

**Second Submission to the Department of Foreign Affairs and Trade on the
Trans-Pacific Partnership Agreement on Behalf of the Australian Fair Trade
and Investment Network**

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1 Introduction

- 1.1 The Australian Fair Trade and Investment Network (AFTINET) is a national network of organisations and individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection.
- 1.2 AFTINET welcomes this opportunity to make a second submission to the Department of Foreign Affairs and Trade (DFAT) on the Trans-Pacific Partnership Agreement (TPPA). This submission makes recommendations about improving the process of community and parliamentary consultation, addresses some general issues about the Australian Government's negotiating position and also addresses the issues of the Pharmaceutical Benefits Scheme, investor-state dispute processes, financial services, labour standards, environmental standards and labour mobility.
- 1.3 AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international agreements.
- 1.4 AFTINET supports the concept of multilateral trade negotiations. However we believe that fundamental changes are needed to ensure that the multilateral negotiations are conducted within a framework that guarantees the interests of less powerful nations, regulates corporate influence and is based on agreed international standards for human rights, labour rights and environmental protection. Generally we believe that multilateral negotiations are preferable to bilateral or regional negotiations because they are not discriminatory and have less potential for problems with trade diversion and rules of origin issues. The proposed TPPA is a plurilateral agreement which aims to reach agreement between the initial negotiators and then invite others to join, without their having been involved in determining the initial framework. It remains to be seen whether this will prove an attractive proposition to other governments.

2 Community and Parliamentary Consultation

- 2.1 AFTINET believes that the following principles should guide Australia's approach to negotiations:
 - 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 before commencement 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.
 - Trade agreements should be clearly based on governments' commitments to 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 on health, environmental, social and cultural issues in the public interest.
- 2.2 Our first submission in October 2008 noted that there was insufficient time (one month) for adequate community consultations between October 2008 and the decision in November 2008 for the Australian Government to become involved in negotiations.
- 2.3 **Recommendation:** That the Government set out the principles and objectives that will guide Australia's consultation processes for the TPPA negotiations for debate and approval by parliament, and conduct broad community consultations during the 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 any proposed agreement in addition to the implementing legislation.

3 Australia's general negotiating position

- 3.1 Preliminary discussions about the TPPA were initiated by the US Bush administration through the Office of the US Trade Representative (USTR) in 2007-08, and were continued after some delay by the Obama administration in 2009.
- 3.2 The USTR sees gains from the TPPA because the US only has bilateral agreements with Australia, Singapore, Peru and Chile, and none with the larger countries in the Asian region. It has not been successful in securing legally binding NAFTA-style agreements through the Asia Pacific Economic Cooperation Forum (APEC), which has non-binding voluntary goals. This is because many Asian governments have more interventionist development strategies and do not agree with the NAFTA model. From a US perspective, the TPPA is an opportunity to construct a building bloc for a NAFTA-style legally binding agreement

which will eventually expand US exports to other Asian countries with larger markets.

- 3.3 In contrast, Australia already has bilateral free trade agreements with four of the seven TPPA governments, and also has a Free Trade Agreement with the ten ASEAN countries, which include Brunei and Vietnam. It is difficult to see any significant additional market access for the Australian economy in the Asia Pacific from the TPPA. Moreover, the US is likely to demand more concessions on health and other sensitive social policies before it would consider additional Australian access to US agricultural markets, especially in the context of the unemployment resulting from the global financial crisis, which is much higher in the US than in Australia.
- 3.4 US business groups are indeed making such demands. The USTR received public submissions from US industry groups in 2009 indicating that they wanted further changes to Australian policies on the price controls on medicines through the Pharmaceutical Benefits Scheme,¹ local media content², labelling of genetically engineered food³, and procurement policies⁴, and that they supported the inclusion of an investor-state dispute process in the agreement⁵. Submissions to the USTR from Agribusiness groups advocate against further opening of US agricultural markets.⁶

¹ Pharmaceutical Research and Manufacturers of America, January 25, 2010, *Submission to the Office of the US Trade Representative*, found at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a83601

² Motion Picture Association of America, January 25, 2010, *Submission to the Office of the US Trade Representative*, found at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a83187

³ Biotechnology Industry Organization, March 11, 2009, *Submission to the Office of the US Trade Representative*, found at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480907dd2>

⁴ Coalition of Services Industries, *Statement on the Proposed Trans-Pacific Partnership Agreement*, January 25, 2010, available at <http://www.uscsi.org/press/TPP%20Statement%20January%202010.pdf>

⁵ Coalition of Services Industries, *Statement on the Proposed Trans-Pacific Partnership Agreement*, January 25, 2010, available at <http://www.uscsi.org/press/TPP%20Statement%20January%202010.pdf>

⁶ US Sugar Alliance, March 11, 2009 and Dairy Farmers of America, March 10, 2009, *Submissions to the Office of the US Trade Representative*, found at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480905285>
<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808f9dfd>

- 3.5 The USTR National Trade Estimate report on Foreign Trade Barriers in Australia in 2010 also lists pharmaceuticals, intellectual property rights protection, treatment of blood products, local media content regulation and government procurement policies as trade barriers.⁷
- 3.6 All of these issues are matters of public policy which most Australians expect will be debated and decided through open democratic parliamentary processes, not decided through a process of trade negotiations behind closed doors. These issues were extremely controversial and strongly debated during the negotiations for the US-Australia Free Trade Agreement (AUSFTA) in 2003-04. The danger is that concessions will be made on these public policy issues in the vain hope of increased access to US agricultural markets.
- 3.7 The Trade Minister has indicated on the one hand, that “everything is on the table” in the negotiations⁸, and on the other hand that there will not be a “re-opening of obligations in relation to the Pharmaceutical Benefits Scheme that were settled in 2005”⁹.

4 The Pharmaceutical Benefits Scheme

- 4.1 In the US, the wholesale prices of common prescription medicines are three to ten times the prices paid in Australia. Under the PBS, the wholesale prices of medicines are controlled because health experts on the Pharmaceutical Benefits Advisory Committee compare the price and effectiveness of new medicines with the prices of comparable but cheaper generic medicines whose patents have expired. This is known as reference pricing. Prices are negotiated with the pharmaceutical companies based on clinical effectiveness and value for money. The listed medicines are then made available for sale at regulated subsidised retail prices, currently \$5.30 for pensioners and other low income groups and \$33.30 for others. The difference between the wholesale price and the subsidised retail price is the cost of the PBS to taxpayers. If wholesale prices rise, there is pressure on the government to raise the regulated retail prices to try to contain costs.
- 4.2 During the debate on the AUSFTA, US pharmaceutical companies argued that Australia's system prevented them from enjoying the full

⁷ Office of the United States 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.

⁸ Quoted in Saulwick, J, “Nations ponder terms for Pacific free trade”, *Sydney Morning Herald*, March 16, 2010, p.6.

⁹ Simon Crean, letter to the *Canberra Times*, March 17, 2010.

benefits of their intellectual property rights by comparing the price and clinical effectiveness of new drugs with cheaper generic drugs. A strong community campaign helped to retain the PBS reference pricing system.

- 4.3 But the AUSFTA set up a Joint Medicines Working Group of US and Australian representatives and in 2007 the Howard Government made changes to medicines policy that enable pharmaceutical companies to receive higher wholesale prices for some medicines, by creating a new F1 category for medicines that are supposed to have unique health benefits. However the definition of these benefits and whether they justify the higher prices has been the subject of debate.
- 4.4 Medical studies published in 2010 show that the higher priced F1 medicines are an increasing share of the PBS budget, without enough evidence that they have proportionally improved health effects.¹⁰ A study of the cost of statin drugs, very widely prescribed to lower blood cholesterol levels, published in the *Medical Journal of Australia*, found that the proportion of more expensive patented statins in the F1 category is a growing share of the Australian market, without clear evidence that these are more clinically effective. This contrasts with Britain, where the use of cheaper generic statins is increasing, based on studies which compare both clinical outcomes and cost effectiveness. The article also noted that prices of generic drugs are higher in Australia than elsewhere. The article estimates that savings of at least \$3.2 billion could be made on statins over the next 10 years if the British policy of using generic drugs were adopted. The article concludes that:
- 4.5 “The key question is whether the health benefits resulting from using statins under patent...justify the substantially higher subsidies from the PBS...while this has been examined in other countries, there has been little consideration of this question in Australia”¹¹.
- 4.6 A government review of PBS costs published in February 2010 confirms that the F1 category is contributing to higher costs for the PBS than were predicted.¹² Given these trends, it may well be in the public

¹⁰ Faunce, T, *et al*, “The Impact of the Australia – US Free Trade Agreement on Australian medicines regulation and prices,” *Journal of Generic Medicines*, Vol. 7, 1, 18–29, January 2010.

¹¹ Clarke, P and Fitzgerald, E, “Expiry of patent protection on statins: effects on pharmaceutical expenditure in Australia”, *Medical Journal of Australia*, 27th April, 2010, p. 8, found at www.mja.com.au/public/issues/192_11_070610/cla11057_fm.html.

¹² Department of Health and Ageing, “The Impact of PBS Reform”, *Report to Parliament on the National Health Amendment (Pharmaceutical Benefits Scheme) Act 2007*, Commonwealth of Australia, 2010, p.15.

interest for the Australian government to consider modifying or even abolishing the F1 category, so that all medicines are assessed more rigorously on both medical efficacy and value for money through the application of reference pricing.

- 4.7 In the May 2010 federal budget, the Government attempted to address some of these cost issues by reducing the cost of generic medicines. It also announced new therapeutic groups of drugs which would enable reference pricing based on both clinical effectiveness and value for money to be applied to patented drugs. This strengthening of reference pricing is consistent with the aims of the PBS to ensure access to affordable medicines. Medicines Australia, which represents the major pharmaceutical companies, made strong submissions against these changes¹³.
- 4.8 The TPPA provides another opportunity for the pharmaceutical industry to argue that policies like the therapeutic groups announced in the 2010 Budget, which control prices in order to keep medicines affordable, violate their intellectual property rights and are a barrier to trade.
- 4.9 The US Pharmaceutical Industry submission to the USTR advocates that the TPPA should “address intellectual property rights and market access barriers in countries like New Zealand.” This refers to the New Zealand medicines policy which, while different from the Australian system, has been very effective in reducing the wholesale price of medicines and making medicines available at affordable prices to all.
- 4.10 The submission also recommends that, “At the beginning of the TPP negotiations, the parties should agree to a ‘standstill’ on implementing new policies that might impede trade in innovative products”¹⁴. “Impede trade in Innovative products” means that there should be no reference pricing or other controls on the wholesale prices that pharmaceutical companies charge for medicines.
- 4.11 This demand demonstrates the power of the pharmaceutical lobby in the US political system. Governments are being asked to reduce their ability to develop policies for affordable medicines before even commencing negotiations.

¹³ Medicines Australia, Presentation to the Senate Community Affairs Committee Reference Inquiry into Consumer Access to Pharmaceutical Benefits, May 7, 2010, found at www.apf.gov.au/hansard/senate/committee/S12998.pdf.

¹⁴ Pharmaceutical Research and Manufacturers of America, January 25, 2010, *Submission to the Office of the US Trade Representative*, pp. 4-5, found at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a83601.

- 4.12 The Australian government should stand firm against this demand, which could prevent it and other governments from making legislative or other changes in the public interest to reduce the cost of medicines, as it has just done in the Federal Budget.
- 4.13 Given that there is clearly pressure from both US business and the US government on all of the issues listed above, AFTINET recommends that the government adopt a clear set of principles that there will be no concessions on these issues in the negotiations.
- 4.14 **Recommendation:** That the government adopts the following principles in the TPPA negotiations:
- 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
 - retention of full rights for governments to regulate labelling of genetically engineered food and to regulate GE crops, including existing moratoria
 - no further weakening of Australian Government power to regulate audiovisual media for Australian content purposes
 - retention of the Foreign Investment Review Board, and of its powers to review all foreign investment in the public interest
 - no weakening of quarantine regulations
 - no reductions in the ability of all levels of government to have local content requirements for government purchasing and industry policies that support local employment.

5 The Investor-State Dispute Settlement Process

- 5.1 Investor-state dispute settlement processes are controversial in the context of trade agreements. OECD governments failed to reach agreement on the Multilateral Agreement on Investment in the face of strong community opposition to many aspects of the draft agreement which gave additional corporate rights to investors at the expense of governments. A key issue was the inclusion of an investor-state dispute process, based on the model in the North American Free Trade Agreement (NAFTA).
- 5.2 The AUSFTA does not contain the investor-state dispute process because of strong community concern expressed to the previous government, based on evidence from claims for damages against governments for environmental, health and other public interest

regulation. The current P4 Agreement, which was the original basis for the TPPA, does not include an investor-state dispute process.

- 5.3 Investor-state dispute processes are additional dispute processes which give corporate investors additional rights to challenge government laws and policy and sue governments for damages if they believe their investments have been harmed. These disputes are heard by tribunals trained in commercial law which gives priority to the interests of the investor, rather than to the public interest considerations which inform the law or policy.
- 5.4 The grounds on which investors may sue are very broad and based on US legal concepts, which have been elaborated and reinforced through the case law of investor-state disputes¹⁵.
- 5.5 A key concept is the definition of expropriation. The concept that governments compensate investors if their property is nationalised or expropriated is well established.
- 5.6 However the concept of expropriation has been expanded to include compensation for “indirect expropriation”, which falls short of the physical taking of property but results in “the effective loss of management, use or control, or a significant depreciation of the value of the assets of a foreign investor”¹⁶. Such actions by governments can include “regulatory takings” which are “those takings of property which fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country”¹⁷.
- 5.7 This concept is an unacceptable expansion of the rights of corporate investors at the expense of democratic governance. 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.

¹⁵ Tienhaara, K, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge University Press, 2009,

¹⁶ UNCTAD, “Taking of property: issues in international investment agreements”, UNCTAD/DITE/2, Vol. V, Geneva, 2000, p. 4. quoted in Tienhaara, p.74.

¹⁷ UNCTAD 2000, p. 12, quoted in Tienhaara, p. 75.

- 5.8 The criteria which have been developed in case law about whether a government regulation or “taking” is legitimate reinforce this power imbalance. These criteria include that it must be for a public purpose, it must be non-discriminatory and compensation must be paid to the affected investor. Note that all three conditions must be fulfilled, and that even if a law or policy is found to be for a legitimate public purpose, there may still be a requirement that the government pay compensation if the investor can demonstrate a loss¹⁸.
- 5.9 Another aspect of case law in investor-state dispute processes which has caused controversy has been the development of the concept of “fair and equitable treatment” for foreign investors. This is distinct from non-discriminatory treatment compared with domestic investors. There are many possible interpretations of this concept. On the one hand, corporations have sought to expand its legal meaning to include detailed positive obligations on governments to consult with foreign investors specifically about proposed regulation. On the other hand, governments have argued that the expansion of the meaning of this concept simply provides greater scope for investors to launch disputes, and that governments should not be obliged to meet a higher standard of consultation or other procedural treatment for foreign investors than would exist for other parties in the legislative process¹⁹.
- 5.10 Investor-state dispute processes in the North America Free Trade Agreement (NAFTA) have enabled corporations to challenge environment, health and other public interest laws and sue governments for millions of dollars. The following examples show the impacts of investor-state dispute processes in NAFTA on health and environmental policies.
- 5.10.1 **Ethyl vs Canadian Government 1998-99:** US company Ethyl successfully challenged a Canadian ban on gasoline additive MMT which the Canadian government claimed was harmful to human health and the environment. Ethyl claimed expropriation and discriminatory treatment, and also argued that the Canadian government had interfered with its corporate image and reputation. Ethyl claimed US\$251 million in costs. 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

¹⁸ Tienhaara, K, (2009), op.cit., p. 79

¹⁹ Tienhaara, K, (2009), op.cit., pp212-13

even larger damages it would have to pay to Ethyl if it lost the case.²⁰

5.10.2 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, alleging expropriation and unfair treatment for the impact of the ban, despite the fact that the ban was based on a multilateral environmental treaty on toxic waste trade. Ethyl won \$6million in damages.

5.10.3 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.

5.11 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.

5.12 A more recent example comes from a bilateral investment treaty containing an investor-state dispute process based on the NAFTA principles and has direct implications for Australia.

5.13 Philip Morris vs government of Uruguay 2010 ongoing: 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" damages²¹.

5.14 The Australian government also announced in April 2010 that it would introduce similar legislation. Philip Morris immediately threatened legal

²⁰ Tienhaara, K, (2009), op.cit., pp. 152-7

²¹ International Centre for Trade and Sustainable Development, *Bridges Weekly*, March 10, 2010, <http://ictsd.org/i/news/bridgesweekly/71988/>.

action against the Australian Government, claiming “expropriation” under Australia's international trade obligations, including the US-Australia Free Trade Agreement²². 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.²³

- 5.15 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.²⁴
- 5.16 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 suit against the 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.
- 5.17 **Recommendation:** Australia should continue with the example set by the AUSFTA and the current P4 Agreement and make a clear public commitment not to agree to the inclusion of an investor-state dispute processes in the TPPA negotiations.

6 Financial Regulation

6.1 Prime Minister Kevin Rudd wrote in February 2009:

- 6.1.1 “The current crisis is the culmination of a 30-year domination of economic policy by a free market ideology that has variously been called neoliberalism, economic fundamentalism, Thatcherism or the Washington consensus. The central thrust of this ideology has been

²² Philip Morris spokesperson quoted in Nick O’Malley, “Hard Sell in a dark market” *Sydney Morning Herald*, April 24, 2010, features, p. 1.

²³ 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>.

²⁴ Davison, M, “Big tobacco’s huff and puff is just hot air”, *The Age*, May 4, 2010, p.11.

that government activity should be constrained, and ultimately replaced, by market forces...The neoliberal deregulation mantra has been even more evident in the management of financial markets ... We have seen how unchecked market forces have brought capitalism to the precipice. The banking systems of the Western world have come close to collapse. Almost overnight, policymakers and economists have torn up the neoliberal playbook and governments have made unprecedented and extraordinary interventions to stop the panic and bring the global financial system back from the brink”.²⁵

- 6.2 Most analysts agree that the global financial crisis which spread into a general economic crisis in many countries had its roots in the financial deregulation policies which had their most extreme expression in the US, but spread to many other countries. Even Allan Greenspan, the former Chairman of the US Federal Reserve Board, a former champion of deregulated financial markets, admitted that he had “put too much faith in the self-correcting power of free markets”²⁶.
- 6.3 The removal of restrictions on foreign ownership and the merging of commercial and investment bank functions resulted in the creation of massive global financial entities operating in global markets with minimum regulation. The weakening of predatory lending regulation allowed banks to make risky loans on a massive scale. These were then converted by global merchant banks into risky unregulated investment products labelled “safe” by ratings agencies and sold to banks, pension funds, and other investors around the world. When the bubble burst, these investors suffered massive losses. But it was argued that some of the banks which had caused the crisis were “too big to fail” as their failure would put at risk the global credit system, and governments were called on to bail them out.
- 6.4 There is now an emerging consensus amongst governments that clear national and global regulatory frameworks are required to prevent such a crisis from recurring. The September 2009 G20 Leaders’ Summit on the crisis committed to ensure that “our regulatory systems for banks and other financial firms rein in the excesses that led to the crisis”²⁷. The commitments include national and international regulation to raise

²⁵ Rudd, K, “The Global Financial Crisis”, *The Monthly Magazine*, February 2009, pp22-3.

²⁶ New York Times “Greenspan Concedes Error on Regulation”, October 24, 2008, p. B1, found at www.nytimes.com/2008/10/24/business/economy/24panel.html.

²⁷ G20 Group of Governments (2009), *Leaders Statement: the Pittsburgh Summit*, September 24-5, p.2.

capital standards, to regulate financial products markets, including the derivatives market, to implement strong international executive compensation standards aimed at ending practices that lead to excessive risk-taking, and to create more powerful tools to hold large global firms to account for the risks they take. There has also been discussion of the need for regulation of foreign investment and mergers of banks to ensure that they do not become so large that their market dominance means that they are “too big to fail”.

- 6.5 Despite this, organizations like the US Coalition of Service Industries (CSI) have made submissions on the TPPA urging governments to make further commitments to deregulation of the financial services sector²⁸.
- 6.6 There is a clear contradiction between the move to national and global financial regulation by governments and the continued push for deregulation of financial services by the financial services industry through trade agreements. The United Nations Commission of Experts on Reforms of the International Monetary and Financial System, chaired by Nobel Prize winning economist Joseph Stiglitz, argued in 2009 that:
- 6.7 “Many bilateral and regional trade agreements contain commitments that restrict the ability of countries to respond to the current crisis with appropriate regulatory, structural, and macroeconomic reforms and support packages...In addition, they have also faced restrictions on their ability to manage their capital account and financial systems (e.g. as a result of financial and capital market liberalization policies)”²⁹.
- 6.8 The report argued that existing trade agreements on financial services should be reviewed to ensure that they are “more consistent with the need for an inclusive international regulatory framework, more conducive to crisis prevention and management, counter-cyclical and prudential safeguards”³⁰.
- 6.9 In its existing trade agreements, including the AUSFTA, Australia has reserved rights to regulate financial services in the public interest, including prudential regulation, the four pillars banking policy and the right to restrict levels of foreign investment in financial institutions.

²⁸ Coalition of Services Industries, *Statement on the Proposed Trans-Pacific Partnership Agreement*, January 25, 2010, pp. 4, 10, available at <http://www.uscsi.org/press/TPP%20Statement%20January%202010.pdf>.

²⁹ United Nations, *Report of the Commission of Experts on Reforms of the International Monetary and Financial System, (Stiglitz Report)*, Geneva, 2009, p. 104.

³⁰ *Ibid*, p. 104.

- 6.10 **Recommendation:** The Australian Government should resist submissions for further financial deregulation through the TPPA, and should ensure that there are no concessions in the negotiations which would restrict its capacity to regulate financial services in the public interest, to retain prudential regulatory powers, policies like the four pillars banking policy and the ability to regulate levels of foreign investment in financial services.

7 Support and implementation of internationally-recognized labour rights

- 7.1 The TPPA should require that government support and implement international standards on labour rights as defined by the United Nations (UN) and the International Labour Organisation (ILO).
- 7.2 In 1998 the ILO summarized the fundamental rights which are the subject of 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.
- 7.3 The TPPA must at a minimum require that each government adopt and maintain laws and regulations consistent with these fundamental labour rights and effectively enforce those rights, as well as enforcing all domestic laws on wages, hours of work, and health and safety conditions.
- 7.4 Violation of these and other labor 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.
- 7.5 **Recommendation:** That the TPPA require government signatories to adopt and implement laws which protect the fundamental rights in International Labor Organisation Conventions, including freedom of association, the right to collective bargaining, no forced labour, no child labour, and the elimination of discrimination in employment. Governments should also enforce domestic laws on wages, hours of work and health and safety. There should be trade penalties for noncompliance, the monitoring of these provisions should include

workers' and employers' representatives, and the agencies responsible for enforcement must be adequately resourced.

8 Support and implementation of International Environmental Standards

- 8.1 Protection of the environment is a critical trade policy objective. 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.
- 8.2 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.
- 8.3 **Recommendation:** That the TPPA require government signatories to adopt and implement all applicable international environmental standards including those contained within UN environmental agreements, with trade penalties for non compliance, and ensure that the Agreement does not contain any provisions that would restrict governments' ability to adopt measures to address climate change.

9 Temporary movement of people

- 9.1 The P4 agreement currently contains a provision for temporary movement of business people as part of its chapter on trade in services, but this does not apply to other workers. The wording is that those provisions do "not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, nationality, residence or employment on a permanent basis."³¹
- 9.2 AFTINET supports these exclusions because we do not support the inclusion of the temporary movement of workers other than executives and senior management in trade agreements. This is because their labour market position is different from that of executives and senior management, and there is overwhelming evidence that they are in a far

³¹ P4 Agreement Text, Article 13.3, found at www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf.

weaker bargaining position which leaves them vulnerable to exploitation as temporary migrant workers.

- 9.3 AFTINET raised concerns about the exploitation of temporary workers under the previous government's Visa 457 regulations, including exploitation by migration agents and employers, low pay and unacceptable working conditions, and poor health and safety conditions leading to injury and death in some cases. The fact that these workers are temporary, and that their visa applies only to employment with a particular employer, that they often lack English language skills and have little information about their rights, and that they are afraid they will be dismissed and deported if they complain, leaves them more vulnerable to exploitation than other workers.
- 9.4 Many of these issues were documented by the Deegan Report commissioned by the ALP government in 2008. The *Migration Legislation Amendment (Worker Protection) Act 2008* (the Worker Protection Act) implemented in September 2009 seeks to provide better protection for these workers, including regulation of employers who sponsor their employment. It is as yet too early to say how effective this will be, and whether further legislation will be required.
- 9.5 It is clear that workers are not commodities and the movement of temporary migrant workers requires comprehensive specific regulation to protect them from exploitation. Governments must be free to change the regulatory framework to improve protections as required.
- 9.6 The inclusion of these workers in trade agreements would "lock in" existing regulatory frameworks and make it difficult for governments to change the regulatory framework as required, because they could be subject to trade disputes action by other governments.
- 9.7 **Recommendation:** That the TPPA should not include provisions for the temporary movement of non-executive and non-senior management workers.