



## Department for International Trade Consultation Response

### UK-Australia FTA

Trade Justice Movement  
October 2018

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#### About the Trade Justice Movement

The Trade Justice Movement is a UK-wide network of seventy civil society organisations, with millions of individual members, calling for trade rules that work for people and planet. Our members include trade unions, NGOs, consumer groups and faith organisations. Together we are calling for trade justice, where the global system of trade ensures sustainable outcomes for ordinary people and the environment.

A list of current members is [available here](#).

The Trade Justice Movement has deep concerns about the Government's post-Brexit trade policy. At this critical time, it is essential that we lay down norms for international trade which promote sustainable development and protects the environment. We believe that civil society has a crucial role to play in the development of trade policy, and has too long been left out of the conversation. In this consultation we outline our specific concerns about an FTA with Australia and lay out a framework for what civil society expects in future trade agreements.

#### **What concerns, if any, does your organisation have about a free trade agreement (or related trade talks) with Australia, and why?**

##### **1. Democracy and Scrutiny**

The Trade Justice Movement (TJM) is concerned about the level of democratic oversight, scrutiny and public involvement in the negotiation and agreement of new Free Trade Agreements. This applies to all future UK FTAs, including one with Australia, because of their likely broad scope and impact on issues that are of concern to TJM members and their supporters.

Our concerns in respect of democracy and scrutiny can be summarised as (A) the lack of Parliamentary scrutiny of FTA negotiations and its ability to amend or reject proposed FTAs; (B) the lack of a clear role for civil society in contributing to the creation of FTAs and (C) that weak impact assessments of FTAs do not give sufficient weight to social factors - including the effect of FTAs on the environment, human rights and developing countries.

##### (A) Parliamentary Scrutiny

We do not yet know what Parliamentary mechanisms the government intends to employ when negotiating and ratifying an FTA with Australia. The current Trade Bill does not cover

the UK's new post-Brexit trade deals and there currently appear to be no plans to bring forward a second Bill which deals specifically with this issue.

However, the precedent of the Trade Bill, which gives ministers the power to negotiate continuity agreements with third countries, gives serious cause for concern. The Bill affords ministers Henry VIII powers such that they can amend primary legislation, potentially affecting important human rights and regulatory standards.<sup>1</sup> This is despite the government's claim that the deals with third countries will remain the same as before.<sup>2</sup>

Furthermore, the current Trade Bill gives Parliament no role in setting a mandate for future negotiations, which would define the scope of trade deals. Parliament is given no power to scrutinise the texts of trade negotiations, and it therefore has limited power to monitor, amend or prevent unwanted changes to legislation resulting from new trade deals.<sup>3</sup> The government must urgently bring forward legislation to ensure that Parliament has a clear role in the development of trade deals. Specifically, Parliament should be given:

- A role in setting the mandate for negotiations and the ability to approve or reject the commencement of trade negotiations.
- Access to key negotiating texts in a timely manner and be able to feed in to negotiations, including via full debates in parliament.
- The ability to approve or reject trade deals via a binding vote at the end of the negotiations.
- Have a formal role in the review of implemented trade deals.

In order to provide an appropriate level of scrutiny, the government should establish a Trade Scrutiny Committee in Parliament, composed of cross-party MPs. The committee should have advance warning of proposed trade deals, oversight of negotiation texts and the ability to refer deals - or provisions within deals - to ratification in Parliament. Parliament's decision on a deal, or amendment of a negotiating position, must be final and bind the government.

These steps are necessary to ensure the level of democracy and transparency that will empower Parliament to decide whether or not a negotiated trade deal is in the public interest. It will also have the effect of holding the incumbent government accountable for its negotiations, and ensure that the public interest is not forgotten when trade deals are negotiated. The controversy and public backlash around TTIP should serve as a warning that ordinary voters expect democratic oversight of trade deals such as the one with Australia, and after Brexit it is essential that these powers are given to Parliament, not just ministers and civil servants.

#### (B) Involvement of Civil Society

TJM appreciates the Department for International Trade's willingness to consult civil society organisations on the UK-Australia FTA and the presence of such organisations on some of DIT's working groups. However there continues to be a lack of clarity on what the different mechanisms are for gathering civil society input and how views will be incorporated into future negotiations.

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<sup>1</sup> House of Commons Library (2018), 'The Trade Bill' – Lorna Booth et al, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8073>

<sup>2</sup> BBC News, 'Brexit: UK hopes to roll over 40 EU trade deals, says Liam Fox', 29 March 2018 <https://www.bbc.co.uk/news/uk-politics-43581729>

<sup>3</sup> See Trade Justice Movement (2018), 'Securing democracy in UK trade policy' [https://www.tjm.org.uk/documents/reports/TJM\\_SecuringDemocracyInUKTradePolicy\\_2017\\_web.pdf](https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf)

It is essential that civil society remains engaged in all stages of negotiating a UK-Australia FTA. There should be a separate public consultation when the UK has begun negotiations with Australia, including details of the UK's aims for the negotiation so that individuals and civil society organisations can assess specific provisions of the proposed FTA.

With all trade deals, there is a risk that those groups with the most financial interest in a trade deal - such as multinational businesses - have the most influence over countries' negotiating positions. However, it is important that negotiating positions are in the public interest, and accountable to the electorate, not just corporations. DIT should build in mechanisms for listening to civil society groups - through online consultations, events in local communities and meetings with representatives of key groups, such as trade unions, NGOs and faith organisations. This will help to ensure that any resulting trade deal is reflective of the concerns and interests of wider society.

### (C) Comprehensive Impact Assessments

In addition to consulting members of the public, the government should commission and publish independent impact assessments which critically examine the economic, social and environmental effects of the UK-Australia FTA. These should be designed to accurately inform MPs and the public about the impact of the deal, with particular attention to: environmental and health standards; workers' rights and deregulation; public services and privatisation; the impact on global sustainable development and developing countries; impact on gender, equality and discrimination; and any concerns around rule of law and national sovereignty.

The UK must ensure that the deal does not impinge upon the UK's commitments to helping developing countries. Many developing countries benefit from the Generalised System of Preferences (GSP), which is designed to offer preferential tariffs to the least developing countries. Trade agreements between wealthy countries, such as the UK and Australia, risk undercutting exporters in developing countries or diverting trade away from developing countries who would normally benefit from preferential tariff rates. In the case of a deal with Australia, we would be particularly concerned about the mining, wine and agricultural industries, since these industries make up a large proportion of Australia's exports, and would compete with countries in the GSP scheme.<sup>4</sup> Given the UK's proud record in championing international development and partnering with less developed countries, many of which are historic allies, it would be wrong not to assess the impact of an FTA with Australia on these countries' exporters. The Department for International Trade should also proactively seek the views of representatives from these countries and factor these in to any future deals to avoid any negative impacts.

The risk of a UK-Australia FTA in areas such as the environment, workers' rights, public services and local communities are explored further in other sections of our consultation response.

## 2. Regulatory cooperation and deregulation

DIT's original consultation document explains how modern FTAs aim to eliminate non-tariff barriers (NTBs) to trade, as well as to reduce tariffs. This includes aligning standards through various forms of bilateral regulatory cooperation. The document states that removing NTBs leads to "increases in

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<sup>4</sup> Department of Foreign Affairs and Trade (Australia), 'Australia's Top 10 Goods & Services Exports, 2017' (accessed October 2018) <https://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/top-goods-services.aspx>

product quality, variety and consumer choice.”<sup>5</sup> While regulatory cooperation in a UK-Australia FTA may increase the variety of goods available to British consumers, this should not be conflated with an increase in the quality of goods. Indeed, there is plenty of evidence that regulatory cooperation (notably alignment of standards through mutual recognition or harmonisation) can have a deregulatory effect as standards converge to the lowest common denominator. This is because mutual recognition intrinsically involves drawing an equivalence between different standards regimes, such that both countries’ goods are available in each market. This incentivises regulators in the country with higher standards to cut standards in order to reduce costs for producers and compete.

Furthermore, mutual recognition makes it difficult for a government to raise its own domestic standards, since it has committed as part of the FTA to recognise the other country’s lower standards, over which it has no control. Standard raising subsequently requires coordination between FTA members, which can be politically difficult and slow. This reduces the democratic power of ordinary citizens, who expect that their government has control over the standards of goods sold in their country.

The Government has emphasised that after Brexit, the UK’s “regulatory standards will remain as high as the EU’s” and that “We will not water down our standards on food safety, animal welfare and environmental protection as part of any future trade deals.”<sup>6</sup> There is clear public support for retaining current standards – IPPR research found 82% of the public are in favour of retaining current regulations, even at the expense of securing a trade agreement with the US.<sup>7</sup> The government must keep to this commitment, and also ensure that the UK’s regulatory regime does not recognise lower standards in other countries as ‘equivalent’ to those in the UK.

#### *Example: Food standards and animal welfare*

The government has not announced its negotiating priorities with Australia and has repeatedly claimed that post Brexit trade deals will not involve a reduction in UK food or health standards (most notably in the case of a UK-US trade agreement). However DIT has not ruled out regulatory cooperation with new trading partners on health, environmental and other standards. The UK was supportive of such provisions in TTIP and it seems likely that regulatory cooperation will form part of the negotiations, which could apply to food, health and environmental standards. DIT has not explicitly proposed mutual recognition of Australia’s health, environmental and other standards in a UK-Australia FTA; however it is difficult to see how a comprehensive FTA would reduce NTBs without aligning such standards.

DIT’s consultation document states that: “the greatest number of non-tariff measures in Australia fall under the category of sanitary and phytosanitary measures. This is a category which covers any standards which a country applies to ensure food safety, animal health or plant health standards. According to this data Australia also has a high number of technical barriers to trade, which include regulations, standards and procedures required to ensure that domestic legislative requirements are

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<sup>5</sup> Department for International Trade (2018), ‘An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and Australia’, p13 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/745965/FTA\\_brochure\\_AUS\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745965/FTA_brochure_AUS_FINAL.pdf)

<sup>6</sup> Government Response to Environment, Food and Rural Affairs Committee Sixth Report of Session 2017–19, ‘The future for food, farming and the environment’ (HC 870) (October 2018).

<sup>7</sup> The Independent, ‘Ditch trade deal with Trump rather than accept chlorinated chicken, Britons say’, 7 April 2018 <https://www.independent.co.uk/news/uk/politics/brexit-trade-deal-theresa-may-us-uk-eu-chlorine-chicken-food-safety-standards-poll-a8292496.html>.

met.”<sup>8</sup> While the government has not announced its negotiating priorities with Australia, and the content of the deal will depend first and foremost on the Future Economic Partnership (FEP) with the EU, these sentences imply that negotiations will concern sanitary and phytosanitary (SPS) measures, which includes things like food and health standards.

Agriculture constitutes a larger proportion of Australia’s economy and exports than the UK’s (2.6% vs 0.6% of GDP), so access to UK meat and dairy markets are likely to be a priority for Australia’s negotiators in an FTA with the UK.<sup>9</sup> Milk powder, butter and cheese constitute Australia’s largest exports to worldwide markets, but they do not feature in the country’s top exports to Europe and it is therefore likely to seek to increase trade in these areas.

Australia currently faces tariff and non-tariff barriers on agricultural exports to the EU. In May, negotiations between the EU and Australia led to reports that the EU had highlighted that the size of its market offered significant opportunities without the need for the bloc to expose its agricultural sector to cheap imports. At the same time, there have been worrying proposals that the UK should radically liberalise its farming sector.<sup>10</sup> Australia’s most valuable agricultural import to the UK is wine, much of which is bottled for re-export to other EU countries;<sup>11</sup> and beef, lamb and apples are also major agricultural exports.<sup>12</sup> EU tariffs on these products are significant, such as €32 per hundred litres of imported Australian wine.<sup>13</sup>

A UK-Australia FTA is therefore likely to lead to liberalisation the UK’s farming sector, but this could have a significant negative impact on UK farmers and also the level of food and health standards in British produce. Australia has lower food safety and health standards than the UK in many areas. This includes the controversial use of chlorine to wash raw chicken, which received public attention during the TTIP negotiations as the practice is also used in the US.<sup>14</sup> Recent research from the University of Southampton highlights the health risk of chlorinated chicken in failing to kill bacteria,<sup>15</sup> but this is just one example of how Australia food standards are lower than the EU’s. Unlike the EU, Australia also

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<sup>8</sup> Department for International Trade (2018), ‘An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and Australia’, p24 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/745965/FTA\\_brochure\\_AUS\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745965/FTA_brochure_AUS_FINAL.pdf)

<sup>9</sup> Ibid. p15

<sup>10</sup> The Guardian, ‘EU talks with Australia and New Zealand deal blow to UK free trade plans’, 22 May 2018 <https://www.theguardian.com/politics/2018/may/22/eu-trade-talks-australia-new-zealand-brexit-commonwealth>

<sup>11</sup> Wine Australia, ‘What’s the outlook for Australian wine in the UK and Europe?’, 9 February 2017 <https://www.wineaustralia.com/what-s-happening/stories-of-australian-wine/february-2017/australian-wine-in-the-uk-and-europe>

<sup>12</sup> Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Inquiry into Australia’s trade and investment relationship with the United Kingdom’ (2017), p3 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/tradewithUK/Interim\\_Report/](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/tradewithUK/Interim_Report/)

<sup>13</sup> Trade Tariff Service (UK Government), Commodity information for 2204210800 (as of 21 October 2018) <https://www.trade-tariff.service.gov.uk/trade-tariff/commodities/2204210800>

<sup>14</sup> Australian Chicken Meat Federation, ‘Chicken Meat Production’ (accessed October 2018) <https://www.chicken.org.au/chicken-meat-production/>

<sup>15</sup> The Observer, ‘Chicken safety fear as chlorine washing fails bacteria tests’, 26 May 2018, <https://www.theguardian.com/world/2018/may/26/chicken-health-fear-chlorine-washing-fails-bacteria-tests-brexit-salmonella-listeria>

allows hormone-treated meat<sup>16</sup> and has looser legislation on use of pesticides.<sup>17</sup> Any MRAs with Australia on agri-goods risk products with these lower standards being sold on UK supermarket shelves, and furthermore, is likely to encourage lowering of UK standards in these areas or at least delay any standard-raising.

It would be tempting, in a rush to secure a new trade deal with countries Australia after Brexit, to model this deal on TTIP and agree to regulatory cooperation across multiple sectors. However there is reason to believe that this would put deregulatory pressure on existing standards in important industries including food, health and financial services. This could have far reaching negative consequences for policy and public welfare in the UK.

### 3. Investor-State Dispute Settlement

Investor-State Dispute Settlement (ISDS) mechanisms allow private companies to sue governments if they believe that changes to domestic law or policy implementation have negatively impacted on the profitability of their investment. ISDS was a controversial proposal in the TTIP negotiations, and was replaced in the Comprehensive Economic Trade Agreement (CETA) by the similarly structured Investor Court System (ICS). The European Court of Justice is currently producing an opinion on ICS in CETA which could mean that it is not implemented.

The original stated aim of ISDS was to increase investment in countries where the legal infrastructure was considered to be weak, however the evidence suggests that such provisions have done little to help attract investment to these countries. ISDS effectively provides international investors with a form of political risk insurance, the costs of which are shouldered by taxpayers: the average costs of defending a case is US\$8 million and the average award is US\$504 million.<sup>18</sup> <sup>19</sup> Over 95% of all compensation awarded in ISDS cases has gone to companies with over US\$1 billion in annual revenues and super-rich individuals with over US\$100 million in wealth.<sup>20</sup> The mechanism offers sweeping rights to investors with no equivalent for domestic companies or communities facing adverse effects of business malpractice. It offers a degree of enforceability that is unparalleled elsewhere in international law.

Arbitration courts do not meet recognised standards for rule of law: they lack an appeals system, judges do not have the same level of training, trials are not always transparent and there are very high costs to bring a case. ISDS also has worrying implications for public policy; governments risk significant legal costs for defending a case and compensation in the millions, sometimes billions, of dollars if they lose. This has led to 'regulatory chill', whereby states are reluctant to introduce legislation which might harm the profits of these investors – even if the legislation is in the interests of the environment, social welfare, or is democratically supported by the electorate.

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<sup>16</sup> Food Standards Australia New Zealand, 'Hormonal growth promotants in beef' (updated March 2011, accessed October 2018) <http://www.foodstandards.gov.au/consumer/generalissues/hormonalgrowth/Pages/default.aspx>

<sup>17</sup> ABC News (Australia), 'EU ban on neonicotinoids triggers call for a similar ban in Australia to protect bees', 30 April 2018 <https://www.abc.net.au/news/rural/2018-04-30/beekeepers-call-for-neonicotinoids-australia-ban/9710252>

<sup>18</sup> Gaukrodger, D. and K. Gordon, "Investor-state dispute settlement: a scoping paper for the investment policy community", OECD Working Papers on International Investment, 2012/03, OECD, 2012, p19 <http://dx.doi.org/10.1787/5k46b1r85j6f-en>

<sup>19</sup> UNCTAD, Investor–state dispute settlement: review of developments in 2017. June 2018, [https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf)

<sup>20</sup> Gus Van Harten & Pavel Malysheuski, "Who has benefited financially from investment treaty arbitration? an evaluation of the size and wealth of claimants" Osgoode Legal Studies Research Paper No. 14/2016, [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2713876](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2713876)



Companies have challenged a range of government policies, from environmental policy to minimum wage legislation. For example, in *Vattenfall vs. Germany (2009)*, Swedish energy firm Vattenfall launched an investor-state claim against Germany because it had tightened legislation on water quality which affected Vattenfall's plans to build a coal-fired power plant. Vattenfall argued that this amounted to an expropriation and a violation of Germany's obligation to afford foreign investors "fair and equitable treatment." To avoid the case being taken to an international tribunal, the German government agreed a settlement, including the weakening of the environmental standards required to obtain a permit for the plant.<sup>21</sup> Other cases include *Lone Pine vs. Canada (2013)*<sup>22</sup>, where the company is challenging a ban on fracking under the St. Lawrence river and *Anglian Water Group vs. Argentina (2010)* where investors successfully sued Argentina for measures taken during its currency crisis.<sup>23</sup>

For these reasons, Trade Justice Movement believes that ISDS (or the CETA alternative of ICS) should not be included in any future FTA between the UK and Australia. Its inclusion would undermine key shared values including democracy, transparency and rule of law; there is also significant public opposition to its inclusion in such a deal. In a [separate briefing](#), Trade Justice Movement has outlined possible alternatives to ISDS, some of which are preferable, but many suffer from the same problems. Ultimately it is difficult to see how a system where the public insure private investor risk can avoid the problems of regulatory chill and democratic oversight. Increasingly, this dissatisfaction with ISDS means that it is being left out of FTAs. In October 2018, the US and Canada decided to drop ISDS altogether from the US-Mexico-Canada Agreement (USMCA), the replacement to the North American Free Trade Agreement (NAFTA).

Australia too has suffered from ISDS; a drawn out case against the Australian government for its plain cigarette packaging laws triggered public backlash against ISDS.<sup>24</sup> In 2011 the then-Labor government vowed to never again sign trade agreements containing ISDS provisions, and in the 2016 election Labor pledged to work to remove ISDS from existing trade agreements.<sup>25</sup> However, the incumbent Liberal government has set out plans to include ISDS in FTAs on a case-by-case basis.<sup>26</sup> For example, Australia is seeking to include state-to-state dispute settlement in the EU-Australia FTA but the objectives noticeably make no mention of ISDS.<sup>27</sup> On the other hand, Australia has agreed membership of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), which does

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<sup>21</sup> See report from the International Institute for Sustainable Development, 'The State of Play in Vattenfall v. Germany II' (2014): <https://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-german-public-dark-en.pdf>

<sup>22</sup> See case details at Global Affairs Canada, NAFTA - Chapter 11 - Investment (accessed October 2018) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng>

<sup>23</sup> See Investment Treaty News, 'Awards and Decisions', 23 September 2010, <https://www.iisd.org/itn/2010/09/23/awards-and-decisions/>

<sup>24</sup> The Guardian, 'Revealed: \$39m cost of defending Australia's tobacco plain packaging laws', 1 July 2018 <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>

<sup>25</sup> The Guardian, 'Labor pledges to review trade deals that let companies sue Australia', 7 June 2018 <https://www.theguardian.com/australia-news/2016/jun/07/labor-pledges-to-review-trade-deals-that-let-companies-sue-australia>

<sup>26</sup> Department of Foreign Affairs and Trade (Australia), 'Investor-state dispute settlement (ISDS)' (accessed October 2018) <https://dfat.gov.au/trade/investment/pages/investor-state-dispute-settlement.aspx>

<sup>27</sup> Department of Foreign Affairs and Trade (Australia), 'Australia-European Union Free Trade Agreement: Objectives' (accessed October 2018) <https://dfat.gov.au/trade/agreements/negotiations/aeufta/pages/australia-european-union-fta-objectives.aspx>

contain ISDS provisions; and unlike New Zealand, has not negotiated any bilateral exemptions from these provisions.<sup>28</sup>

Regardless of whether Australia seeks ISDS clauses in a future UK-Australia FTA, the UK must exclude such clauses, and consider alternative ways of ensuring investors have adequate protection. This could be done by requiring UK businesses to undertake due diligence before investing in Australia and encouraging businesses to seek to resolve issues in-country as soon as they arise, including by recourse to mediation. Companies can also make use of political risk insurance, such as the World Bank's Multilateral Investment Guarantee Agency (MIGA) or those available through private providers. The UK should also bring its trade and investment policy in line with its commitments on business and human rights and support moves to hold companies to account for infringements of these rights in third countries. This should include an accessible mechanism for communities to seek redress and enforceable penalties for companies.

#### 4. The environment

DIT's consultation document recognises that trade can pose a threat to the environment, especially where it encourages industries with harmful environmental impacts.<sup>29</sup> Despite the close relationship between trade and the environment, international environmental agreements such as the Paris climate change commitments tend to be made in isolation from trade deal negotiations. Current trade rules place trade promotion and liberalisation ahead of climate goals: for example, ISDS might be used by private investors to challenge domestic environmental legislation, and WTO rules have regularly been used by states to challenge each other's subsidies for renewable energy industries (not one case has been brought against a state for fossil fuel subsidies). No trade deal currently in force contains any binding commitments to ensure that international trade supports climate targets.

Trade and investment deals pose a potential barrier to fighting climate change and developing better environmental policy. A new UK-Australia FTA presents an opportunity for rigorous, binding environmental clauses, to ensure that the UK's post-Brexit trade does not conflict with its international climate commitments.

##### *Example: Mining industry*

Mining is one of Australia's largest industries, comprising around 8.4% of GDP<sup>30</sup> and contributing to 35% of Australian exports.<sup>31</sup> The UK, as a global financial centre, plays a key role in financing mining operations. Australia's trade minister has noted that Australian mining relies on UK investment, and Australia's two largest mining companies - Rio Tinto and BHP - are Anglo-Australian multinationals.<sup>32</sup>

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<sup>28</sup> Library of Congress, 'New Zealand: Agreements with Five Countries Exclude Compulsory Investor-State Dispute Settlement Processes', 26 March 2018 <https://www.loc.gov/law/foreign-news/article/new-zealand-agreements-with-five-countries-exclude-compulsory-investor-state-dispute-settlement-processes/>

<sup>29</sup> Department for International Trade (2018), 'An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and Australia', p14 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/745965/FTA\\_brochure\\_AUS\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745965/FTA_brochure_AUS_FINAL.pdf)

<sup>30</sup> Australian Bureau of Statistics, 'Year Book Australia, 2012, Mining Industry' (2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Mining%20Industry~150>

<sup>31</sup> Treasurer of the Commonwealth of Australia's address to the Minerals Council of Australia, 2002 Minerals Industry Dinner, full text here: <https://web.archive.org/web/20060820193638/http://www.treasurer.gov.au/tsr/content/speeches/2002/003.asp>

<sup>32</sup> Mining Technology, 'The world's biggest mining companies in 2018', 21 June 2018 <https://www.mining-technology.com/features/worlds-biggest-mining-companies-2018/>



Indeed, four of the world's seven largest mining companies are at least in part British-owned, despite the lack of mining operations in Britain, illustrating the importance of the UK in financing global mining.<sup>33</sup> It is therefore likely to be in both countries' interests to expand investment in mining through a UK-Australia FTA.

However, mining has potentially severe environmental impacts. The Australian Academy of Technology and Engineering (ATSE) notes that "Mining poses a variety of environmental risks, including potential impacts on ground and surface water quantity and quality, air quality, biodiversity, landscape stability and climate change."<sup>34</sup> These environmental risks are associated with public safety and health risks. The ATSE report further notes that "By some reports, Australia has more than 50,000 abandoned mines, most of which are decades old and may not meet modern rehabilitation and closure standards."<sup>35</sup> Furthermore, coal mining encourages harmful use of fossil fuel as an energy source. In the context of the UK's Paris COP22 commitments and the recent IPCC report, it is essential that the UK prioritises mitigating the risks of climate change and limiting environmental damage in future trade policy, including moving towards green energy sources. Indeed, trade policy should be used to champion and invest in renewable industries, rather than stimulate investment in mining for fossil fuels.

### *Energy policy*

It is difficult to overestimate the importance of the energy sector to both climate change and the global economy. The high costs and potential profits of energy exploration and production make energy the single largest destination for foreign direct investment (FDI).<sup>36</sup> Much of this investment is protected by ISDS (discussed earlier) in BITs, which makes it very difficult for governments to control or limit this investment. Yet controlling the energy industry is essential if the UK is to meet its international commitments on climate change, as defined in the COP21 Paris Agreement. It is essential that a UK-Australia FTA does not include ISDS, which can be taken advantage of by energy companies to challenge environmental policy, and that the deal does not include an Energy Chapter to encourage further investment in fossil fuels. The government will be aware of opposition from local communities across the country to fracking. There is evidence that fracking poses a severe threat to climate change through fugitive methane emissions, making it worse for climate change than coal on some measures.<sup>37</sup> It is important, for our natural environment and our climate change commitments, that a UK-Australia trade deal is not used as an opportunity for Australia fracking firms to begin exploration in the UK.

The Energy Charter Treaty (ECT) governs a significant proportion of trade and investment in the energy sector. The treaty offers protections to investors, including national treatment (i.e. ensuring that foreign firms are treated the same as domestic firms). Australia and the UK are both members of the ECT, and one concern is that a new trade deal could further increase the protections offered to energy firms under the ECT. It is important that the UK retains the power to control its domestic energy policy, particularly in relation to developing a green energy sector and safeguarding environmental protections.

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<sup>33</sup> Ibid.

<sup>34</sup> The Australian Academy of Technology and Engineering (ATSE), 'Addressing the Environmental Impacts of Australian Mining's Past and Future' (2017) <https://www.atse.org.au/content/publications/policy/addressing-environmental-impacts-australian-minings-past-future.aspx>

<sup>35</sup> Ibid.

<sup>36</sup> Financial Times (2015), 'The FDI Report 2015: Global Greenfield Investment Trends'

<sup>37</sup> Parliamentary Assembly to the Council of Europe Committee on Social Affairs, Health and Sustainable Development (2016), 'The exploration and exploitation of non-conventional hydrocarbons in Europe' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23190&lang=en>

### *Non-regression on environmental standards*

Ministers, and notably the Secretary of State for Environment, Food and Rural Affairs (DEFRA), have repeatedly promised that there will be no regression on the UK's existing environmental legislation, if the UK gets a deal with the EU. This is essential to combating climate change and meeting the UK's environmental targets. Taking these standards seriously also means that there must be guaranteed non-regression in the case of a 'no deal' scenario with the EU, and a future UK-Australia partnership must not undermine this non-regression. As discussed earlier, modern FTAs tend to seek some form of regulatory cooperation to overcome NTBs. It is essential that any regulatory cooperation does not reduce the UK's environmental standards, or bind it (either legally or in practice) to not improving its existing standards.

Many of TJM's members, including environmental groups and trade unions, seek a further commitment that there will not only be non-regression in environmental standards, but that standards will actually continue to rise in line with EU standards after Brexit. This could be achieved through formal harmonisation or some sort of similar commitment in EU law, and would not only be good for the environment but also reduce friction for cross-border trade. Indeed, maintaining the EU's 'common rulebook' on goods standards is a core part of the government's Chequers proposal for the FEP. It is clear that this kind of regulatory cooperation with the EU on environmental standards would limit the scope of a UK-Australia FTA, since the UK would be unable to align its standards with the EU and Australia simultaneously. TJM has concerns about the deregulatory and democratic effects of regulatory cooperation, discussed earlier, however our members are in agreement that a UK-Australia FTA must not be an opportunity to either reduce our existing standards or restrict the UK's ability to raise standards in the future. Given the EU's comparatively high environmental standards, an agreement with the EU is more likely to deliver on our environmental targets than a TTIP-style deal with Australia.

### *EU principles*

In addition to environmental regulations on goods and services, EU environmental law is also directed by key 'principles', such as the 'polluter pays' principle and the principles of precaution, prevention and rectifying pollution at source. Unlike EU environmental regulations, these principles are not translated into UK law through the European Union (Withdrawal) Act. However environmental groups have rightly emphasised that the environmental principles, or similar equivalents, should continue to direct UK environmental legislation and retain binding force after Brexit, and the government has implied that some principles will be enshrined in a new 'Environmental Principles and Governance Bill'. It remains unclear whether this will include all the EU principles, and what powers the new environmental watchdog will have to enforce them - leading to criticism from many environmental groups.

The UK-Australia deal poses a further risk to the ambitions of the Environmental Principles and Governance Bill, since Australia does not honour the same principles in its environmental law. In the EU, the Precautionary Principle is enshrined in EU law which means that potentially harmful products and practices are not allowed until they are proven not to be environmentally damaging. Although the polluter pays principle appears in certain statute laws in Australia, this is a fundamentally different structure to the legally enforceable environmental principles which stand above EU law. Any UK-Australia FTA which encourages regulatory cooperation on environmental principles risks the UK having weaker protections post-Brexit, and diverging from EU principle-led environmental legislation.

### *Technology*

The government's consultation document states that "Free Trade Agreements (FTAs) can also positively impact the environment as increased trade leads to the transfer of new, potentially more

environmentally friendly, technologies and production methods.”<sup>38</sup> Developing new technology is undoubtedly central to tackling environmental challenges including climate change, however it would be insufficient to rely on an assumption that trade will lead to better environmental technology, especially without government support. Both Australia and the UK should commit to funding for the research and development of green technology and could develop a bilateral cooperation agreement on this issue. Environmentally damaging firms, such as fossil fuel companies, are likely to use the new investment opportunities and markets generated by an FTA to expand their existing, harmful operations, rather than invest in greener alternatives. Ideally FTAs would be structured to incentivise innovation of environmentally friendly technology, rather than simply make it easier for all firms - including those with harmful environmental practices - to invest and expand.

## 5. Public services

TJM is concerned about the potential effect of a UK-Australia FTA on the provision of public services in the UK. Proposals for TTIP would have seen significant liberalisation of services. The inclusion of a negative list for public services would have given the provisions significant scope, including services that might be developed in future; the inclusion of a ratchet clause would have made it extremely difficult to reverse privatisation, even where private provision is demonstrably failing. The net effect of this is to reduce the state's ability to ensure that public services are operated in the public interest, rather than in the interest of private profit. Many public services are already provided by a combination of state and private sector finance, something which is controversial among many voters, who are concerned that this decreases the quality of service provision and increases the cost to individuals. Because trade deals tend to limit exemptions to services not provided in competition with a private provider, the vast majority of UK services would be covered. Liberalising trade in services could encourage this trend further, without democratic support, and with potential implications for social welfare.

Although there are no specific proposals for public services liberalisation in a UK-Australia trade deal, there are a couple of reasons to be concerned. First, a Chequers-style FEP with the EU would restrict the UK's ability to negotiate trade deals which are focused on goods, since goods regulation would be harmonised with the EU. This means that services would be one of the most significant areas within the scope of a UK-Australia FTA, which puts pressure on the UK to offer public services liberalisation in return for a trade deal. The Cato Institute, an influential American think tank, recently set out its proposal for a UK-US FTA which would “open all government procurement markets to goods and services providers from the other party... It should open all services markets without exception to competition from providers of the other party.”<sup>39</sup> It would be worrying if a similar model were pursued for a UK-Australia FTA. Second, as mentioned earlier, the services provisions in a UK-Australia FTA could be based on TTIP or the Trade in Services Agreement (TiSA), a plurilateral treaty which aims to liberalise services, particularly in transport, healthcare and banking.<sup>40</sup>

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<sup>38</sup> Department for International Trade (2018), ‘An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and Australia’, p14 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/745965/FTA\\_brochure\\_AUS\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745965/FTA_brochure_AUS_FINAL.pdf)

<sup>39</sup> The Guardian, ‘Rightwing think tanks unveil radical plan for US-UK Brexit trade deal’, 18 September 2018 <https://www.theguardian.com/politics/2018/sep/18/rightwing-thinktanks-unveil-radical-plan-for-us-uk-brexit-trade-deal-nhs>

<sup>40</sup> European Commission, ‘Trade in Services Agreement (TiSA)’ (accessed October 2018) [http://ec.europa.eu/trade/policy/in-focus/tisa/index\\_en.htm](http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm)

TISA aimed to further liberalise trade and investment in services, and expand "regulatory disciplines" on all services sectors, including many public services.<sup>41</sup> The "disciplines," or treaty rules, would provide all foreign providers access to domestic markets at "no less favorable" conditions than those offered to domestic suppliers and would restrict governments' ability to regulate, purchase and provide services. This would essentially change the regulation of many public and privatized or commercial services from serving the public interest to serving the profit interests of private, foreign corporations."<sup>42</sup> A number of our members are trade unions who represent UK public services workers, have deep concerns about the deal.

#### *Example 1: Healthcare provision*

One particular area of concern is healthcare, which is largely provided by the publicly-owned NHS in the UK, and is also the country's single largest employer.<sup>43</sup> Because the NHS already operates in competition with a number of private sector employers, it will be covered by services provisions in trade deals unless the government seeks a specific exemption. Including the NHS in a UK-Australia deal would lock-in and put pressure on the government to increase privatisation. Legal advice commissioned by Unite Union led to the conclusion from leading QC Michael Bowsher, a former chair of the Bar Council's EU law committee, that the NHS would not have been adequately protected from liberalisation under the proposed TTIP deal.<sup>44</sup> TJM is confident that the government is aware of the immense public outcry which would be generated were the NHS to be included in a UK-Australia deal; it is the view of many of our members that post-Brexit trade deals, including a UK-Australia FTA, must exclude the NHS as well as other public services.

There are more subtle ways in which private investor interests can affect healthcare provision. For example, the inclusion of ISDS could prevent future nationalisation of currently privately provided healthcare services or deter the government from introducing health legislation, as private investors could threaten to sue the government for lost profit. ISDS was used against Slovakia when it sought to bring health insurance back into the public sector<sup>45</sup> and against Australia for legislating for plain cigarette packaging.<sup>46</sup> Another concern is that allowing Australia firms to bid for public health contracts might pave the way for greater liberalisation, and convergence towards a Australia public-private model of healthcare, where more of the costs are covered by individuals rather than the state.

#### *Example 2: local government services*

Local authorities provide many vital public services, such as in housing, education and environmental protection, and are also responsible for giving planning permission. For example, local authorities are responsible for establishing local clean air zones to tackle air pollution, and could block fracking

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<sup>41</sup> European Parliament Directorate General for External Policies (2016), 'Financial services liberalisation and TISA: implications for EU Free Trade Agreements' [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578019/EXPO\\_STU\(2016\)578019\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578019/EXPO_STU(2016)578019_EN.pdf)

<sup>42</sup> Public Services International (2013), 'Brief on the Trade in Services Agreement (TISA)', [http://www.world-psi.org/sites/default/files/documents/research/en\\_psi\\_tisa\\_policy\\_brief\\_july\\_2013\\_final.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_psi_tisa_policy_brief_july_2013_final.pdf)

<sup>43</sup> ONS (2012), 'Public Sector Employment, Q3 2012' [http://webarchive.nationalarchives.gov.uk/20160107051715/http://www.ons.gov.uk/ons/dcp171778\\_288679.pdf](http://webarchive.nationalarchives.gov.uk/20160107051715/http://www.ons.gov.uk/ons/dcp171778_288679.pdf)

<sup>44</sup> The Guardian, 'TTIP deal poses 'real and serious risk' to NHS, says leading QC', 22 February 2016 <https://www.theguardian.com/business/2016/feb/22/ttip-deal-real-serious-risk-nhs-leading-qc>

<sup>45</sup> Investment Treaty News, 'Achmea: The Beginning of the End for ISDS in and with Europe?', 24 April 2018 <https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/>

<sup>46</sup> The Guardian, 'Revealed: \$39m cost of defending Australia's tobacco plain packaging laws', 1 July 2018 <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>

companies from operating on land where it is deemed a health or environmental hazard. Provisions on things like investment protection and regulatory cooperation could prevent local authorities from taking decisions in the interest of their local area.

Local 'ethical procurement' policies could also be affected. EU rules allow for environmental and social considerations in awarding contracts; for example, local authorities can decide to procure only Fairtrade or organic produce. Local authorities are also allowed to ensure that procurement benefits small and medium-sized businesses in the area – for instance a number of cities, including Manchester and Glasgow, have become Sustainable Food Cities, and are trying to use more locally sourced, sustainable food in the public sector. The Scottish parliament has also passed a new public procurement act that allows Scottish public bodies to promote the environmental and social wellbeing of the area when buying goods or services. These kinds of measures might not be possible under a new UK-Australia FTA if the deal demands that procurement does not favour local industries, for example by including a ban on local content requirements. The ostensible aim of preventing protectionism must not be used to undermine ethical procurement powers for local authorities.

## 6. Human rights

A number of rights have already been discussed: a UK-Australia FTA poses a potential threat to democracy and scrutiny, environmental protections, rule of law, health regulations, product standards and public services. In addition to this it is worth highlighting a number of other rights that can be threatened via the mechanisms of ISDS and certain kinds of regulatory cooperation.

### *Indigenous Rights*

Certain legal exemptions have been made for Aboriginal communities in Australia, such as the Indigenous Procurement Policy, many of which could be impacted by trade deals.<sup>47</sup> Aboriginal communities received some exemptions in the Australia-US FTA, particularly in relation to small businesses and Intellectual Property rights.<sup>48</sup> However concerns remain that these exemptions do not go far enough, are not guaranteed in future trade agreements and that any adverse effects from Free Trade Agreements will hit indigenous communities disproportionately.<sup>49</sup> Similarly, there are concerns that the voices of the indigenous communities are not heard or consulted.<sup>50</sup> Other concerns related to cultural and Intellectual Property rights.<sup>51</sup> TJM is keen to ensure that all human rights, and especially the autonomous rights of Australia's indigenous peoples, are not compromised by a UK-Australia FTA. The UK government must draw the same red line and not seek a trade deal which harms the interests of Australia's Aboriginal communities.

### *Labour rights*

Workers are currently protected by domestic and EU legislation, which enshrines their right to organise, guarantees minimum wages and ensures protection from discrimination. Workers also enjoy rights related to health and safety at work, maternity and paternity leave, holiday entitlement and

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<sup>47</sup> Parliament of Australia, 'Government procurement and free trade agreements' (accessed October 2018) [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook45p/GovernmentProcurement](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/GovernmentProcurement)

<sup>48</sup> Indigenous Law Bulletin, 'Indigenous Australia and the Australia-United States Free Trade Agreement' (2004) <http://classic.austlii.edu.au/au/journals/IndigLawB/2004/19.html>

<sup>49</sup> The Sydney Morning Herald, 'Adverse effects of free-trade deal will hit indigenous groups hard', 8 March 2004 <https://www.smh.com.au/national/adverse-effects-of-free-trade-deal-will-hit-indigenous-groups-hard-20040308-gdihts.html>

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

working hours. Those rights which are guaranteed in EU law are being translated into UK law through the European Union (Withdrawal) Act. As with other rights, workers' rights are one area which can be affected by FTAs.

Some recent trade deals, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), of which Australia is a member, contain specific chapters on labour rights. Whilst TJM supports international collaboration to raise working standards, these FTA chapters fall far short of offering adequate protections to workers. The New Zealand NGO 'TPP Legal' analysed the Labour chapter in the proposed Trans-Pacific Partnership. They concluded that "The 1998 ILO Declaration on Fundamental Principles and Rights at Work is the primary source of the TPPA labour standards – this is problematic as it is vague, was not intended for the trade and investment arena and could be interpreted inconsistently with international labour conventions and recommendations."<sup>52</sup> Because Labour is a chapter within the CPTPP and the agreement includes ISDS provisions, ISDS can be used against governments for domestic changes to labour rights. Furthermore, there is no meaningful role provided for trade unions or other stakeholders in these agreements in labour rights regulation. Lastly and importantly, TPP Legal found that "There has been a disappointing lack of enforcement of labour commitments under the US FTAs that the TPPA Labour Chapter is modelled on – in fact not a single complaint has progressed to a concluded panel decision."<sup>53</sup>

Two British and Australian think tanks, Demos and McKell, have analysed the difference between the UK and Australia's standards on labour rights. They both conclude that, to avoid downwards pressure on rights in an FTA, a Labour Development Plan (LDP) should be "agreed to as part of the FTA" to account for "changes in labour market protections."<sup>54</sup> An LDP would: "Have time-bound commitments. Rather than requiring compliance from the outset, a LDP could contain specific targets to be reached by certain points in time; Negotiate commitments specific to country contexts. The UK and Australia both have strengths in their labour market protections. The FTA could have tailored commitments aimed at bringing Australia up to the UK's level, and vice-versa; Positive incentives rather than economic sanctions." These proposals demonstrate the immediate impact a UK-Australia FTA could have on the labour market and labour rights, and the need for appropriate safeguards to be put in place.

TJM is therefore concerned about the precedent of attempts to include labour rights in trade deals. As fewer labour rights can mean lower costs for businesses, a CPTPP-style deal with Australia could put deregulatory pressure on UK labour rights, and encourage firms to cut standards, for example by offering more zero hours or temporary contracts. Any regulatory cooperation on labour rights which does not raise standards, with binding enforcement, could encourage this deregulatory process further.

### *Gender*

TJM is pleased that the government has made gender equality a priority in its trade policy. This is evidenced in the Department for International Trade's "gender-responsive approach to trade" and the Commonwealth 'SheTrades' campaign. However there is more to be done to ensure that gender provisions are secured in future trade deals, including a UK-Australia FTA. In December 2017, 118 WTO members supported a Joint Declaration on Trade and Women's Economic Empowerment at the Ministerial Conference. A number of trade deals now include gender chapters and countries including the UK have a renewed focus on female entrepreneurship. International action to address the

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<sup>52</sup> Harré, Laila; 'TPPA Labour Chapter - Not a Gold Standard', TPP Legal, Expert Paper #8 (2017) <https://tpplegal.files.wordpress.com/2017/06/labour-chapter.pdf>

<sup>53</sup> Ibid.

<sup>54</sup> Demos and McKell Institute, 'The Social Benefit of Economic Ties, The Scope for an Australia-UK Free Trade Agreement' (2018), p42 <https://www.demos.co.uk/wp-content/uploads/2018/05/The-Social-Benefits-of-Economic-Ties.pdf>



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gendered impacts of trade policy is welcome. However, this will not be effective if it is limited to non-binding declarations, gender chapters in trade deals or initiatives to increase women's access to export markets. The government must ensure that a future UK-Australia FTA complies with the UK's commitments under international human rights law. Comprehensive gender impact assessments should be conducted, together with human rights and sustainable development assessments, and their findings should be taken into account. Where a conflict is identified, commitments on gender equality and other human rights, must be given precedence over other trade rules in the the FTA.