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**Submission to the Joint Standing Committee on Treaties Inquiry into the
Regional Comprehensive Economic Partnership (RCEP)**

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Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade, consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries, based on the principles of human rights, labour rights and environmental sustainability. We recognise 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 and democratically accountable framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability. In general, AFTINET advocates that non-discriminatory multilateral rules are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

The RCEP includes Australia, China, Japan, South Korea, New Zealand and the 10 ASEAN countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam). India left the negotiations in November 2019.

RCEP negotiations began in 2012 and the text was signed on November 15, 2020, and only then released publicly. The RCEP covers 15 countries and one third of the world's population and economic output. Like all trade agreements RCEP rules are legally enforceable through a state-to-state dispute process through which the winning state can ban or tax the products of the loser.

AFTINET welcomes the opportunity to make a submission to the JSCOT inquiry into the RCEP.

Summary and Recommendations

The RCEP was negotiated with minimal community consultation, and the text was only released after it was signed.

The government acknowledges that, since Australia already has free trade agreements with all other RCEP countries, the RCEP contains no market access gains for Australia's exports, which is usually the main source of economic gains from trade agreements.

The government claims that Australia will benefit from common rules of origin and customs procedures, and from some increased market access for services exports. However, the government has not commissioned an independent study of the economic or social costs and benefits of the RCEP in Australia and so there is no actual assessment of the claimed benefits. China, Australia's largest trading partner in the RCEP is increasingly restricting imports from Australia and the RCEP will not have any direct impacts on these disputes.

Trade agreements should include commitments by governments not to reduce labour rights, and to implement internationally-agreed labour rights ratified by governments through the International Labour Organisation. These should be enforced by the state-to-state disputes process of the agreement. These rights intersect with UN human rights obligations and include freedom of association, rights to collective bargaining, health and safety in the workplace, no forced labour, no child labour and no discrimination in the workplace. The RCEP has no such commitments.

The RCEP would legitimise a brutal military regime in Myanmar at a time when the US and other allies are implementing sanctions and withdrawing from economic agreements with Myanmar. The RCEP also ignores violations of human rights and labour rights in China, the Philippines and other RCEP countries. Australia should not be ratifying a preferential trade agreement without any commitments to human rights and labour rights.

Trade agreements should also include commitments by governments not to reduce environmental standards and to implement international environmental agreements which should be enforced by the state-to-state disputes process of the agreement. The RCEP has no environmental chapter at all, which means that no RCEP governments have made any commitment not to reduce environmental standards, nor to implement agreed international environmental standards, including the 2015 Paris Climate Agreement.

RCEP rules could restrict local industry development. The RCEP was negotiated before the COVID-19 pandemic, which revealed overdependence on imports for essential products. The Australian government acted during the pandemic to assist manufacturing of medical equipment, vaccines and other essential products to save lives.

There is now bipartisan support for longer term policies to develop local industry capacity for essential products. But the RCEP text on trade in goods contradicts these intentions through strict rules on national treatment and market access rules which discourage government assistance for local industries at a time when many argue that more active industry policies are needed to rebuild the economy in the wake of the pandemic.

In the context of the recommendations of the Royal Commission into Aged Care Quality and Safety, it is unacceptable that aged care services have not been reserved from RCEP trade-in-services rules which freeze regulation at current levels and could prevent increases in quality standards and staffing levels recommended by the Royal Commission. It is also unacceptable that state regulation

of carbon emissions and other forms of pollution have not been reserved, when increased regulation is required to reduce carbon emissions. The government should seek re-negotiation of the RCEP to address these issues.

The RCEP fails the human rights test. Given the lack of independent assessment of economic and social costs and benefits, the lack of any enforceable commitments to internationally recognised human rights, labour rights or environmental standards, restrictions on local industry development and restrictions on regulation of aged care, and state regulation of carbon emissions, the parliament should not proceed with enabling legislation. The government should instead seek re-negotiation of these issues.

Recommendation 1

That the government commission and publish an independent evaluation of the economic, social and environmental costs and benefits of the RCEP.

Recommendation 2

That the Australian government should follow the example of the economic sanctions imposed by the EU and US and refuse to legitimise through a preferential trade agreement the military regime in Myanmar which has overthrown a democratically elected government.

That the Australian Government should not ratify a preferential trade agreement that includes Myanmar, China, the Philippines and other RCEP countries where human rights and labour rights are being violated through repression, forced labour, and detention and killing of trade unionists and other human rights activists.

Recommendation 3

That the RCEP be re-negotiated to include enforceable commitments to labour rights based on ILO conventions enforced through the state-to-state dispute process which applies to other chapters in the agreement.

Recommendation 4

That the RCEP be renegotiated to include enforceable commitments to agreed international environmental standards, including the Paris Climate Agreement, enforced through the state-to-state dispute process which applies to other chapters in the agreement.

Recommendation 5

That the RCEP rules on national treatment and market access be reviewed and re-negotiated to ensure that they do not prevent the implementation of bipartisan proposals for active government industry policies needed to ensure local industry capability and to rebuild the economy in the wake of the pandemic.

Recommendation 6:

That the Australian government seek an amendment to Services Chapter 8 Annex III list B, page 32 to list aged care in reservations excluded from obligations in the Services Chapter.

Recommendation 7

That the Australian government review services chapters in existing bilateral and regional trade agreements like the Singapore Australia Free Trade Agreement, the CPTPP and other agreements

to ensure that aged care is listed as a reservation excluded from obligations in the services chapter.

Recommendation 8

That the Australian government ensure that aged care is reserved from obligations in the services chapter in current negotiations with the EU and the UK, and in any other future trade agreements.

Recommendation 9

That the Australian government seek an amendment to Annex III appendix A, p. 54 to ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the Services Chapter.

Recommendation 10

That the Australian government review services chapters in existing bilateral and regional trade agreements like the Singapore Australia Free Trade Agreement, the CPTPP and other agreements to ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the services chapter.

Recommendation 11

That the Australian government ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the services chapter in current negotiations with the EU and the UK, and in any other future trade agreements.

Recommendation 12

Given the lack of independent assessment of economic and social costs and benefits, the lack of any enforceable commitments to internationally recognised human rights, labour rights or environmental standards, restrictions on local industry development and restrictions on regulation of aged care, power station carbon emissions and other forms of pollution the parliament should not proceed with enabling legislation. The government should instead seek re-negotiation of these issues as outlined in recommendations 1-11.

The trade agreement process should be transparent, democratic and accountable

Australia's current procedure for negotiating and ratifying trade agreements is highly secretive and is not compliant with the basic democratic principles that underpin our domestic policy-making processes. Trade negotiations are conducted in secret and neither the Parliament nor the wider public had input into, or oversight over, the development of Australia's negotiation mandates. This was the case with the RCEP negotiations.

Negotiation texts were secret throughout the negotiations and the final text of the agreements was not made public until after the government made the decision to sign the agreement. There was very close consultation with business groups, documented by the Asian Trade Centre (Asian Trade Centre 2018). However civil society consultation was very limited. Specific consultations for civil society groups with Australian and international negotiators for the RCEP did not take place at all from 2012 to 2015, were variable from 2016-19, and ceased after July 2019 (AFTINET 2020: 15-16). All were limited.

The decision to sign trade agreements lies with the Cabinet and is made before the text is tabled in Parliament. Parliament does not vote on the whole agreement and the JSCOT review can only recommend for or against the enabling legislation.

The National Interest Analysis (NIA) presented to the Committee is not independent but is conducted by the same department that negotiated the agreement. There are no independent economic, human rights or environmental impact assessments.

A Senate Inquiry in 2015 entitled *Blind Agreement* criticised this process and made recommendations for change (Senate Foreign Affairs, Defence and Trade Committee 2015). The Productivity Commission has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements before they are authorised for signing by Cabinet (Productivity Commission 2010). The EU has developed a more open process, including public release of documents and proposed text during negotiations and release of texts before they are signed (EU 2015). The JSCOT inquiry initiated in 2020 into the trade agreement process also received many submissions which supported a more open and accountable process (JSCOT 2020). At the time of writing, this Committee had not yet tabled its report.

AFTINET's recommendations to change the trade agreement process were summarised in our submission to the 2020 JSCOT Inquiry. We support publication of negotiating texts, publication of the final text of agreements and independent evaluation of the economic, health, gender and environmental impacts of agreements before the decision is made to sign them. Parliament should vote on the whole text of the agreement, not just the enabling legislation (AFTINET 2020).

Economic, social and environmental costs and benefits of the RCEP should be evaluated

All trade deals result in both winners and losers, because they reduce tariffs and other trade barriers, which can benefit consumers and industries dependent on imports, but intensify competition and result in job losses in some industries. The devil is in the detail, and both costs and benefits need to be evaluated.

India left the RCEP because of concerns about the RCEP's potentially negative impact on its local industry development (Panda 2019). Since Australia already has free trade agreements with all of the other RCEP member countries, India's absence means there are no additional export markets for Australian goods. The Department of Foreign Affairs and Trade (DFAT) Regulation Impact Statement (RIS) acknowledges this:

"Given the relative quality of Australia's existing FTAs with RCEP parties, including the CPTPP, we do not expect RCEP goods market access commitments to provide Australia with additional market access with our current FTA partners" (DFAT 2021b: 6).

The RIS also acknowledges that the RCEP does not offer Australian consumers any additional benefits in the form of reduced tariffs on imports from RCEP countries.

"Under our existing FTAs, Australia will already have eliminated tariffs on imports from all RCEP parties by 1 April 2021" (DFAT 2020b:6).

The National Interest Analysis confirms this by stating:

"There are no costs in losses of tariff revenue for Australia associated with the entry into force of the RCEP as – under existing FTAs – Australia will have already eliminated tariffs on imports from all RCEP parties by 1 April 2021" (DFAT 2021a: 13).

The DFAT NIA claims that Australia will benefit from common rules-of-origin and customs procedures, from some increased market access for services exports in China and ASEAN countries, from increased Australian investment in RCEP countries, and from RCEP countries' businesses investing Australia (DFAT 2021a: 3-5).

However, neither the NIA nor the RIS make any reference to the deterioration in Australia's relationship with China, which is Australia's largest trading partner among the RCEP countries.

Since the RCEP negotiations were finalised in November 2019, China has used WTO anti-dumping rules to initiate anti-dumping procedures and tariffs on Australian barley and wine (Ministry of Commerce, People's Republic of China, 2018).

China has placed restrictions on Australian meat exports alleging lack of conformity to labelling and health standards (ABC/Reuters 2020). China has also delayed unloading of Australian coal exports (Hurst and Butler 2021).

China claims that the barley and wine restrictions are based on WTO anti-dumping rules and the beef restrictions on WTO-consistent labelling requirements. The existence of the China-Australia Free Trade Agreement (ChAFTA) has not prevented these restrictions, and the RCEP in itself will not affect them, since both are based on WTO rules. Australia is pursuing remedies under WTO rules. However, the restrictions will reduce Australia's exports to China, if they persist after the agreement comes not force, and should be taken into account in any assessment of the costs and benefits of the RCEP.

Since the government has not commissioned an independent study of the economic or social costs and benefits of the RCEP in Australia, we have no actual assessment of the claimed benefits listed by DFAT above, nor of the impact of China's restrictions on Australia's imports.

Recommendation 1

That the government commission and publish independent evaluations of the economic, social and environmental costs and benefits of the RCEP.

Lack of commitments to internationally recognised human rights, labour rights and environmental standards

No commitments to internationally-recognised human rights and labour rights.

The trade policy model of global production chains encourages competition to provide the lowest labour and environmental costs for exports, which can erode workers' rights, especially in low-income countries. This often occurs in export processing zones or export industries where the workers have little or no effective labour rights of freedom of assembly, the right to join a union or engage in collective bargaining, and where other related human rights like the right to free speech and freedom from arbitrary detention are sometimes restricted. This model of global production chains suits the needs of global corporations but can have negative impacts on workers.

To counter these trends, trade agreements should include commitments by governments not to reduce labour rights, and to implement internationally-agreed labour rights which are defined by the International Labour Organisation (ILO). These should be enforced by the state-to-state disputes process of the agreement. These rights intersect with UN human rights obligations and include freedom of association, rights to collective bargaining, health and safety in the workplace, no forced labour, no child labour and no discrimination in the workplace (ILO 1998).

The Korea-Australia Free Trade Agreement (KAFTA) included a Labour Chapter in which parties made commitments not to reduce labour rights, to implement the ILO fundamental rights, and their own labour laws, but these commitments were not legally enforceable through the state-to-state dispute process in the agreement (KAFTA text, 2014, Chapter 17). The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also has a Labour Chapter, for which some aspects of labour rights are enforceable through a disputes process which is specific to that chapter. However, the process is more protracted and less enforceable than the state-to-state dispute process that applies to other chapters in the agreement (CPTPP text 2018, Chapter 19).

In contrast, there is no Labour Chapter at all in the RCEP. This means governments have endorsed preferential trade arrangements without any commitments not to reduce labour rights, nor to implement the fundamental ILO rights.

Examples of human rights and labour rights violations in Myanmar and other RCEP countries

Myanmar's military coup

The military coup in Myanmar on February 1, 2021, against a democratically elected government has caused repression of all human rights and labour rights, including the killing of peaceful protesters and striking workers by the military. It is clear from the persistent widespread strikes and protests that there is majority resistance to the coup. Over 700 people have been killed, and the death toll is rising (Goldman 2021).

Concluding a preferential trade agreement with Myanmar would legitimise the brutal military regime. Australia should instead exert economic pressure to support the call of the majority in Myanmar for the return of democracy.

Australia's response of suspending military cooperation and redirecting aid (ABC 2021) appears weak in comparison with economic actions taken by our allies. The US and EU have implemented economic sanctions against military leaders (Reuters 2021). The US has also suspended its engagement with Burma under the 2013 Trade and Investment Framework Agreement (USTR 2021). Australia should follow this example and should not legitimise the military regime by ratifying the RCEP.

China's repression of labour rights

China's export processing industries range from textiles, clothing and footwear to electronics equipment for global markets, including Australia. Despite labour law reforms in 2008 requiring a written employment contract, the *China Labour Bulletin* reported in 2020 that only 30% of employees have such contracts (China Labour Bulletin 2020).

Most workers face precarious temporary employment, long hours of work and unsafe working conditions. These conditions occur not only in locally-owned enterprises, but in those under contract to global corporations like Apple, Mattel and Disney. Reports include underpayment, excessive work hours, and unsafe working conditions, including exposure to toxic chemicals (McKevitt 2018, Lazarus 2018, Taylor 2018).

The International Trade Union Confederation 2019 index of labour rights lists China amongst 40 countries with no guarantees for basic labour rights, including restrictions on rights to freedom of association and to collective bargaining, and with long hours of work and low health and safety standards (ITUC 2019: 10). There were reports of arrests of Chinese labour activists in 2018 and 2019 (China Labour Bulletin 2018, ITUC 2019:15).

In 2019 there were allegations of forced labour of Uighur peoples in Western China contributing to production chains for exports of clothing to Australia (McNeil *et al* 2019). Over the last year there have been more detailed reports documenting detention, forced labour, other human rights abuses and allegations of genocide (British Broadcasting Corporation (BBC) 2021).

On March 22, 2021, 24 cross-party members of parliament spoke in support of a private member's motion moved by Liberal MP Kevin Andrews and Labor MP Chris Hayes, in the House of Representatives. The motion condemned forced labour and other human rights abuses in China and called for UN action. As with all private member's motions, the debate was adjourned (Galloway 2021).

The Philippines: repression of labour rights, detention and killing of unionists and other activists

The repression and arrest of trade union and other activists, and the killing of alleged drug addicts and community activists prompted an investigation by the UN High Commissioner for Human Rights in 2019-20. This investigation documented widespread repression, arbitrary arrest and killings of trade unionists, journalists, lawyers, church and indigenous activists in the Philippines (United Nations High Commissioner for Human Rights 2020).

The repression of labour rights, arbitrary arrest and killings of workers and union activists has also been documented by the ITUC in their 2020 annual report, which listed the Philippines as one of the 10 worst countries in the world for workers' rights (ITUC 2020: 6).

The ITUC has also documented the lack of labour rights guarantees and labour rights abuses in other RCEP countries, including Thailand, Cambodia, Laos and Indonesia (ITUC 2020: 12).

The RCEP entrenches preferential access for imports from Myanmar, China, the Philippines and other RCEP countries to Australia but has no commitments by any governments about human rights, labour rights or forced labour. There is no means for the Australian government to raise the issue of whether products from these countries should have preferential access to Australia, and there is no obligation on the governments concerned to take action to end forced labour and other labour rights and human rights abuses.

Recommendation 2

That the Australian government should follow the example of the economic sanctions imposed by the EU and US and refuse to legitimise through a preferential trade agreement the military regime in Myanmar which has overthrown a democratically elected government.

That the Australian Government should not ratify a preferential trade agreement that includes Myanmar, China, the Philippines and other RCEP countries where human rights and labour rights are being violated through repression, forced labour, and detention and killing of trade unionists and other human rights activists.

Recommendation 3

That the RCEP be re-negotiated to include enforceable commitments to labour rights based on ILO conventions enforced through the state-to-state-dispute process which applies to other chapters in the agreement.

No Commitments to Environmental Standards

Trade agreements should include commitments by governments to implement international environmental agreements which should be enforced by the state-to-state disputes process of the agreement. The KAFTA included an Environment Chapter, in which parties made commitments not to reduce environmental standards, and to implement multilateral environmental agreements, but it was not enforceable (KAFTA Chapter 18). The CPTPP also has an Environment Chapter, but its provisions are mostly non-enforceable. For some provisions, there is a disputes process which is specific to that chapter, although the process is less enforceable than the state-to-state dispute process that applies to other chapters in the agreement (CPTPP 2018 Chapter 20).

The RCEP has no environmental chapter at all, which means that no RCEP governments have made any commitment not to reduce environmental standards, nor to implement agreed international environmental standards, including the 2015 Paris Climate Agreement.

Recommendation 4

That the RCEP be renegotiated to include enforceable commitments to agreed international environmental standards, including the Paris Climate Agreement, enforced through the state-to-state dispute process which applies to other chapters in the agreement.

The RCEP entrenches pre-pandemic supply chains and restricts local industry policy

The RCEP text was completed in November 2019, before the COVID-19 pandemic, and has not been revised since (ASEAN 2019).

The pandemic revealed Australia's over dependence on imports for many essential products. The Australian government acted during the pandemic to assist manufacturing of medical equipment, vaccines and other essential products to save lives (ABC 2020, Tobin 2020, Sas and Exposito 2020). These actions contradict the rules embodied in the RCEP, which forbid assistance to local industries, but could be justified as emergency measures during the pandemic.

The Prime Minister has since announced some longer term local industry support as part of plans for economic recovery (Hayne 2020). The former Trade Minister has said that the challenge for future trade policy is "to get the balance right for Australia by having domestic capacity in key certain areas" (Birmingham 2020).

But the RCEP text on trade in goods contradicts these intentions through strict rules on national treatment and market access for both imported goods and investment. These discourage government assistance for local industries at a time when many argue that even more active industry policies are needed to rebuild the economy in the wake of the pandemic (Stanford 2020, Nahum 2020).

Recommendation 5

That the RCEP rules on national treatment and market access be reviewed and re-negotiated to ensure that they do not prevent the implementation of bipartisan proposals for active government industry policies needed to ensure local industry capability and rebuild the economy in the wake of the pandemic.

The RCEP restricts changes to regulation of essential services like aged care and regulation of carbon emissions

Restriction of regulation of Aged Care

RCEP rules in Chapter 8 on trade-in-services are designed to increase foreign investment in essential services and restrict the ability of future governments to regulate them.

This is confirmed by the DFAT Regulation Impact Statement which says the RCEP imposes "obligations on the Australian Government (and the governments of the other RCEP participating countries), including to 'lock-in' and not adversely modify existing regulation in particular services sectors" (DFAT 2021b: 6).

Australia has chosen to include all services unless they are specifically reserved, known as a negative list (DFAT 2020a, RCEP Chapter 8, Article 8.7).

These rules suit the needs of international investors but can restrict the flexibility needed to make future policy changes like dealing with the current aged care crisis and with climate change.

The rules of Chapter 8 treat regulation of services as if it were a tariff, with regulations “locked in” at current levels, and not to be increased in future, unless they are excluded as reservations in Chapter 8 Annex III List B.

RCEP Services Annex III List B includes “the specific sectors and sub sectors or activities for which Australia may maintain existing, or adopt new or more restrictive, measures” (DFAT 2020c, RCEP Services Annex III, Schedule of Australia: 24).

The reservations list for essential services includes regulation of admissions, accreditation and funding of public and private education services (DFAT 2020c, RCEP Services Annex III, p.25).

There is a further list of reserved services on p.32, which reads:

“Australia reserves the right to adopt or maintain any measure (23) with respect to the provision of law enforcement and correctional services and the following services (24) to the extent that they are social services established or maintained for a public purpose:

- income security or insurance;
- social security or insurance;
- social welfare;
- public education;
- public training;
- health (25);
- childcare;
- public utilities;
- public transport and
- public housing.

23. For greater certainty, measures adopted or maintained with respect to the provision of services covered by this entry include measures for the protection of personal information relating to health and children

24. For the avoidance of doubt, this includes any measure with respect to the collection of blood and its components, the distribution of blood and blood related products, including plasma derived products, plasma fractionation services, and the procurement of blood and blood related products and services

25. For greater certainty, the subsidies programs under Australia’s pharmaceutical benefit scheme and Medicare Benefits Scheme, or successive programs, are not subject to chapter 8 (Trade in Services) consistent with article 8.2 (Scope) or Chapter 10 (Investment) consistent with article 10.2 (Scope).” (DFAT 2020c, RCEP Services Annex III, p.32).

Aged care has not been listed as a reservation in this list or elsewhere in Annex III.

Claims that aged care is reserved under the general heading of “health services” or welfare services” are not convincing for three reasons.

Firstly, child care, which is similar to aged care in that the government provides funding for a public purpose but the service is provided by a mix of public, non-profit and private providers, is specifically included in the list of reservations.

Secondly, there are three footnotes in the quote above from Annex III which clarify some specific services that are included in the definition of health services, using phrases like ‘for the avoidance of doubt’ and ‘for greater certainty.’ Aged care is not included in any of these footnotes.

Thirdly the United Nations CPC classification list Version 2.1 is used for classifying services in WTO and other trade agreements, and aged care is classified separately from both health services and other social or welfare services.

Health services are listed as CPC 931, other social or welfare services are listed as CPC 935 and aged care is listed as CPC 932 (United Nations 2015: 234-5).

For these reasons, for the avoidance of doubt and greater certainty, it would be reasonable to have separate listing for aged care as a reservation. This would better ensure that Commonwealth and state governments are not restricted in responding to recommendations for changes or increases in regulation. This is particularly important in the context of the Royal Commission into Aged Care Quality and Safety.

RCEP rules restrict governments from regulating numbers of staff in all services (DFAT 2020b, RCEP Chapter 8 Article 8.5.) Qualifications, licensing and technical quality standards cannot be “more burdensome than necessary” for the investor (DFAT 2020b, RCEP Chapter 8 Article 8.15). Aged care has not been reserved from these obligations.

The Royal Commission into Aged Care Quality and Safety has exposed scandals caused by a lack of qualified staff and poor quality of care, and has recommended increases in staffing numbers, increases in qualifications of staff and changes to requirements for quality of care and licensing arrangements. These are all areas of regulation restricted in the RCEP clauses described above. Since aged care has not been reserved, RCEP rules could prevent new regulation in these areas.

The failure to reserve aged may be related to the fact that, up until a decade ago, the aged care industry was dominated by local firms, including both for-profit and not-for-profit providers like church organisations. The for-profit providers were based in Australia, and not subject to international trade and investment rules which apply to international investors and service providers.

This has now changed. Recent data show that almost half of all aged care beds are now provided by for-profit providers and that international investors are growing rapidly. A study by the Tax Justice Network published in 2018 identified the six largest for-profit aged care companies in Australia. Of the top two of these, BUPA is UK owned, and Opal is jointly owned by a Singapore company (Ward 2018:5). This means that rules in trade agreements that lock in current levels of regulation now apply to international investors in the aged care sector. Since regulation cannot be discriminatory, these rules also apply to the sector as a whole.

The rules of international trade agreements on trade and investment in services now apply to services that are owned by companies from countries that are parties to trade agreements. Singapore is a party to the RCEP, and Australia is currently negotiating a free trade agreement with a services chapter with the UK.

If Australia makes regulatory changes to improve staffing and quality of care that are contrary to RCEP rules, Singapore could initiate a state-to-state dispute before an international tribunal as specified in the RCEP. If the tribunal finds the complaint valid, it could authorise Singapore to ban or tax Australian products. A similar situation could arise with BUPA and the UK FTA if aged care is not exempted from the services chapter in that agreement.

The RCEP does not include Investor-State Dispute Settlement (ISDS) immediately, but ISDS will be reconsidered two years after the agreement comes into force (DFAT 2020b, Chapter 10, Article 10.18). ISDS gives additional legal rights to foreign investors to bypass national courts and sue governments directly for compensation if a change in law or policy harms their investment. ISDS claims are heard by panels of investment lawyers who are not independent judges, and have awarded billions of dollars in compensations to corporations for dubious calculations of foregone profits. For the latest evidence on ISDS, see Appendix 1 which contains a summary of AFTINET's submission to the DFAT review of Bilateral Investment Treaties.

If ISDS is agreed in future, Australia could face both state-to-state disputes and ISDS disputes from international aged care companies if it increases regulation in the aged care sector.

Recommendation 6:

That the Australian government seek an amendment to Services Chapter 8 Annex III list B, page 32 to list aged care in reservations excluded from obligations in the Services Chapter.

Recommendation 7

That the Australian government review services chapters in existing bilateral and regional trade agreements like the Singapore Australia Free Trade Agreement, the CPTPP and other agreements, to ensure that aged care is listed as a reservation excluded from obligations in the services chapter.

Recommendation 8

That the Australian government ensure that aged care is reserved from obligations in the services chapter in current negotiations with the EU and the UK, and in any other future trade agreements.

The RCEP could restrict state regulation of carbon emissions

The RCEP also fails to reserve environmental services at state government levels. In fact, there is an Appendix A to Annex III of Services Chapter 8 which lists state government services to which RCEP rules that restrict future regulation do apply.

This listing includes environmental services, including “services at power stations or industrial complexes to remove air pollutants, monitoring of mobile emissions and implementation of control systems or reduction programs” (DFAT 2020c, RCEP Chapter 8, Annex III, Appendix A, p. 56, footnote 56).

Following privatisation, some power stations are owned by investors from RCEP members Japan and South Korea (Sumitomo Corporation 2020, DL Energy Corporation 2020). This means RCEP rules which “lock in” existing levels of regulation will apply to all regulation of power station carbon emissions, since regulation cannot be discriminatory. This could also impact on regulation of non-carbon air pollution and measures to monitor and encourage greater coal ash re-use. The failure to exclude these forms of regulation could reduce flexibility for state governments to regulate to reduce both carbon emissions and other forms of pollution in future.

The RCEP does not include Investor-State Dispute Settlement (ISDS) immediately, but ISDS will be reconsidered two years after ratification. ISDS enables foreign investors to sue governments directly for millions of dollars if they can argue that a change in law or policy harms their investment. If ISDS

is included in the RCEP in future, Australia could face both state-to-state disputes and ISDS disputes if state governments increase regulation of carbon emissions.

Recommendation 9

That the Australian government seek an amendment to Annex III appendix A, p. 54 to ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the Services Chapter.

Recommendation 10

That the Australian government review services chapters in existing bilateral and regional trade agreements like the Singapore Australia Free Trade Agreement, the CPTPP and other agreements to ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the services chapter.

Recommendation 11

That the Australian government ensure that state government regulation of carbon emissions and other pollution is excluded from obligations in the services chapter in current negotiations with the EU and the UK, and in any other future trade agreements.

Conclusion

The RCEP fails the human rights test. It was negotiated with minimal community consultation, and the text was only released after it was signed. The government acknowledges that there are no market access gains for Australia's exports. There has been no independent assessment of its economic and social costs and benefits to Australia. The RCEP would legitimise a brutal military regime in Myanmar at a time when the US and other allies are implementing sanctions and withdrawing from economic agreements with Myanmar. The RCEP also ignores violations of human rights and labour rights in China, the Philippines and other RCEP countries, and has no commitments by governments to internationally recognised human rights, labour rights or environmental standards. RCEP rules could also restrict local industry development.

In the context of the recommendations of the Royal Commission into Aged Care Quality and Safety, it is unacceptable that aged care services have not been reserved from RCEP rules which freeze regulation at current levels and could prevent increases in quality standards and staffing levels recommended by the Royal Commission. It is also unacceptable that state regulation of carbon emissions and other forms of pollution have not been reserved, when increased regulation is required to reduce carbon emissions. The government should seek re-negotiation of the RCEP to address all of these issues.

Recommendation 12

Given the lack of independent assessment of economic and social costs and benefits, the lack of any enforceable commitments to internationally recognised human rights, labour rights or environmental standards, restrictions on local industry development and restrictions on regulation of aged care, power station carbon emissions and other forms of pollution, the parliament should not proceed with enabling legislation. The government should instead seek re-negotiation of these issues as outlined in Recommendations 1-11.

Appendix 1: Summary of the AFTINET submission to the DFAT review of Bilateral Investment Treaties, July 2020

Although particular provisions of Bilateral Investment Treaties (BITs) vary, in general the aim is to encourage investment and to ensure a certain standard of treatment of investments in the territories of each party.

These include non-discriminatory treatment, fair and equitable treatment and protection and security under domestic law. They also include provisions against nationalisation or expropriation of property unless it is in the public interest, non-discriminatory, and fair compensation is provided.

The most controversial aspects of these investment treaties are the inclusion of Investor-State Dispute Settlement (ISDS) processes. ISDS has also been included in some of Australia's broader trade agreements over the last 20 years, but not in all of them. Current negotiations for the EU-Australia FTA and the Regional Comprehensive Economic Partnership with 14 Asia-Pacific countries do not include ISDS.

AFTINET welcomes the opportunity to make a submission to this review of Australia's BITs.

In the past, the Australian government has taken an *ad hoc* approach to BITS. We advocate that there should be a consistent approach, based on Australia's commitments to the right of governments to regulate in the public interest, UN human rights and ILO labour rights conventions, and UN agreements on environmental standards.

All trade agreements have government-to-government dispute processes. ISDS is controversial because it is an optional, separate dispute process that gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for compensation in an international tribunal if they can claim that a change in law or policy will harm their investment. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

The number of reported ISDS cases has been increasing rapidly and is 1,023 as of December 2019.

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with lack of confidence in the system shared by both civil society organisations and by a growing number of governments.

Criticisms of the structure of the system include the power imbalance which gives additional legal rights to international corporations that already exercise enormous market power, the lack of obligations on investors and the use of claims for compensation for public interest regulation.

ISDS Arbitrators are not independent judges but remain practising advocates with potential or actual conflicts of interest. Criticisms of the process include lack of transparency of proceedings, length of proceedings, high legal and arbitration costs and lack of precedents and appeals leading to inconsistent decisions, Third Party funding for cases as speculative investments and excessively high awards based on dubious calculations of expected future profits.

There have been increasing numbers of claims for compensation for public interest regulation. These include regulation of public health measures like tobacco regulation, patents on medicines, environmental protection, reduction of carbon emissions and regulation of the minimum wage.

Developing countries have been burdened with legal costs and compensation payments amounting to billions of dollars, which can be equivalent to a large proportion of the government's budget. A recent example is the award of US\$5.5 billion to Australian company Tethyan against Pakistan, when Pakistan was experiencing a severe economic crisis and had just received an emergency loan of about US\$5 billion from the IMF. This was also a forum shopping exercise, as the majority owner of the mine was a Canadian company that used its Australian subsidiary to sue because Australia, unlike Canada, has a bilateral investment agreement with Pakistan. The same Canadian mining company has used another Australian subsidiary to launch a case against Papua New Guinea.

Huge awards against developing countries and the use of Australian BITS in forum shopping contradict Australia's commitments to human rights, undermine its aid and development programs, and harm Australia's reputation and relationships with developing countries.

The Clive Palmer threat to use the Singapore-Australia FTA to sue the Australian government shows that current changes in ISDS provisions to prevent forum shopping are not adequate in preventing it.

Some governments are withdrawing from ISDS arrangements, the EU and the US are now negotiating trade agreements without ISDS, and the system is being reviewed by the two institutions which oversee ISDS arbitration systems.

Legal experts and UNCTAD, the body responsible for monitoring ISDS, have recognised the danger of ISDS cases against a wide range of governments' actions taken during the COVID-19 pandemic, and have recommended means of preventing such cases.

Current revised clauses in ISDS provisions are not effective in protecting the rights of governments to regulate since the exclusions only prevent cases in a narrow range of areas, omitting important public policy areas like the environment, workers' rights and Indigenous land rights.

The full submission with references is at

<http://aftinet.org.au/cms/sites/default/files/200929%20AFTINET%20DFAT%20ISDS%20%20submission%20final.pdf#overlay-context=node/1929>

Recommendations:

- 1. Australia should take a consistent approach to the review of its BITS, based on its commitments to the right of governments to regulate in the public interest and its commitments to human rights, labour rights and environmental standards as expressed in UN and ILO conventions and agreements.**
- 2. The review should recognise the impact on aid and development budgets and the harm to Australia's reputation of forum shopping and excessive awards made to Australian companies against developing countries, and take more effective steps to prevent this.**
- 3. The review should recognise that current revised clauses in ISDS provisions are not effective in protecting the rights of governments to regulate since the exclusions only prevent cases in a narrow range of areas, omitting important public policy areas like the environment, workers' rights and Indigenous land rights.**
- 4. The review should acknowledge the danger of ISDS cases being taken against a wide range of governments' actions during the COVID-19 pandemic, recognised by legal experts and by UNCTAD, the body responsible for monitoring ISDS cases. The Government should follow the advice of legal experts to make arrangements in the short-term with BIT partners to**

exclude cases against pandemic-related actions and to review BITS to exclude ISDS as per Recommendation 5.

- 5. Australia should take a policy approach to BITS that involves investment promotion and facilitation rather than dispute resolution. Australia's existing BITS should be amended to exclude ISDS provisions and should instead be enforced through state-to-state dispute processes. The Investment Cooperation and Facilitation Treaty between Brazil and India provides an example of this approach. ISDS should not be included in other trade agreements.**

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