations, with detailed information about the progress of negations provided for public comment.*
- *Before an agreement is signed, an independent and transparent assessment of the likely impacts and community-wide benefits of the proposed agreement, commissioned independently of the executive, should be undertaken. The assessment should be made against the text of the agreement and not an overly optimistic scenario. It should take into account any additional administrative and compliance costs, social and environmental impacts and the economic effects of the proposal for reducing barriers to trade and investment and other provisions.*
- *Prior to an agreement being signed Parliament should vote on the whole trade treaty that is negotiated, not only on the implementing legislation.*