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Australian Human Rights Commission
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The Director
Australian Human Rights Commission Human Rights and Technology Project

The Australian Fair Trade and Investment network (AFTINET) is a national network of 60 community organisations and many more individuals advocating for trade agreements to be consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET recognises that the development of the digital economy, and the rapid emergence of new technologies, brings both new opportunities and new human rights risks and challenges. We understand that new regulatory frameworks and techniques may be required to ensure that digital economy benefits everyone, and that consumer rights and human rights, particularly privacy rights and rights against discrimination, are not undermined.

We are pleased that the Australian Human Rights Commission (AHRC) is responding to these concerns through the Human Rights and Technology Project and we welcome the opportunity to respond to the Human Rights and Technology Discussion Paper.

AFTINET is concerned that the electronic commerce (e-commerce) rules included in Australia's bilateral and regional trade agreements, and currently under negotiation in a plurilateral agreement on e-commerce, could impinge on the AHRC's project by closing-off opportunities for regulatory reform and undermining government enforcement mechanisms.

E-commerce is a complex and emerging area of trade law, which aims to secure the free flow of cross-border data, prevent governments from requiring companies have a local presence when operating in their country, and restrict access to source code and algorithms.

The human rights and regulatory risks of these rules are significant. They allow global companies to operate in Australia without having a local presence, enabling them to bypass Australian laws and regulations. They also enable these companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively evading privacy legislation. Further, they can restrict the ability of regulators to identify and respond to algorithmic bias by preventing their access to source code and algorithms.

We have attached a submission made by AFTINET to the Department of Foreign Affairs and Trade, which details the social, economic and human rights risks of e-commerce rules, including how they could affect the AHRC Human Rights and Technology project.

We have identified a specific risk in relation to Proposal 7 in the Human Rights and Technology Discussion Paper which recommends that the government introduce legislation "regarding the

explainability of AI-informed decision making.” This legislation would enable an individual, in certain circumstances, to demand both a non-technical and a technical explanation of an AI-informed decision.

It is probably that, in many cases, a technical explanation would require access to source code and that this access could be restricted by e-commerce rules either in one of Australia’s existing trade agreements, or the plurilateral agreement on e-commerce that is currently under negotiation.

It is also possible that e-commerce rules could impact on other proposals made in the Human Rights and Technology Discussion Paper as well as on future regulation that may be required as this digital economy evolves, and new technologies are developed.

We would be pleased to meet with representatives from the Human Rights and Technology project to provide additional information or to discuss these concerns further.

We can be contacted on [REDACTED].

Warm regards,

[REDACTED]

Convenor, Australian Fair Trade and Investment Network

Attachment 1.

**Submission to the Department of Foreign Affairs and Trade
On the
Plurilateral Negotiations on Trade-Related Aspects of Electronic Commerce**

February 2020


AFTINET
7/321 Pitt St, Sydney 2000.

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1. Introduction to AFTINET

The Australian Fair Trade and Investment Network (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 and recognises the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

2. Recommendations

Transparency and democratic accountability

- The government should commit during the negotiations for a plurilateral agreement on e-commerce to:
 - Publicly release Australia's negotiation positions;
 - Conduct and publicly release a detailed analysis of the social and economic risks of e-commerce provisions, including their potential impact on domestic policy-making processes. These should include any reforms emerging from the ACCC inquiry into digital platforms, the The Australian Human Rights Commission Human Rights and Technology Project, and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as well as other social and economic policy processes;
 - Conduct and publicly release an independent economic and social impact assessment of the plurilateral agreement before the agreement is signed.
- The government should update its procedure for the negotiation and ratification of trade agreements to ensure that:
 - Negotiating texts are published throughout trade negotiations;
 - The final text of agreements is published before each agreement is signed;
 - Independent economic, social and environmental impact assessments are completed before the agreement is signed;
 - Parliament has the right to debate and vote on the full text of the agreement.

Privacy rights and consumer protections

- The plurilateral agreement on e-commerce should not:
 - prevent current and future governments from regulating the cross-border flow of data for legitimate policy purposes and in the public interest;
 - prohibit the use of local presence requirements.
- The plurilateral agreement on e-commerce should:
 - Include mandatory minimum standards for privacy and consumer protections;
 - If provisions are included that liberalise cross-border data flows and prohibit local presence requirements the agreement must include provisions to ensure data that is held offshore is subject to privacy and consumer protections and include Australian

standards as a minimum for such privacy and consumer protection provisions including higher standard of protection for sensitive information.

Anti-competitive and discriminatory practices

- The plurilateral agreement on e-commerce should not:
 - prevent governments from accessing source code and algorithms, and/or other information required for regulatory purposes such as performance testing and audit results, and from regulating to prevent the misuse of algorithms to reduce competition, ensure accessibility for people with disabilities, and to prevent class, gender, race and other forms of discrimination.

Cybersecurity and security standards for electronic transmissions

- The plurilateral agreement on e-commerce should not:
 - Prevent governments from setting standards for the security of electronic transactions

Financial services

- The plurilateral agreement on e-commerce should not include:
 - provisions that cover financial services;
 - provisions that prevent restrictions on the cross-border flow of financial data;
 - provisions that prohibit the use of local presence requirements in relation to financial data;
 - The government should conduct and publicly release a detailed analysis of the risks of e-commerce agreements that cover financial services that details the infrastructure and procedures that are in place to ensure it has adequate oversight over financial data.

Corporate tax avoidance and evasion

- The plurilateral agreement on e-commerce should include full exemptions for tax policy, and should not include provisions that enable companies to avoid tax obligations, including those that ban local presence requirements, prevent governments from regulating cross-border data flows and prohibit local storage requirements.

Workers' rights

- The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, endorsed by most governments, including the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the associated Conventions. These are the basis of Australian employment law and include:
 - the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98);
 - the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105);
 - the effective abolition of child labour (ILO conventions 138 and 182);
 - the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).
- The plurilateral agreement on e-commerce should not:
 - include provisions that enable companies to avoid the scope and enforcement of Australian employment law;
 - Restrict the ability of government to implement new labour regulation and standards that can ensure that workers' rights are enforced regardless of claims by digital platform companies that they are not bound by labour regulation.

Australia's place in the global digital economy

- The Department of Foreign Affairs and Trade should invite a new round of public submissions into the plurilateral e-commerce negotiations based on the issues raised by the ACCC Report and The Australian Human Rights Commission Human Rights and Technology Project;
- The government should not proceed with e-commerce negotiations until it has fully assessed and responded to regulatory gaps in the digital domain identified in the ACCC Report and other sources;
- Policy space must be maintained to enable existing and future government to implement new regulation that responds to rapid changes in the digital economy and supports the development and implementation of local industry strategies and policies;
- The government should hold a broader inquiry into the social, human rights and economic impacts of e-commerce trade rules.

3. E-commerce provisions in trade agreements

Electronic commerce is a complex area of trade law that is directly tied with provisions relating to financial services and broader trade in services as well as the rapid emergence of the digital economy. As the digital economy develops it is bringing both new opportunities and new risks and challenges. It is widely recognised, including by numerous government and expert inquiries in Australia and internationally, that governments must develop new regulatory frameworks and techniques that ensure the digital economy benefits everyone, and that consumer rights and human rights, particularly privacy rights and rights against discrimination, are not undermined.

Yet the incorporation of e-commerce rules in bilateral and regional trade agreements, as well as the instigation of plurilateral e-commerce negotiations that have not been mandated by the WTO, could restrict governments from implementing public interest regulation. The global e-commerce agenda has been heavily influenced by the US tech industry lobby and e-commerce rules seek to codify the tech industry wishlist, which was the basis of the USA's negotiating position during the Trans-Pacific Partnership negotiations¹, and is known as the Digital2Dozen principles.²

The aim of e-commerce rules in trade agreements is to secure the free flow of cross-border data and to establish an international regulatory framework that could restrain governments from regulating the digital domain and the operations of big tech companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of big tech companies including:

- Facebook and Google's data abuse scandals;³
- Uber classifying itself as a technological platform to avoid regulation and enable its exploitation of workers;⁴
- Apple's tax avoidance;⁵
- Anti-competitive practices by Facebook, Google and Amazon.⁶

Australia is increasingly including more extensive provisions on e-commerce in recent trade agreements. The Trans-Pacific Partnership (TPP-11) is the most comprehensive to date and the agreements raised significant privacy and human rights concerns.⁷ The Australia-Hong Kong trade agreement is the first to include e-commerce rules for financial services, which could restrict

¹ Kelsey, J, "E-commerce - The development implications of future proofing global trade rules for GAFA", Paper to the MC11 Think Track, 'Thinking about a Global Governance of International Trade for the 21st Century; Challenges and Opportunities on the eve of the 11th WTO Ministerial Conference', Buenos Aires, Argentina, 13 December 2017. pp. 5-8. Available at <https://bestbits.net/wp-uploads/2017/12/Kelsey-paper-for-MC11-Think-Track.pdf>

² Office of the United States Trade Representative, "The Digital2Dozen principles", 2016, available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>.

³ Waterson, J, "UK fines Facebook £500,000 for failing to protect user data", The Guardian, October 2018. Available at <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>; MacMillan, D and McMillan, R, "Google Exposed User Data, Feared Repercussions of Disclosing to Public", The Wall Street Journal, October 2018. Available at <https://www.wsj.com/articles/google-exposed-user-data-feared-repercussions-of-disclosing-to-public-1539017194>

⁴ Bowcott, O, "Uber to face stricter EU regulation after ECJ rules it is transport firm", The Guardian, December 2017. Available at <https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>

⁵ Drucker, J and Bowers, S, "After a Tax Crackdown, Apple Found a New Shelter for Its Profits", The New York Times, November 2017. Available at <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html>.

⁶ Ho, V, "Tech monopoly? Facebook, Google and Amazon face increased scrutiny", The Guardian, June 4, 2019. Available at <https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon>

⁷ Kelsey, J, "The Risks for ASEAN of New Mega-Agreements that Promote the Wrong Model of e-Commerce," October 2017, ERIA Discussion Paper Series. Available at: <http://www.eria.org/ERIA-DP-2017-10.pdf>

governments from regulating in a financial crisis.⁸ The Digital Economy Agreement that the government is currently negotiating with Singapore could also include extensive e-commerce provisions, including in relation to financial services. Both Australia and Singapore are members of the TPP-11, which means that the Digital Economy Agreement is likely to include provisions that move beyond those included in the TPP-11.⁹

In contrast, the leaked final un-scrubbed text of the e-commerce chapter of the Regional Comprehensive Economic Partnership (RCEP) agreement¹⁰, which Australia and 14 other governments have agreed to sign in 2020, is much more cautious than the TPP-11 and other recent agreements. According to legal analysis, the e-commerce chapter is not enforceable by state-state dispute settlement; there are no provisions that restrict access to source code; and rules relating to the cross-border transfer of data and that prohibit the use of local presence requirements are subject to a self-judging public policy test and a national security exception.¹¹

The RCEP chapter still contains many concerning provisions. However, the rolling-back of some of the provisions included in the TPP-11 demonstrates that broad concern about the social and economic impact of e-commerce rules remains, particularly amongst developing countries who make up a significant proportion of RCEP member countries. It is essential that the government takes this concern seriously and considers the social, human rights and economic risks of e-commerce rules before agreeing to a plurilateral e-commerce agreement or future bilateral and regional trade agreements.

4. Negotiations for a plurilateral agreement on e-commerce

The Australian government's decision to take a leadership role in discussions among 76 of the WTO's 164 member governments on the development of a plurilateral agreement on e-commerce raises new concerns at a national and international level. The discussions have been widely criticised by developing country governments and civil society organisations for taking place without an official WTO mandate. The talks also pose new risks to Australia's policy sovereignty and could restrict our ability to implement effective regulatory reform across a range of emerging policy areas.

4.1. No mandate for WTO e-commerce negotiations

AFTINET notes the concerns raised by the African Group and other developing countries in 2017 regarding developed countries' attempts to extend e-commerce rules in the WTO. We also note that these countries, which are a majority of WTO members, rejected proposals in the WTO for a new multilateral agreement on e-commerce.¹² We are concerned by the decision of the Australian government, along with 75 other WTO member governments, to commence negotiations for a plurilateral agreement on e-commerce without having a mandate from all WTO members.

The digital economy is in its infancy and is rapidly growing and transforming. Many countries are in the early stages of developing an appropriate regulatory regime. For example, the findings of the Australian

⁸ AFTINET, Submission to the Joint Standing Committee on Treaties Inquiry into the Free Trade Agreement between Australia and Hong Kong, China *And* The Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, August 2019. pp 11-13. Available at <http://aftinet.org.au/cms/sites/default/files/AFTINET%20A-HKFTA%20JSCOT%20submission.pdf#overlay-context=node/1771>

⁹ Department of Foreign Affairs and Trade, Australia and Singapore Digital Economy Agreement. Available at

<https://dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreement.aspx>

¹⁰ Un-scrubbed text of the Electronic Commerce chapter in the Regional Comprehensive Economic Partnership Agreement <https://www.bilaterals.org/IMG/pdf/rcep-e-commerce-chapter-2.pdf>

¹¹ Kelsey, J, "Important differences between the final RCEP electronic commerce chapter and the TPPA and lessons for e-commerce in the WTO", February 10, 2020. Available at <https://www.bilaterals.org/?important-differences-between-the>

¹² World Trade Organisation, The work program on Electronic Commerce: statement by the African group, December 2019, Doc WT/MIN(17)/21. Available at <https://www.tralac.org/images/Resources/MC11/mc11-work-programme-on-electronic-commerce-statement-by-the-african-group-6-december-2017.pdf>

Competition and Consumer Commission (ACCC) inquiry into digital platforms demonstrates that Australia's regulatory framework requires significant reform.¹³

For many developing countries that require access to a broad range of policy tools to facilitate their digital industrialisation, the preservation of policy space is particularly important. There is a significant risk that a plurilateral agreement on e-commerce would curtail policy space, limiting the scope for regulation of the digital economy as it emerges. There is also broad concern from developing country governments and civil society organisations that WTO members that are not participating in these negotiations will be pressured to join any agreement that is made.

4.2. The domestic context, the ACCC Report and Australia's approach to e-commerce negotiations

Negotiations for a plurilateral agreement on e-commerce are taking place in the context of increasing domestic concern about the impact that the emerging digital economy will have on the Australian business and media landscape and on privacy rights and consumer protections. Concern has also been raised about the behaviour of businesses providing services across a range of service sectors including the banking and finance sectors and across the digital platform economy. Key domestic inquiries have identified the need for Australia to strengthen its regulatory frameworks.

The ACCC's ground-breaking Digital Platforms Inquiry final report detailed the inadequacy of existing regulatory frameworks in the context of an emerging and rapidly evolving digital domain. The report, released in June 2019, made 23 recommendations for government action, including regulatory reform, to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.¹⁴

In its response to the ACCC report in December 2019, the government "accepted the overriding conclusion that there was a need for reform." Of the 23 recommendations, the government has supported six in their entirety and given in-principle support to an additional ten. Five recommendations have been noted and two rejected.¹⁵ The government has outlined a plan for immediate and longer-term action to respond to the ACCC recommendations, although for key issues relating to consumer privacy protections, the government's commitment to further consultation and legislative review means that the final form which reform will take will not be known for at least 18 months.¹⁶

Concerns have already been raised that the government's response to the ACCC inquiry does not go far enough to address existing and emerging gaps in Australia's regulatory framework and that additional reform may be required.¹⁷ In this context, policy flexibility will be particularly important given how rapidly the digital economy and associated technologies are developing and evolving.¹⁸ State governments are also considering their own legislative frameworks, including privacy legislation.

The Australian Human Rights Commission (AHRC) is currently undertaking a project on human rights and technology, which aims to address the human rights impacts of new and emerging technologies

¹³ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. pp 30-37. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

¹⁴ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

¹⁵ Commonwealth of Australia, Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, December 2019, p.3. Available at <https://treasury.gov.au/publication/p2019-41708>

¹⁶ Kemp, K and Nicholls, R, "The federal government's response to the ACCC's Digital Platforms Inquiry is a let down", available at <http://theconversation.com/the-federal-governments-response-to-the-acccs-digital-platforms-inquiry-is-a-let-down-128775>

¹⁷ Kemp, K and Nicholls, R, "The federal government's response to the ACCC's Digital Platforms Inquiry is a let down", available at <http://theconversation.com/the-federal-governments-response-to-the-acccs-digital-platforms-inquiry-is-a-let-down-128775>

¹⁸ UNCTAD, "Digital Economy Report 2019 -Value creation and capture: implications for developing countries," 2019. Available at https://unctad.org/en/PublicationsLibrary/der2019_overview_en.pdf

including Artificial Intelligence.¹⁹ The Commission released a Discussion Paper in December 2019, following broad public consultation.²⁰ The discussion paper outlines several proposals for regulatory reform. Further consultation will take place in early 2020, with a final report set to be released later in the year.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry final report, released in February 2019, also identified widespread malpractice across the banking and finance sectors. The report signalled the need for reform of regulatory and oversight mechanisms to facilitate a significant shift in culture and practice within the banking, superannuation and financial services sectors.

The government has accepted all the recommendations made by that Royal Commission. However, concerns have been raised about the extent to which this will address the structural issues in Australia's banking and finance system, with some experts warning that the narrow remit of the Royal Commission has meant that the underlying causes of misconduct were not examined and that necessary structural reform was not considered.²¹

The e-commerce rules that Australia agrees to in bilateral and regional agreements or through negotiations for a plurilateral agreement could impact on current and future regulatory processes. E-commerce rules that lock-in the free flow of cross-border data and prevent governments from requiring the localisation of data could undermine the government's regulatory power by limiting both the applicability of Australian laws to the entities that hold data, and regulator access to information necessary for enforcement. These rules could restrict reform efforts in response to the ACCC inquiry and inhibit regulatory and oversight processes in relation to the banking and financial services sector. They may also impact on proposals made by the AHRC inquiry, which aim to ensure human rights are protected as new technologies emerge.

These agreements could also encroach on future governments' policy space, by establishing rules that impact a range of domestic policy issues including privacy rights, rights against discrimination, consumer protections, national security, workers' rights, competition law and tax policy. These rules could restrict the ability of future governments to regulate the emerging digital domain and key social and economic policy areas. This is particularly the case where trade rules relate to both existing and future technologies and services.

Despite the shifting domestic context and the potential for e-commerce rules to come into conflict with proposals for regulatory reform, Australia is increasingly including more extensive provisions on e-commerce in trade agreements. In this context, there is significant concern about the lack of analysis undertaken by the Australian government regarding the impact that e-commerce rules could have on our ability to govern the digital economy and particularly on human rights, privacy rights and consumer protections.²²

The National Interest Analyses (NIA) developed by the Department of Foreign Affairs and Trade (DFAT) for Australian Free Trade Agreements that include e-commerce rules assert that e-commerce rules will facilitate international trade and that they will not have negative impacts on privacy rights or consumer protections. For example, the NIA for the TPP-11 simply states that "Australia's regulatory framework,

¹⁹ The Australian Human Rights Commission, "Human Rights and Technology Project. Available at <https://tech.humanrights.gov.au/>

²⁰ The Australian Human Rights Commission, Human Rights and Technology: Discussion Paper, December 2019. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

²¹ Linden, A and Staples, W, Hayne's failure to tackle bank structure means that in a decade or so another treasurer will have to call another royal commission <https://theconversation.com/haynes-failure-to-tackle-bank-structure-means-that-in-a-decade-or-so-another-treasurer-will-have-to-call-another-royal-commission-110437>

²² Greenleaf, G, "Free Trade Agreements and data privacy: Future perils of Faustian bargains", in Svantesson, D and Kloza D (eds.) *Transatlantic Data Privacy Relationships as a Challenge for Democracy*, 2018, Intersentia. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386&download=yes

including the Privacy Act 1988, will not be affected.”²³ However, DFAT has not provided evidence to support these claims. Nor is it sufficient to note that current law is unaffected when the need for significant reform has already been recognised.

The government’s 2017 International Cyber Engagement Strategy states that “Australia promotes trade enabling rules and the free flow of information. But we recognise the importance of allowing governments to respond to legitimate public policy concerns, including consumer and privacy protections.”²⁴ Yet, no detail is provided on how Australia is assessing the impact that e-commerce rules could have on the government’s ability to uphold and improve consumer and privacy protections in Australia.

A 2018 Joint Standing Committee on Trade and Investment Growth inquiry into trade and the digital economy addressed some of the concerns raised about e-commerce provisions and cyber security but failed to address privacy, consumer and other concerns. The Inquiry report included only four references to privacy and two references to consumer protections.²⁵

AFTINET is concerned that the lack of analysis of the broad risks posed by e-commerce rules could result in the government agreeing to trade rules that lock-in the deregulation of the digital economy and that encroach on government policy space at a time where domestic policy processes have highlighted significant gaps in Australia’s regulatory framework and identified the need for increased regulation. Our specific concerns and recommendations are detailed below.

5. Lack of transparency and democratic accountability in plurilateral e-commerce negotiations

The WTO’s negotiating procedures are far more transparent than most bilateral, regional and plurilateral negotiations. Negotiating rounds are publicised and the WTO now publishes submissions made by member states during negotiations and reports by committee chairs on its website.²⁶

In contrast, for plurilateral negotiations that occur outside of the WTO, transparency requirements are limited. In the context of the e-commerce plurilateral negotiations, details of the negotiations have not been released and texts and proposals have not been made public.

Beyond this, there is very little information about the negotiations available on the DFAT website. As of January 14, 2020, the website noted that that Australia is chairing the negotiations with Singapore and Japan but had not made a written submission to the negotiations.²⁷ Australia’s negotiating position has also not been made public.²⁸

AFTINET has consistently raised concerns about the lack of transparency and democratic accountability in Australia’s trade negotiations and has called for reform of our negotiation and ratification

²³ Department of Foreign Affairs and Trade, “National Interest Analysis for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, 2018, pp. 13. Available at <https://dfat.gov.au/news/news/Documents/national-interest-analysis-including-analysis-of-regulatory-impact-on-australia.pdf>

²⁴ Commonwealth of Australia, Department of Foreign Affairs and Trade, Australia’s International Cyber Engagement Strategy, October 2017, p. 15. Available at https://dfat.gov.au/international-relations/themes/cyber-affairs/aices/pdf/DFAT%20AICES_AccPDF.pdf

²⁵ Commonwealth of Australia, Joint Standing Committee on Trade and Investment Growth, Trade and the digital economy Inquiry Report, September 2018. Available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Joint_Standing_Committee_on_Trade_and_Investment_Growth/Tradeanddigialeconomy/Report

²⁶ See WTO documents portal at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

²⁷ See the DFAT website on the plurilateral e-commerce negotiations at <https://dfat.gov.au/trade/services-and-digital-trade/Pages/e-commerce-and-digital-trade.aspx>

²⁸ See the DFAT website on the plurilateral e-commerce negotiations at <https://dfat.gov.au/trade/services-and-digital-trade/Pages/e-commerce-and-digital-trade.aspx>

processes.²⁹ Reforms have also been recommended by the Productivity Commission³⁰ and a 2015 Senate Inquiry into the treaty-making process.³¹

In the context of the e-commerce negotiations, transparency concerns are compounded by the rapid development of the digital domain and the limitations of existing regulatory frameworks. There is a significant danger that this lack of transparency will result in e-commerce rules being developed without adequate parliamentary and public oversight and without consideration of domestic policy processes and human rights implications, and without the input needed from business and research expertise at the cutting edge of these technologies. This is particularly concerning given the ongoing response to the ACCC report and the risk that e-commerce rules could close-off opportunities for current and future governments to implement regulatory reform.

Recommendations

- The government should commit during the negotiations for a plurilateral agreement on e-commerce to:
 - Publicly release Australia’s negotiation positions;
 - Conduct and publicly release a detailed analysis of the social and economic risks of e-commerce provisions, including their potential impact on domestic policy-making processes. These should include any reforms emerging from the ACCC inquiry into digital platforms, The Australian Human Rights Commission, Human Rights and Technology Project, and the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as well as other social and economic policy processes;
 - Conduct and publicly release an independent economic and social impact assessment of the plurilateral agreement *before* the agreement is signed.
- The government should update its procedure for the negotiation and ratification of trade agreements to ensure that:
 - Negotiating texts are published throughout trade negotiations;
 - The final text of agreements is published before each agreement is signed;
 - Independent economic, social and environmental impact assessments are completed before the agreement is signed;
 - Parliament has the right to debate and vote on the full text of the agreement.

6. Social, economic and human rights risks of e-commerce rules

6.1. E-commerce rules and privacy rights and consumer protections

The ACCC report raised serious concerns about the impact of digitalisation and the effects of the rise of digital platforms was having on privacy rights and consumer protections, stating that “existing regulatory frameworks for the collection and use of data have not held up well to the challenges of digitalisation and the practical reality of targeted advertising that rely on the monetisation of consumer

²⁹ AFTINET, “Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Commonwealth’s treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements,” 2015. Available at

<http://aftinet.org.au/cms/sites/default/files/AFTINET%20Senate%20submission%20final%200215.pdf>

³⁰ Productivity Commission, *Bilateral and Regional Trade Agreements Final Report*, Productivity Commission, Canberra, December 2010. Available at <https://www.pc.gov.au/inquiries/completed/trade-agreements/report>.

³¹ Senate Standing Committee on Foreign Affairs Defence and Trade, *Blind agreement: reforming Australia’s treaty-making process*, May 2015. Available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report.

data and attention.”³²

The ACCC recommended that the government reform the Privacy Act and other privacy regulation to ensure that the public is informed about how their personal data is collected and used and has more access to and control over this data.³³ It has also recommended reform of Australia’s consumer laws to ensure that consumers are protected in the digital domain. In response to these recommendations, the government has committed to undertake a review of the Privacy Act and other privacy laws and further consultation in relation to consumer laws.³⁴

The risk of e-commerce rules to privacy rights and consumer protections has been widely documented³⁵ and contradict government assurances that e-commerce rules are compatible with privacy and consumer protections. Privacy rights and data security are undermined by rules that restrict the regulation of electronic transmissions, preventing governments from requiring encryption or other technical protection of personal data and other security measures.

Rules that lock-in the free cross-border flow of data also enable companies to move data, including personal data, to jurisdictions where privacy laws are more limited, effectively evading privacy legislation.³⁶ The assertion that the inclusion of privacy and consumer protections in e-commerce chapters, which require parties to have/enact privacy and consumer laws, is enough to ensure privacy is upheld is misleading. Unless these provisions outline a minimum standard for this legislation there is no guarantee that once data is moved and stored offshore it will be subject to the same privacy standards as in Australia (as enacted today or as reformed in the future).³⁷

This issue is likely to be raised in the context of Australia’s negotiations for a free trade agreement with the European Union (EU) and there is a possibility that this agreement will require that Australia bring our privacy and consumer protections into line with the EU’s General Data Protection Regulation.³⁸

The prohibition of local presence requirements would also restrict the ability of governments to monitor business activities and to identify and hold businesses accountable for noncompliance with consumer protection laws and rights and other national legislation.

Recommendations

- The plurilateral agreement on e-commerce should not:
 - prevent current and future governments from regulating the cross-border flow of data for legitimate policy purposes and in the public interest;
 - prohibit the use of local presence requirements.

³² Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. p. 3. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

³³ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. pp. 22-26. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

³⁴ Commonwealth of Australia, Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, December 2019, pp.15-19. Available at <https://treasury.gov.au/publication/p2019-41708>

³⁵ See Greenleaf, G, “Free Trade Agreements and data privacy: Future perils of Faustian bargains”, in Svantesson, D and Kloza D (eds.) *Transatlantic Data Privacy Relationships as a Challenge for Democracy*, 2018, Intersentia. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386; Kelsey, J, “The Risks for ASEAN of New Mega-Agreements that Promote the Wrong Model of e-Commerce,” October 2017, ERIA Discussion Paper Series. Available at: <http://www.eria.org/ERIA-DP-2017-10.pdf>

³⁶ Greenleaf, G, “Free Trade Agreements and data privacy: Future perils of Faustian bargains”, in Svantesson, D and Kloza D (eds.) *Transatlantic Data Privacy Relationships as a Challenge for Democracy*, 2018, Intersentia. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732386

³⁷ Kelsey, J, “The Risks for ASEAN of New Mega-Agreements that Promote the Wrong Model of e-Commerce,” October 2017, ERIA Discussion Paper Series, pp 32-34. Available at: <http://www.eria.org/ERIA-DP-2017-10.pdf>

³⁸ European Commission, EU data protection rules. Available at https://ec.europa.eu/info/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules/eu-data-protection-rules_en

- The plurilateral agreement on e-commerce should:
 - Include mandatory minimum standards for privacy and consumer protections;
 - If provisions are included that liberalise cross-border data flows and prohibit local presence requirements the agreement must include provisions to ensure data that is held offshore is subject to privacy and consumer protections and include Australian standards as a minimum for such privacy and consumer protection provisions including higher standard of protection for sensitive information.

6.2. E-commerce rules and government responses to anti-competitive and discriminatory practices

The use of Algorithmic systems to collect and analyse data is a fundamental aspect of the digital economy. Algorithms are “a set of mathematical instructions or rules that, especially if given to a computer, will help calculate an answer to a problem.”³⁹ They are increasingly used by technology companies to sort data for search engine results, which means that the choice of algorithms increasingly controls access for consumers to information on the internet. Algorithms and/or related technologies are used to sort personal data or assess video interviews for purposes like selection for employment interviews, in which value judgements are required to ensure that potential race, gender, class or other biases are identified and minimised.

However, as the use of algorithms is expanding, growing evidence demonstrates that algorithms can be used by companies to reduce competition. For example, in 2017 the European Commission fined Google €2.42 billion for breaching EU antitrust rules after finding that “Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors.”⁴⁰

The ACCC report raised similar concerns about the opacity of Google and Facebook’s key algorithms, arguing that their near monopoly market power and lack of algorithmic transparency increases the potential for anti-competitive behaviour, including self-preferencing to reduce competition.⁴¹ These examples show that as algorithms are mathematical formulae, they can be abused in situations where impartial selection of data is required to prevent self-referencing. In response, the government has committed \$27 million over four years to establish a special unit in the ACCC to monitor and report on the state of competition and consumer protection in digital platform markets, and take enforcement action as necessary.

Evidence of algorithmic bias is also increasing,⁴² showing that algorithms are “are inescapably value-laden” and that “operational parameters are specified by developers and configured by users with desired outcomes in mind that privilege some values and interests over others.”⁴³ For example, in 2018 Amazon was forced to abandon a computer program that was designed to review job applications after

³⁹ <https://dictionary.cambridge.org/dictionary/english/algorithm>

⁴⁰ European Commission, “Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service”, June 2017. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784

⁴¹ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. P. 12. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>; See also Media, Entertainment and Arts Alliance, “Submission to the Australian Competition and Consumer Commission’s Digital Platform’s Inquiry”, 2018, p. 12-15. Available at <https://www.meaa.org/download/meaa-submission-to-the-accc-inquiry-into-digital-platforms/>

⁴² Media, Entertainment and Arts Alliance, “Submission to the Australian Competition and Consumer Commission’s Digital Platform’s Inquiry”, 2018, p. 11. Available at <https://www.meaa.org/download/meaa-submission-to-the-accc-inquiry-into-digital-platforms/>

⁴³ Mittelstadt, B., Allo, P., Taddeo, M., Wachter, S and Floridi, L., “The ethics of algorithms: Mapping the debate”, *Big Data & Society*, July–December 2016. P. 1. 1-21. Available at <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679>

it found that it discriminated against women.⁴⁴ Similarly, in 2017, French company Idemia’s facial recognition system, was found to be 10 times more likely to falsely match black women’s faces than white women’s.⁴⁵

The AHRC’s discussion paper on Human Rights and Technology details the human rights risks associated with facial recognition technology, which is already being used by government agencies in Australia.⁴⁶ The Commission highlighted evidence that the use of facial recognition technology by police can increase the risk of profiling, particularly racial profiling.⁴⁷ It also pointed to the “emerging evidence that facial recognition technology generally is less accurate when identifying women and people from minority ethnic and racial groups.”⁴⁸

For government’s and regulators that are responsible for identifying and responding to concerns in relation to competition law and algorithmic bias, source code is an important tool in this process. Source code is “the original form of a computer program as it is written by a programmer. It is then converted into code that the computer can understand.”⁴⁹ Regulators may require access to source code in a range of situations, including for example, to determine whether practices contravene competition law or to detect if algorithms are discriminatory.⁵⁰

The AHRC discussion paper addresses the issue of accountability for AI decision-making and has proposed that the government introduce legislation “regarding the explainability of AI-informed decision making.”⁵¹ The AHRC proposes that, in cases where individuals would have been eligible to receive information about a decision that has been made about them if AI was not being used, this legislation should give individuals the right to demand:

- (a) “a non-technical explanation of the AI-informed decision, which would be comprehensible by a lay person, and
- (b) a technical explanation of the AI-informed decision that can be assessed and validated by a person with relevant technical expertise.”⁵²

The AHRC envisages that a technical explanation of AI-informed decision could include:

“the data set used to train the AI; any limitations of that data set; any profiles created from data mining used in the AI decision-making process; any risk factors and mitigating action taken; any impact assessments, monitoring or evaluation conducted by the decision maker; and key data points taken into account in the decision-making process and the weight attributed to those

⁴⁴ Dastin, J, “Amazon scraps secret AI recruiting tool that showed bias against women”, October 10, 2018. Available at <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>

⁴⁵ Simonite, T, “The Best Algorithms Struggle to Recognize Black Faces Equally”, July 22, 2019. Available at <https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/>

⁴⁶ Evans, M and Webb, C, “Australian police using face recognition software as privacy experts issue warning”, January 19, 2020. Available at <https://www.smh.com.au/national/australian-police-using-face-recognition-software-as-privacy-experts-issue-warning-20200119-p53ssj.html>

⁴⁷ Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 29. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

⁴⁸ Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 29. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

⁴⁹ <https://www.collinsdictionary.com/dictionary/english/source-code>

⁵⁰ Ried-Smith, “Some preliminary implications of WTO source code proposal – MC11 briefing paper,” 2017, pp. 6-8. https://ourworldisnotforsale.net/2017/TWN_Source_code.pdf

⁵¹ Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 96. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

⁵² Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 96. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

data points.”⁵³

It is entirely possible that a technical explanation would require access to source code.⁵⁴ In this context, e-commerce rules that prevent governments from requiring that companies transfer or give access to their source code could undermine this process and make it more difficult to identify whether the AI decision was biased.⁵⁵ The implications of this are extensive, raising the possibility that e-commerce rules could severely limit the government’s ability to respond to anti-competitive practices and algorithmic bias. These rules have already been included in several Australian trade agreements, including the TPP-11,⁵⁶ and they are likely to be under negotiation in the WTO discussions.

It is imperative that the government has the flexibility to require access to source codes and algorithms so that it can use all available tools to identify and respond to anti-competitive practices and potential race, gender, class or other biases. E-commerce rules in trade agreements should not prevent or restrict such access and close-off opportunities for regulatory oversight and reform.

We note also that access to source code may not be sufficient (or appropriate) for all regulatory purposes. Access to other information, such as training data or its source; performance audits etc may also be needed. Rules in international trade must ensure the necessary flexibility for governments to require access to the information required for proper investigation and enforcement, and enable, where needed and with appropriate protections in place, trade secret or other claims to confidentiality.

Recommendation

- The plurilateral agreement on e-commerce should not:
 - prevent governments from accessing source code and algorithms, and/or other information required for regulatory purposes such as performance testing and audit results, and from regulating to prevent the misuse of algorithms to reduce competition, ensure accessibility for people with disabilities, and to prevent class, gender, race and other forms of discrimination.

6.3. E-commerce rules, cybersecurity and security standards for electronic transmissions

Concerns have also been raised about the potential for rules on electronic transactions to increase the cybersecurity risks. A 2016 report by The Internet Society found that data breaches are continuing to increase with more people being affected and the cost of prevention expanding.⁵⁷ Trade agreements are increasingly including provisions that impact on the regulations of electronic transactions. For example, the TPP-11 includes provisions that restrict governments from setting security standards for electronic transactions.⁵⁸ This could reduce security across a range of sectors, including impacting credit card data, online banking, and healthcare data amongst others.⁵⁹ The impact of electronic transactions

⁵³ Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 96. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

⁵⁴ Rieke, A, Bogen, M, and Robinson, D, “Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods,” February 2018, p. 13. Available at https://www.omidyar.com/sites/default/files/file_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf;

⁵⁵ Australian Human Rights Commission, “Human Rights and Technology: Discussion Paper”, December 2019, p. 99. Available at https://tech.humanrights.gov.au/sites/default/files/2019-12/TechRights_2019_DiscussionPaper.pdf

⁵⁶ Text of the TPP-11, Article 14.17. Available at <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

⁵⁷ The Internet Society, “Global Internet Report 2016,” 2016, pp, 16-17. Available at https://future.internetsociety.org/2016/wp-content/uploads/2016/11/ISOC_GIR_2016-v1.pdf

⁵⁸ Text of the TPP-11, Article 14.6. Available at <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/14-electronic-commerce.pdf>

⁵⁹ Reid Smith, S, “Preliminary note: Electronic authentication: some implications,” 2018, pp. 8-25. Available at <http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf>

rules is worsened when combined with e-commerce rules that enable the free flow of cross-border data, as governments are restricted in their ability to ensure that this data is encrypted when it is transferred or stored securely.⁶⁰

It is important that governments retain the ability to regulate security standards in order to reduce cybersecurity issues. This is particularly the case given the rapid emergence of new technologies in this space, which could adapt or create new cybersecurity risks requiring new regulatory frameworks.

Recommendation

- The plurilateral agreement on e-commerce should not:
 - Prevent governments from setting standards for the security of electronic transactions

6.4. E-commerce rules and financial services

E-commerce rules relating to financial services are an emerging trade issue that raises additional privacy concerns and poses new financial oversight and management risks. To date, Australia's recently ratified FTA with Hong Kong is the only agreement globally to include e-commerce provisions that cover financial services.⁶¹ However, there is significant risk that these rules will be on the table in the plurilateral e-commerce negotiations as well as in future Australian bilateral and regional agreements.

The Hong Kong FTA enables the free flow of financial data and prevents governments from requiring a local presence in the country where they are providing financial services.⁶² As mentioned above, these provisions undermine the government's ability to protect privacy by enabling companies to move financial data to jurisdictions where privacy laws are more limited. Once finance data has moved offshore it is extremely difficult for states to control or have oversight over this data.⁶³

The Global Financial Crisis demonstrated the risks of foreclosing governments' control over financial data. US Treasury Secretary Lew told Congress there were times during the crisis when they were cut off from timely and appropriate information.⁶⁴ Because of that experience, the US insisted in the TPP that financial data were treated more restrictively than other data and was exempted from the data transfer rules that prevent requirements that data is stored and processed locally. This provision remained in the TPP-11 text after the US left the agreement.⁶⁵

As with other e-commerce provisions, the lack of government analysis of the risks of e-commerce rules that cover financial services is extremely concerning and raises serious questions about government

⁶⁰ Reid Smith, S, "Preliminary note: Electronic authentication: some implications," 2018, p. 26. Available at <http://ourworldisnotforsale.net/2018/esignatures2018-9.pdf>

⁶¹ Department of Foreign Affairs and Trade, National Interest Analysis of the Free Trade Agreement between Australia and Hong Kong, China and the Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China, 2019. Available at <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-text/Documents/a-hkfta-national-interest-analysis.pdf>

⁶² Department of Foreign Affairs and Trade, Text of the Free Trade Agreement between Australia and Hong Kong, China, 2019, Article 11.15.1 - 11.15.2. Available at <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-text/Pages/default.aspx>.

⁶³ Reid Smith, S, "Some preliminary implications of WTO source code proposal," 2017, pp. 6-7. Available at <https://twn.my/MC11/briefings/BP4.pdf>

⁶⁴ Lew, J., (2016) Evidence given to the House Financial Services Committee hearing on the international financial system, March 22, 2016, found August 22, 2019 at <https://www.c-span.org/video/?407079-1/treasury-secretary-jack-lew-testimony-international-financial-system&start=2490>; Guida, V., (2016) "Lew defends financial services data carveout", *Politico*, 11 February 2016. Available at <https://www.politico.com/tipsheets/morning-trade/2016/02/lew-defends-financial-services-data-carveout-senate-to-vote-on-customs-bill-democrats-weigh-in-on-tpp-212657>.

⁶⁵ Department of Foreign Affairs and Trade (2018) *Text of the Trans-Pacific Partnership*, found August 22, 2019 at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents.aspx>

processes, including consultation processes, when developing negotiating positions. This is particularly concerning in the context where the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry identified widespread misconduct across the Banking, Superannuation and Financial Services industries and demonstrated the need for strong oversight and regulation across these sectors.

Recommendations

- The plurilateral agreement on e-commerce should not include:
 - provisions that cover financial services;
 - provisions that prevent restrictions on the cross-border flow of financial data;
 - provisions that prohibit the use of local presence requirements in relation to financial data.
- The government should conduct and publicly release a detailed analysis of the risks of e-commerce agreements that cover financial services that details the infrastructure and procedures that are in place to ensure it has adequate oversight over financial data.

6.5. E-commerce rules and corporate tax avoidance and evasion

Corporate tax avoidance and evasion is an ongoing issue impacting on governments across the world. Over the last several years, the Australian government has taken important steps to address corporate tax avoidance, including developing the Multinational Anti-Avoidance Law, increasing penalties for tax avoidance and establishing the Tax Avoidance Taskforce to pursue tax avoidance by multinational companies.⁶⁶ After its establishment in 2016, the Tax Avoidance Taskforce was successful in collecting an additional \$5.6 billion in corporate tax in its first two years of operation.⁶⁷ However, according to ATO data released in December 2019, for the 2017-18 financial year almost a third of large companies still weren't paying any tax despite these measures.⁶⁸

E-commerce rules could impact on the government's ability to access and enforce corporate tax liabilities. Rules that ban local presence requirements, prevent governments from regulating cross-border data flows and prohibit local storage requirements enable corporations to provide services without establishing a local presence and to transfer and store data in external jurisdictions. This can significantly undermine the government's ability to assess tax liabilities by reducing physical access to tax information. Further, if global corporations do not have a local presence, the government is limited in its ability to hold multinational corporations accountable for their tax obligations.⁶⁹ For example, In a recent case in France, the Paris administrative court of appeals found that Google Ireland did not have to pay a 1.11bn Euro tax bill because it doesn't have a permanent base in France.⁷⁰

In a context where corporate tax avoidance in Australia is already resulting in significant losses to government revenue and has led to considerable government investment in initiatives aimed at ensuring that corporations pay their fair share of tax, e-commerce rules also risk foreclosing opportunities for additional tax reform. Restrictions on local presence and data localisation rules encroach on the policy space of current and future governments and limit the scope for democratic

⁶⁶ See <https://www.treasury.gov.au/tax-evasion>

⁶⁷ [https://www.ato.gov.au/Media-centre/Media-releases/Tax-Avoidance-Taskforce-helps-net-\\$5-6-billion-in-first-two-years/](https://www.ato.gov.au/Media-centre/Media-releases/Tax-Avoidance-Taskforce-helps-net-$5-6-billion-in-first-two-years/)

⁶⁸ <https://www.theguardian.com/australia-news/2019/dec/12/ato-data-reveals-almost-a-third-of-big-companies-still-not-paying-tax-in-australia>

⁶⁹ James, D, "Anti-development Impacts of Tax-Related Provisions in Proposed Rules on Digital Trade in the WTO," 2019, Society for International Development. Available at https://link.springer.com/epdf/10.1057/s41301-019-00205-4?author_access_token=LEQAjw6_uYVFUZYXQaceL1xOt48VBPO10Uv7D6sAgHvIbAQIRtdani3r_BjdRTz9hy0keOW3-Qpp2pXQCU2Blihy0ItrB_C0xcBZDOJQfxEB3eS16_oT34Zp_4gg_WFpeIKtG3l_07uSnrtpgPiLg%3D%3D

⁷⁰ Sebag, G, "Google Wins Again in French Court Fight Over \$1 Billion Tax Bill", April 26, 2019. Available at <https://www.bloomberg.com/news/articles/2019-04-25/google-wins-again-in-french-court-fight-over-1-billion-tax-bill>

policy-making to address ongoing tax policy issues. This is particularly concerning given the rise of the digital economy and new digital technologies that could expand opportunities for corporate tax avoidance and require new and innovative regulatory responses from government.

Recommendations

- The plurilateral agreement on e-commerce should include full exemptions for tax policy, and should not include provisions that enable companies to avoid tax obligations, including those that ban local presence requirements, prevent governments from regulating cross-border data flows and prohibit local storage requirements.

6.6. E-commerce rules and workers' rights

We are already seeing how the rise of the gig-economy is undermining workers' rights by classifying workers as contractors or individual business⁷¹, thus removing the responsibility for gig-economy giants like Uber⁷² or Deliveroo⁷³ to provide basic employee entitlements.

As identified previously, by enabling global corporations, including those operating in the gig-economy, to access Australian markets without a local presence, e-commerce rules could worsen the situation for workers and undermine Australian employment law. The International Trade Union Confederation (ITUC) argues that "without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce labour standards, as well as other rights, is fundamentally challenged."⁷⁴ The main objective of many digital platforms is to bypass many of the obligations and labour cost that should be borne by the employer. The ambiguity about whether gig economy workers are independent contractors, dependent contractors or employees allows employers to undermine minimum wages and other legislated employment conditions.

The use of digital platforms to organise and compensate irregular work, and the ability of businesses (including large global firms like Uber) to classify their workers as independent businesses in their own right, are undermining the effectiveness of traditional labour market protections (such as the minimum wage, superannuation entitlements, paid leave, and others). It is imperative that Australian workers are able to use domestic labour laws to challenge the classification of 'independent businesses' and the avoidance of basic employee entitlements by companies such as Uber.

Concerns have also been raised about the impact that new technologies and Artificial Intelligence (AI) can have in recruitment practices and on work conditions. The ITUC points to the risk that "algorithmic bias and data control makes hiring and firing less transparent."⁷⁵ Data collection and new technologies can also increase opportunities for workplace surveillance, with workers increasingly monitored and evaluated using technologies and AI.⁷⁶

⁷¹ Sutherland, C, "It's just a gig: How the gig economy is stealing workers' Rights", May 15, 2019. Available at

<https://www2.monash.edu/impact/articles/economy/its-simply-a-gig-how-the-gig-economy-stole-workers-rights/>

⁷² Bowcott, O, "Uber to face stricter EU regulation after ECJ rules it is transport firm", December 21, 2017. Available at

<https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu>

⁷³ Waters, C, "'Throwing workers a bone': Deliveroo calls for national laws to govern gig economy", February 12, 2019.

Available at <https://www.smh.com.au/business/small-business/throwing-workers-a-bone-deliveroo-calls-for-national-laws-to-govern-gig-economy-20190212-p50x72.html>

⁷⁴ ITUC, "'E-commerce' push at WTO threatens to undermine labour standards," 2019. Available at <https://www.ituc-csi.org/e-commerce-push-at-wto-undermines-workers>

⁷⁵ ITUC, "A workers' agenda for e-commerce," 2018. Available at <https://www.ituc-csi.org/WTO-public-forum-2018-workers-agenda-for-e-commerce>

⁷⁶ The Centre for Future Work, "Turning 'Gigs' Into Decent Jobs - Submission to: Inquiry into the Victorian On-Demand Workforce", pp 17-18. Available at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8815/5669/1362/The_Australia_Institute.pdf

Questions have been raised about the effectiveness of existing labour laws and standards in the context of the emerging digital economy and the rapid rise of new technologies, including through the Victorian Government's ongoing Inquiry into the Victorian On-Demand Workforce.⁷⁷ It is essential that the government retain the flexibility to implement policy reform and new innovative regulation to respond to emerging issues in relation to labour rights and conditions. However, there is a risk that e-commerce rules will hinder this process by limiting policy space for regulatory reform and undermining government enforcement mechanisms.

Recommendations:

- The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, endorsed by most governments, including the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the associated Conventions. These are the basis of Australian employment law and include:
 - the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98);
 - the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105);
 - the effective abolition of child labour (ILO conventions 138 and 182);
 - the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).
- The plurilateral agreement on e-commerce should not:
 - include provisions that enable companies to avoid the scope and enforcement of Australian employment law;
 - Restrict the ability of government to implement new labour regulation and standards that can ensure that workers' rights are enforced regardless of claims by digital platform companies that they are not bound by labour regulation.

7. Australia's place in the global digital economy

The ACCC report outlined detailed concerns about the concentration of market power in Australia's digital domain. In April 2019, Google Search had a 95 per cent market share in general search.⁷⁸ Facebook is used by 95% of Australians using social networking⁷⁹ and its market power was strengthened by its ownership of Instagram, WhatsApp and Messenger.⁸⁰

The ACCC found that Google and Facebook's near monopoly power enabled them to "determine the content and prominence of material displayed to consumers and the power to set the terms and conditions of access to their service."⁸¹ The flow on effect is that these companies can use their monopoly position to advantage other businesses owned by the company and to lock smaller businesses out of the market. In particular, the ACCC found that "the significant amount of data that

⁷⁷ See <https://engage.vic.gov.au/inquiry-on-demand-workforce>

⁷⁸ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>, p. 62.

⁷⁹ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>, p. 62.

⁸⁰ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>, p. 62.

⁸¹ Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>, p. 6.

these platforms collect, including on rival businesses, cannot be easily replicated, providing them with a competitive advantage.”⁸²

The ACCC’s findings are reflected at the global level. The global digital economy is dominated by seven big players - Microsoft, Apple, Amazon, Alphabet (the parent company of Google), Facebook, Tencent and Alibaba,⁸³ with most of the benefits flowing to the US and increasingly China.

In its response to the ACCC report the government acknowledged that “while digital platforms such as Google and Facebook are key pioneers in developing and popularising the online services they provide, their dominance of markets for the supply of these services creates competition risks.”⁸⁴ Yet, the government seems to lack a coherent strategy to address these risks.

This is particularly the case in relation to trade policy, where the government is actively supporting e-commerce rules that could extend the power of corporations like Google and Facebook and worsen competition risks in Australia by increasing their market access while limiting the scope for regulatory oversight.

There is little evidence that the government has seriously grappled with these challenges. The Department of Industry, Innovation and Science’s 2018 report *Australia’s Tech Future: Delivering a strong, safe and inclusive digital economy*, points to Australia’s leadership role in developing digital trade rules and standards but provides no detail on what these rules are or analysis about the impact that they will have on Australian businesses or public.⁸⁵

The National Interest Analysis provided by DFAT for recent trade agreements that include more extensive e-commerce provisions, such as the TPP-11 and the recent trade agreements with Indonesia and Hong Kong, assert that e-commerce rules will build business capacity and competitiveness.⁸⁶ This may be the case in some situations. However, in a global market that is dominated by seven technology companies, none of which are based in Australia, it is questionable how trade rules that expand their market access and reduce government regulatory power would increase the competitiveness of Australian companies, enable entry by small to medium enterprises or even larger Australian firms, or would have broad economic benefits across Australia communities.

⁸² Commonwealth of Australia, Australian Competition and Consumer Commission, Digital Platforms Inquiry final report, June 2019. Available at <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>, p. 6.

⁸³ UNCTAD, “Digital Economy Report 2019,” 2019, p. xvi. Available at https://unctad.org/en/PublicationsLibrary/der2019_en.pdf

⁸⁴ Commonwealth of Australia, Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry, December 2019, p. 7. Available at <https://treasury.gov.au/publication/p2019-41708>

⁸⁵ Commonwealth of Australia, Department for Industry, Science and Technology, Australia’s Tech Future: Delivering a strong, safe and inclusive digital economy, 2018. Available at: <https://www.industry.gov.au/data-and-publications/australias-tech-future>

⁸⁶ Department of Foreign Affairs and Trade, National Interest Analysis for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, 2018, p. 13. Available at <https://dfat.gov.au/news/news/Documents/national-interest-analysis-including-analysis-of-regulatory-impact-on-australia.pdf>; Department of Foreign Affairs and Trade, “National Interest Analysis of the Free Trade Agreement between Australia and Hong Kong, China and the Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China,” 2019. Para 48. Available at <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-text/Documents/a-hkfta-national-interest-analysis.pdf>

At a minimum, the Department of Foreign Affairs and Trade must address these concerns by inviting a new round of public submissions into the plurilateral e-commerce negotiations. AFTINET also calls on the government to hold a full inquiry into the the social, human rights and economic impacts of e-commerce trade rules.

Recommendations

- The Department of Foreign Affairs and Trade should invite a new round of public submissions into the plurilateral e-commerce negotiations based on the issues raised by the ACCC Report and The Australian Human Rights Commission Human Rights and Technology Project;
- The government should not proceed with e-commerce negotiations until it has fully assessed and responded to regulatory gaps in the digital domain identified in the ACCC Report and other sources;
- Policy space must be maintained to enable existing and future government to implement new regulation that responds to rapid changes in the digital economy and supports the development and implementation of local industry strategies and policies;
- The government should hold a broader inquiry into the social, human rights and economic impacts of e-commerce trade rules.