## Contesting the social impacts of neoliberal trade and competition policies

Policies to create markets for the pricing and distribution of what were formerly treated as public goods through National Competition Policy developed in Australia in 1995, at the same time as the formation of the World Trade Organization (WTO), and were inspired by the same principles. The WTO replaced the General Agreement on Tariffs and Trade with a wider range of legally binding agreements and greater legal enforcement powers.

The nexus between trade and competition policy was summarized by Allan Fels in 1996:

> "There is a discernible trend on the part of leading world economists and key policy makers to try to characterize trade policy as a form of competition policy, as requiring the application of the same principles, (and even processes) in the interests of world economic progress. Formulation and implementation of this ambitious approach is a substantial world policy challenge " (Fels, 1996:1)

The principles referred to are those of the neoliberal version of neoclassical economics which are assumed to lead to "world economic progress" which is not further defined. These principles were developed at the height of neoliberal policy ascendancy, described by Stiglitz and others (Stiglitz, 2005, 2010). In fact the question of whether these policies lead to progress and how that is defined is now far more contestable.

The market failures exposed by the global financial crisis and climate change have led to increasing public questioning of neoliberalism, and calls for a greater regulatory role from government, including from the present Australian Labor Party Prime Minister, Kevin Rudd, who wrote in February 2009:

> 'The current crisis is the culmination of a 30-year domination of economic policy by a free market ideology that has variously been called neoliberalism, economic fundamentalism, Thatcherism or the Washington consensus. The central thrust of this ideology has been that government activity should be constrained, and ultimately replaced, by market forces' (Rudd, 2009)[1].

This paper analyses neoliberal trade and competition policy using a critical theory approach from the classical political economy tradition developed by Cox (Cox, 1981:129). This approach seeks to explain the origins of, and changes in, government institutions and policies through a critical analysis of their social origins and histories, and the power relationships between the advocates and critics of them. This requires analysis of different interests of classes and social forces and their relationship to the

[1] Kevin Rudd's article criticizes neoliberal polices, which it links politically with the former Australian Coalition government, and justifies the Keynesian policies adopted by the Australian Labor Party in response to the global financial crisis, which were implemented early and effectively . It does not acknowledge the influence of neoliberalism on Labor governments.

state. These include corporations and business organisations, on the one hand, and social groups like unions and community groups which seek to defend the interests of the less powerful, on the other. State institutions at national and international levels are influenced, but not simply determined by, dominant economic interests. Institutions also develop their own histories which in turn influence the development of ideas. State policies reflect the outcomes of contests between social forces (Cox, 1981:137).

Transnational corporations have both global and regional interests in developing consistent global regulatory frameworks and policies which create a favourable environment for their global trade and investment strategies. They have advocated neoliberal policies which include rapid removal of tariffs, removal of limits on levels of foreign investment, shifts from company and income taxes to consumption taxes, cuts in social welfare spending, privatisation of public services and deregulation of labour markets. These policies have become entrenched in global institutions like the International Monetary Fund (IMF), the World Bank, and the World Trade Organisation (WTO) (Stiglitz, 2006).

The rationale for these policies is that competition through markets with minimum levels of regulation maximizes efficient allocation of resources, while government regulation leads to inefficiencies. Comparative advantage theory argues that removal of all trade barriers benefits consumers and enables global competition to maximise efficient allocation of resources. More broadly, neoliberal policy argues that the removal of regulatory restrictions and taxes on investors, and consequent redistribution of income towards investors, will result in increased investment and higher economic growth, the benefits of which will trickle down to the majority in the form of employment growth at the national and global levels.

Neoliberal theory ignores the social context which underpins markets, which historically have required legal frameworks with varying levels of intervention. Despite the rhetoric, neoliberalism is not simply about removing regulation, but is about changing the regulatory framework in favour of investors. Beneath the rubric of economic efficiency, an analysis of the power relationships shows that these policies are supported strongly by business because they are understood to increase profitability.

The trade arm of these policies is promoted by the WTO, through multilateral legally binding global trade agreements negotiated by governments, and through bilateral and regional free trade agreements like the Australia-US Free Trade Agreement (AUSFTA).

The establishment of global, regional and bilateral trade agreements which can change national forms of regulation is not a simple or uniform process of reduction of the role of nation states in relation to global institutions. States are the main actors in trade negotiations, brokering the referral of their regulatory powers. In the historical context of colonialism, some states remain more powerful than others. For example, the WTO has been dominated by the US, Europe and Japan. US and European trade agreements often seek to establish their legal frameworks as the model for enforceable global or regional

regulation through trade agreements. This dominance is now being modified by the emergence of strong developing economies like China, Brazil and India.

Trade agreements not only deal with reductions in tariffs, but now seek to apply global trade rules to many areas previously regarded as the domain of national government regulation. These include access to medicines, water services, financial services, cultural policies, quarantine, food regulation, government purchasing and environmental policies. These forms of legally binding global regulation internationalise previous national state functions, effectively removing key aspects of policy from national politics and democratic pressures. However the removal of key social policies from the democratic process at the national level can also provoke resistance from social movements which can influence governments and policy outcomes (Cox, 1994).

The development of National Competition Policy (NCP) in Australia and its intersection with trade policy can be analysed in this framework.

NCP was legislated in 1995, based on recommendations of the 1993 Hilmer Report. At the time, it was seen as complementary to WTO trade agreements and as a possible model for other countries in the Asia Pacific region (Industry Commission, 1995c: 17).

The stated objective of NCP was to achieve economic efficiency by applying the same legal frameworks for competitive behaviour in the same way across all industries and services, at national and state levels, and in the private and the public sector (Hilmer, 1993: 3). The development of consistent national competition policies in some areas like consumer protection was not controversial. The greatest social impact of the policy, and the contest about it, was in its application to services like public transport, energy and water services, and in the establishment of quasi markets for other “non business” public sector services like health or education through competitive tendering processes.

The Hilmer Report conceded that some areas of public infrastructure like rail, electricity grids and pipelines are natural monopolies, with economics of scale and scope that mean that it is inefficient for competitors to duplicate them. Instead, the report argued that competitors should have regulated access to publicly owned infrastructure (Hilmer, 1993: 238).

The report claimed to be agnostic about the privatization of public monopolies, claiming that competition was its main focus, and argued that, in any case, competition should be introduced before privatization. The report also recommended reviews of all legislation and regulation against the sole criterion of whether they restricted competition. This was intended to encourage administrative simplicity and lighten regulatory burdens on business activity (Hilmer, 1993, xxx).

The then Australian Labor Government adopted the main recommendations of the Hilmer report in its 1995 National Competition Policy legislation. The legislation was strongly supported by business through the Business Council of Australia and other business organizations. They welcomed the Industry Commission prediction of ‘rebalancing” of electricity and water prices after the removal of consumer cross subsidies, which would

mean lower prices for business (Industry Commission, 1995: 221and 336, Business Council of Australia, 1995).

Transnational corporations offering services which could compete with public services also supported the policy. Transnational services companies like Serco approached governments with claims that they could operate support services for education at lower cost than the public sector (Serco, 1994, Adelaide Advertiser, 1995). Some of these services were seen as potential areas of high profitability. As an article on water services in *Fortune* business magazine put it, "Today companies like France's Suez are rushing to privatize water, already a $400 billion global business. They are betting that water will be to the 21st century what oil was to the 20th" (Tully 2000: 55).

Unions and other community groups debated and contested the application of NCP to areas of public services and public regulation. They expressed fears about the impacts of NCP on equitable access to essential services and its potential to promote privatization of public services by companies which would place profitability above social and environmental objectives. They successfully lobbied the Labor government to add public interest objectives like environmental sustainability, access and equity and regional development to the objective of economic efficiency in the legislation. However, the Federal and State (regional) governments had discretion in applying these additional objectives (Author, 1995: 18-19).

Some economists also argued that the application of extreme neoliberal principles in NCP was not consistent with some neoclassical economic theory because the policies were being applied to public goods which did not meet the conditions required for competitive markets to lead to efficient outcomes. They argued that services like energy, water and public transport were not normal commodities, as they have inelastic demand, meaning consumers cannot choose not to consume them, and have positive or negative externalities. Competition in these service markets would not work in the way predicted by competition theory, and would result in market failure which would need to be addressed by government intervention (Ernst, 1994: 39-41).

The adoption of NCP since 1995 means that many Australian public utilities like public transport, energy and water services now operate under market principles, and are evaluated on market criteria rather than social or public interest objectives. Many of these services have also been privatized, a process which accelerated under the Howard Coalition (conservative) Government from 1996-2007. In other areas of direct service provision, some governments have retained policy functions but introduced competitive tendering or outsourcing of service delivery functions (Author, 2002).

As indicated by Allan Fels, there is an explicit policy link between the national regimes of competition policy and international trade agreements in their application to public services, through the WTO General Agreement on Trade in Services (GATS) and bilateral trade agreements based on GATS principles. The drafting of GATS rules was strongly influenced by business organizations like the International Chamber of Commerce and transnational services corporations which support neoliberal policies (Braithwaite and Drahos, 2000: 200-201).

GATS applies global market access rules in a legally binding trade agreement which governments cannot withdraw from without exposing themselves to pay compensation to other GATS signatory governments. GATS rules, like all legally binding trade agreements, also enable governments to challenge specific policies or regulations of another government before a trade tribunal on the grounds that they contravene the provisions of the agreement, with trade sanctions applied as penalties if the challenge is successful. This reinforces the NCP process of reviewing all legislation on the sole criterion of whether it reduces competition.

GATS is a positive list agreement, which means that many of its rules only apply to those services which each government agrees to list in its legal commitments as part of the agreement.

Public services are exempted from the GATS, but the definition is of public services is ambiguous. A public service is "a service supplied in the exercise of governmental authority … which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" (WTO GATS 1994, Article 1, 3b). This means that government provided services could have trade rules applied to them if they operate on a commercial basis, or in competition with other service suppliers. As explained above, this is precisely the effect of national competition policy, which applies competitive rules and quasi market structures to public business organizations and public services. Thus NCP prepares some public services for exposure to GATS rules.

GATS applies to all services listed by governments the free trade principle of "national treatment" for transnational investors (WTO GATS, 1994, Article 17). This means that that there can be no preference or assistance for local service providers, no limits on levels of transnational investment, and no requirements for joint ventures, technology transfer or links with local firms.

GATS applies the principle of "full market access" for transnational investors (WTO GATS, 1994, Article 16). This means there can be no regulatory limits on the number of service providers, and no requirements for services to be located in particular regions or to employ or train local people.

GATS also restricts the ability of governments to regulate essential services in the public interest. For example, qualifications, licensing and technical standards for services cannot be "more burdensome than necessary" for business (WTO GATS, 1994, Article 6.4).

The trade law policy approach to regulation is to treat regulation perceived as unfavourable to business interests as if it were a tariff, to be frozen, reduced and removed over time, without consideration of the social or environmental impacts of particular regulation.

These provisions of the GATS agreement are mirrored in the Australia-US Free Trade Agreement, negotiated by the Howard Coalition Government in 2003-4, with one

important difference. The GATS is a “positive list” agreement, which only applies all of its rules to services which governments agree to list in the agreement. The AUSFTA is a “negative list” agreement for investment and services. This means its rules apply to all services, even those not in existence at the time of the agreement, except those which are specifically listed as reservations. This gives it much wider scope of application than the GATS, labeled GATS-plus in trade jargon. Social regulation of services which governments choose to retain must be specifically listed as “non-conforming measures”.

The AUSFTA also contains provision on intellectual property rights and on government procurement which are more extreme than current multilateral WTO agreements.

The WTO agreement on Trade-Related Intellectual Property Rights (TRIPs) is not logically consistent with competition policy or free trade agreements, since it is about the extension and strengthening of monopoly rights to patent holders, which enable them to charge high prices for their products for longer periods. However, most OECD governments supported its inclusion as a WTO agreement following corporate lobbying (Braithwaite and Drahos, 2000: 201)

One of the most controversial aspects of TRIPs has been its application to patents on medicines. The extension of patents on medicines makes many essential medicines unaffordable in developing countries. The neoliberal rationale for extended patent rights is that they are required to provide sufficient incentive for investment in research to develop new medicines. This was strongly contested by pubic health organizations and developing country governments, who argued that this extension of corporate rights was in conflict with the internationally recognized human right of people to have access to health care, including affordable medicines (United Nations, 1978). It took years of legal action and publicity by governments like Brazil and South Africa and by health and other community organizations, to achieve some amendments to the TRIPs agreement. These amendments enable developing governments to get some limited access to cheaper generic medicines to combat epidemics like HIV-AIDS and malaria, but their implementation has been very restricted in practice (Author, 2004).

The US is home to many of the largest global pharmaceutical companies, and was the chief government advocate for the WTO TRIPS agreement. US bilateral trade agreements also pursue aggressively the inclusion of even greater rights for patent holders, based on US national legislation, which is reflected in the AUSFTA. The provisions for additional rights are labeled “TRIPs-plus” in trade jargon.

Another contested area of government policy now included in some trade agreements is that of government procurement. Neoliberal theory suggests that government procurement should be based solely on price competition and completely open to transnational suppliers, and there should be no policies that give preference to local suppliers. In practice, most governments do have broader value for money and public interest criteria, including some local preference policies, as part of industry development policy, and most trade agreements have exceptions which allow this. Developing countries have strongly opposed a legally binding WTO government procurement agreement on the grounds that it would prevent them for using government procurement

for industry development in the same way that it has been used historically in most industrialized countries. The outcome of this opposition is that there is a voluntary plurilateral WTO Procurement agreement, but few countries have signed it. However, a chapter on government procurement was included in the AUSFTA, another example of the "WTO-plus" nature of the agreement.

Three examples of the impact of the GATS and the AUSFTA on Australian policy debates illustrate the contests between social forces over the application of those policies.

The first example is in the area of water and energy services.

As discussed above, AUSFTA has a 'negative list' structure for both services and investment. All of Australia's laws and policies on services and investment at all levels of government can be affected by the agreement unless they are specifically listed as reservations.

US service companies must be given national treatment and full market access to non-government services, meaning that US companies must be treated as if they were Australian companies, and there can be no limits on levels of foreign ownership, no requirements to have joint ventures with local firms, no limits on the number of service providers, and no requirements on staffing numbers for particular services. Qualifications, licensing and technical standards for services cannot be 'more burdensome than necessary to ensure the quality of the service' (AUSFTA, 2004, Articles 10.2, 10.4, 10.7). Regulations could be challenged if they do not conform to these terms. These obligations apply to all services unless they have been specifically reserved.

Social welfare, public education, public training, health and childcare are reserved, but only 'to the extent that they are established or maintained for a public purpose', which is not defined.

The list of reservations leaves out key essential services that **were** included in a similar list of reservations in the Singapore-Australia Free Trade Agreement. Water, energy and public transport services were omitted from the list of reservations at the insistence of the US. The lack of reservation these services means that Australian governments now have restricted rights to regulate them in the ways described above.

The impact of the inclusion of water and energy services in AUSFTA became visible in 2006 in the public debate about the privatisation of the Snowy Mountains Hydro-electric scheme, jointly owned by the Australian Federal Government and two state governments. The Federal government held shares valued at $450 million.

So long as the scheme remained in public ownership, neither GATS nor AUSFTA rules would apply to it. However, if it were sold into private ownership, the trade agreement rules would apply.

The sale of the scheme was agreed by the two State governments and the Federal Government, which were joint owners. However, Federal legislation was required to complete the sale. A very broad community campaign developed against the sale, on the grounds that private and possibly transnational foreign ownership would reduce the ability of governments to regulate both water flows and electricity supply for public interest and environmental reasons. The campaign was led by the Federal Government member of Parliament in whose electorate the scheme was located, and supported by other government back benchers and a former conservative Prime Minister, the National Farmers' Federation, members of the Opposition Labor Party and minor parties, unions and a broad range of prominent individuals and community and environmental groups (Myer, 2006, National Farmers' Federation, 2006, Grigg, 2006).

The Prime Minister sought to diffuse the campaign by announcing that the Government would amend the sale legislation to limit transnational investment to 35% of total shares, and require the management to be located in Australia and to include Australian nationals. However, the Prime Minister's Department then reportedly received legal advice that such regulation could be directly contrary to AUSFTA services and investment chapters, which did not exclude water or energy services and forbade any limits on foreign ownership of assets worth less than $800 million. The Federal Government share of the scheme fell below this threshold. The AUSFTA rules also excluded nationality requirements for management and requirements about where management could be located. The Government was reportedly highly embarrassed by the prospect of any public discussion of the possibility of its own proposed nationalist safeguards being in conflict with AUSFTA (Myer 2006). The Prime Minister hurriedly withdrew the amended sale legislation altogether, announcing that he was responding to community concerns about privatisation, and the sale did not proceed (Howard, 2006). This was a victory for the community campaign. However, it also showed that AUSFTA placed clear restrictions on the government's ability to regulate water and energy services, which the government was not willing to debate or defend publicly.

The second example is the debate about the impacts of AUSFTA on the wholesale price controls on medicines in the Pharmaceutical Benefits Scheme (PBS).

The policy goal of the PBS is to ensure affordable access to prescription medicines for all by controlling wholesale prices and subsidizing retail prices. Under the PBS, the Australian government controls the wholesale prices of medicines commonly prescribed by doctors by using a panel of experts on the Pharmaceutical Benefits Advisory Committee to compare the price and effectiveness of new medicines with the prices of comparable but cheaper generic medicines whose patents have expired. This is known as reference pricing, and enables the government to negotiate lower wholesale prices. The listed medicines are then made available for sale at regulated subsidised retail prices. The difference between the wholesale price and the subsidised price is the cost of the PBS to taxpayers. The overall cost of the scheme to taxpayers is therefore strongly influenced by the ability to reduce wholesale prices.

Pharmaceutical lobby groups and US negotiators clearly identified the price control of wholesale prices by the PBS as a target from the outset of the negotiations on AUSFTA. In 2003, the wholesale prices of common prescription medicines in the US were three to ten times greater than the prices paid in Australia (The Australia Institute, 2003). US Pharmaceutical companies argued that Australia's system prevented them from enjoying the full benefits of their intellectual property rights by comparing the price of new drugs with cheaper generic drugs (Pharmaceutical Research and Manufacturers of America, 2003, p. 6).

These attacks on the PBS reference pricing system were strongly contested by health organisations, pensioner groups, unions and other community groups in the public debate during the AUSFTA negotiations (Australia institute, 2003, Drahos *et al*, 2004, ABC 2004a and b). This had an impact on the government's position in the negotiations, and the scheme largely remained in place. However the implementation of AUSFTA resulted in changes that could undermine the effectiveness of the system over time and lead to higher prices.

The AUSFTA set up a joint Medicines Working Group of Australian and US officials based on the commercial principles that contribute to the high cost of medicines in the US. These principles give priority to the 'need to recognise the value of innovative pharmaceutical products' through strict intellectual property rights protection (AUSFTA, 2004, Annex 2c). The principles effectively reduce the importance of the Australian public health goal of affordable access to medicines for all.

The establishment of this working group ensured that the US government could continue to influence future policy and challenge policy decisions on trade grounds. US Senator Jon Kyl, a strong supporter of the US pharmaceutical industry, commented that the AUSFTA is 'only the beginning of negotiations over Australia's pharmaceutical system' and that 'there is much more work that needs to be done in further discussions with the Australians in relation to pharmaceuticals' (Garnaut, 2004).

Following the signing of the AUSFTA, the Howard Government made specific changes to medicines policy that enable pharmaceutical companies to receive higher wholesale prices for some medicines.

The government announced in February 2007 that it would develop different categories for different types of medicines to be listed under the PBS. These changes were legislated in August 2007. The F1 category applies to single brand medicines that are judged to have unique health benefits and not to be interchangeable in their health effects with other medicines. These medicines are not subject to reference pricing and higher prices will be paid for them. The F2 category includes single brand medicines that are judged to be interchangeable in their health effects with other medicines, including generic medicines. These are subject to reference pricing to obtain the best value for money. The legislation also included mandatory price reductions for medicines as patents expired, and cheaper generic versions became available. The government claimed that savings from the large number of medicines coming off patent would offset higher prices for the

medicines in F1, resulting in net savings to the PBS overall (Department of Health and Ageing, 2007).

These proposed changes to the PBS were discussed at the AUSFTA Medicines Working Party held in January 2006, well before the government's public announcement about the changes. Documents distributed at the meeting obtained under Freedom of Information legislation include an editorial opinion article written by a Government Member of Parliament that outlined the F1/F2 changes as a desirable model (Laming, 2006).

These changes clearly open the way for the PBS to allow higher wholesale prices for some new medicines, which was a major goal for US pharmaceutical companies and the US government. The discussion of the changes at the AUSFTA Medicines Working Party shows that this body is continuing to influence Australian medicines policy as predicted by key pharmaceutical industry supporters like Senator Kyl quoted above.

The 2007 legislation was contested in the media by health experts and community groups (ABC, 2007, Faunce, 2007). The Australian Labor Party Opposition successfully amended the legislation to include a review of its impacts on the price and affordability of medicines.

This review of the impact of the PBS changes, conducted under the Australian Labor Party Government elected in 2007, was published in February 2010. The review confirms that F1 category is contributing to higher costs for the PBS than were predicted. The study showed that the actual savings from the implementation changes were less than estimated in 2007. This is partly because of the growing share of the higher cost medicines in the F1 category. The report predicts that the future costs of the scheme will be higher than estimated at the time of the changes, and that this will place increasing pressures on the health budget (Department of Health and Ageing, 2010).

A preliminary academic study also published in 2010 comparing the prices of key F1 drugs with F2 drugs with similar therapeutic effects since the 2007 changes shows that government 'has been paying an increasingly disproportionate amount for the F1 classified medication without the necessary expectation (according to the *National Health Act* 1953) that they are paying for increased cost-effectiveness, or a greater level of objectively demonstrated therapeutic significance' (Faunce *et al* , 2010).

The review and study indicate that the F1 category of medicines for which higher wholesale prices are paid is likely to take an increasing share of the PBS budget, and to contribute to overall higher costs than were estimated at the time of the 2007 changes. This could place pressure on governments to recover more of these costs by raising the prices charged to consumers. It is therefore likely that the impacts of this policy change will continue to be contested by health and community organizations.

The third example of contested policy deals with the impact of AUSFTA's government procurement rules on the processing of blood products supplied to the health system in Australia.

AUSFTA sought to change government policy on the supply and regulation of blood products. In Australia, blood is donated by individuals through a national voluntary scheme run by the Australian Red Cross and is processed into blood products by an Australian company, CSL. The scheme is regulated through the National Blood Agreement, a joint agreement between the Federal and State Governments, as the hospital system that purchases most of the blood products is run by state governments. All blood and blood products are supplied free of charge to patients.

In 2001 the National Blood Authority Committee of Inquiry recommended that the voluntary system of blood collection continue and that Australia's blood products continue to be processed by CSL, for both health and national security reasons, to ensure that there was continued national capacity to ensure timely and continuous supplies. This report followed a lengthy inquiry, including public submissions and hearings (National Blood Authority, 2001).

The government procurement chapter of AUSFTA exempted blood products from being opened up for competitive tendering by US firms. However, during the negotiations a side letter was added that required the Australian government to conduct a review and to recommend to state governments that the rules of the AUSFTA procurement chapter be applied to blood products. This would open up the supply of blood products to tendering by US firms, directly contrary to the findings of the 2001 Report.

This side letter was the result of lobbying by Baxter Healthcare (the Australian subsidiary of US Baxter Health Corporation). Baxter's submission to the Joint Standing Committee on Treaties stated: 'Baxter referred its concern …to the United States Government which then added the issue to its agenda, and in 2003 the topic was discussed at length in the FTA negotiations. The Side Letter describes the results of those negotiations' (Baxter Healthcare 2004: 3).

The USFTA side letter required a review of Australia's blood processing arrangements in 2006, but also specified that the Federal Government 'will recommend to Australia's States and Territories that future arrangements for the supply of such services be done through tender processes consistent with the government procurement chapter of AUSTFTA'. However, the wording of the side letter did not bind the States and Territories to agree with the Federal Government's recommendation.

The review was conducted in 2006. Health and community organizations, health academics, and the Australian Red Cross, made submissions to the review, urging retention of the current system, and there was a public media debate (Australian Red Cross, 2006, Bambrick et al, 2006). The Australian State Health Ministers' Conference also made a public statement in April 2006 re-asserting the national policy principle of self-sufficiency in blood products." (Australian Health Ministers' Conference, 2006).

The review report recommended against tendering, concluding that the voluntary collection of blood in Australia and self sufficiency in blood products should remain key

objectives of Australian policy. Tendering could involve substantial additional costs for transport and return of Australian blood plasma, safety compliance and risk management costs, increased lead time between the collection of blood plasma and its clinical use, and increased risk of interruption to supply. The review recommended that, in the absence of competition, CSL costs and prices be benchmarked to ensure value for money (Flood *et al*, 2006, pp 6-8).

Despite these recommendations, Federal Health Minister Tony Abbott announced that the terms of AUSFTA obliged him to recommend the application of the AUSFTA government purchasing rules and to open provision of blood products and services to competitive tendering by US firms. He then forwarded the Review to the States and Territories for consideration (Abbott, 2006).

A meeting in March 2007 of all State and Territory Health Ministers rejected the Federal Government recommendation for tendering. The Federal Health Minister then announced that, since there was no consensus for change, the current arrangements would continue without competitive tendering (Abbott, 2007).

The then Trade Minister Warren Truss appeared publicly to accept the right of state and territory governments to refuse to accept the Federal Government recommendation. He was quoted in the media as saying "We've met our commitment under the FTA. The commitment was to conduct a review, and we have asked the states, we have done everything we can do within our sovereign powers. We're quite satisfied we've met the obligations. I'm not saying the US won't continue to raise the issue with us" (Breusch and Sutherland, 2007).

The US Ambassador did indeed criticise the findings of the review (Breusch and Sutherland, 2007). It remains to be seen whether the US government will use the AUSFTA disputes process to argue that Australia has not met its AUSFTA obligations.

This issue is a clear example of the way in which trade agreements are perceived to undermine the democratic process of policy making. The Federal government was bound by AUSTFTA to conduct a review by health policy experts and was then bound to ignore its findings. Because of a prior Commonwealth-State Agreement, the state governments remained free to decide the issues on the basis of health policy as indicated in the review findings, and refused to accept tendering. The Federal Government then declared that is had met its AUSFTA obligations. However, it is still open the US government to use the dispute process to challenge the outcome. The US Trade representative also continues to list the CSL blood processing contract as a barrier to trade (US Trade Representative, 2010)

## Conclusion

From the 1990s, both national competition policy and international trade agreements based on neoliberal principles have sought to apply these principles in Australia to a

range of policy areas which were previously seen to require regulation by governments to meet a range of social, health and environmental policy objectives. These policies have been supported transnational corporate interests, but implemented by states, often through the internationalization of state regulatory powers through multilateral and bilateral trade agreements.

These policies have been contested by a range of community organization and unions at the national level. The AUSFTA rules have resulted in the most extreme examples. In the cases of the proposed privatization of water and energy services delivered by the Snowy Mountains Hydro Scheme, broadly based public resistance led to the Federal Government proposal for local ownership. However, the Prime Minister's Department appeared unaware that the AUSFTA restricted its own ability to regulate levels of foreign investment until advised by the Department of Foreign Affairs and Trade. The Government was then unwilling to expose the restrictions on its regulatory powers to public debate, and withdrew the proposal for privatization. This is consistent with Cox's theory about the complexity of government institutions and the impact of resistance on policy outcomes.

The impact of AUSFTA intellectual property rules on the reference pricing system of the PBS illustrates the influence of powerful corporations and the US state to impose aspects of US regulation on other states through trade rules which are **not** logically consistent with neoliberal principles, since they extend monopoly patent rights and impose higher costs on public health systems and on the economy as a whole.

The case of attempted competitive tendering of blood products also shows the impact of resistance by social forces to the application of market rules to essential medical services, and the complexity of federated state structures, as state governments responded to public pressure.

These examples support the proposition that such contests are likely to continue in the context of environmental and social crises when most governments are facing the damaging realities of market failure and the need for increased social regulation of markets.

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