



ASSOCIATION OF SALARIED MEDICAL SPECIALISTS
TOI MATA HAUORA

**ASMS submission on the
International Treaty Examination of the
Trans Pacific Partnership Agreement (TPPA)
to Parliament's Foreign Affairs, Defence and Trade Select Committee**

14 March 2016



Background

The ASMS is the union and professional association of salaried senior doctors and dentists employed throughout New Zealand. We were formed in April 1989 to advocate and promote the common industrial and professional interests of our members and we now represent more than 4,000 members, most of whom are employed by District Health Boards (DHBs) as medical and dental specialists, including physicians, surgeons, anaesthetists, psychiatrists, oncologists, radiologists, pathologists and paediatricians. Over 90% of all DHB-employed senior doctors and dentists eligible to join the ASMS are in fact members.

Although most of our members work in secondary and tertiary care (either as specialists or as non-vocationally registered doctors or dentists) in the public sector, a small but significant number work in primary care and outside DHBs. These members are employed by the New Zealand Family Planning Association, ACC, hospices, community trusts, Iwi health authorities, union health centres and the New Zealand Blood Service.

The ASMS promotes improved health care for all New Zealanders and recognition of the professional skills and training of our members, and their important role in health care provision. We are committed to the establishment and maintenance of a high quality, professionally-led public health system throughout New Zealand.

The ASMS is an affiliate of the New Zealand Council of Trade Unions. The NZCTU will be making a more extensive submission.

Introduction

This submission on the Trans Pacific Partnership Agreement (TPPA) reflects one of the key policy roles of the Association of Salaried Medical Specialists (ASMS) of promoting policies which support the development and maintenance of a high quality public health service and a healthy population. Time and resources have not allowed for the submission to cover all matters on which we have a view, especially given the unreasonably short timeframe to make a submission and the complexities of the TPPA. It concentrates on our concerns about the undemocratic process for decision-making that can have a negative impact on New Zealanders' access to health care, the potential for the TPPA to open the way for multinational companies to compete with District Health Boards to provide health services, and the effects on public health measures such as tobacco control.

Secret processes have no place in a democracy

The ASMS is strongly opposed to any New Zealand government signing up to international agreements - like the TPPA - that are negotiated in secret and which put multinational company interests before factors such as New Zealanders' health and wellbeing.

We find it a sad irony that at a time when western democracies such as New Zealand have been vociferously promoting the importance of the principles of democracy in foreign policy, our Government is proposing to sign up to an agreement that enables international commercial interests to influence New Zealand policy and regulatory approaches that have been formed through an open, democratic process. Indeed, international commerce agreements such as the TPPA essentially future-proof against new and changing regulations. They provide for protections against future policy changes while limiting a government's ability to legislate in the interest of the public. This may result in undue control over a government's action, thereby undermining the democratic process.

The process for coming to such agreements therefore should be more like that of developing and passing legislation, with open circulation and consultation (including reasonable time for feedback) on drafts of the text. Furthermore, given these agreements can impede on the policy development of future New Zealand governments, ratification should be by Parliament rather than the current Executive.

As the public debate over the TPPA shows, there is significant mistrust among many New Zealanders about how this agreement is going to affect their lives. Delegates at the ASMS's Annual Conference in November 2014 made it clear that mistrust is shared by many of the country's senior doctors. The delegates adopted, without dissent, resolutions to support the request for a formal independent health impact assessment of the TPPA, based on the draft text, prior to signing, and that the ASMS opposes the TPPA on the grounds that health care will suffer from the loss of national autonomy that may result.

Radical changes are needed to the process for negotiating such international agreements if they are to have the support of the New Zealand public and be politically sustainable. If these agreements are truly in the interests of New Zealanders, there should be no issue with demonstrating that through a transparent and democratic process. With respect to the effects of the TPPA on New Zealanders' health care, our assessment is that the agreement will be financially costly and have a negative impact on health care. Due to the short timeframe for making this submission, we can outline only briefly some of our concerns, including the following:

Impact on the cost of medicines

It is disingenuous of the Government to defend the TPPA by saying the PHARMAC model will remain in place. The model may remain in place, but the TPPA will significantly undermine the effectiveness

of the model, resulting in more expensive medicines, which in turn will adversely affect New Zealanders' access to health care.

Specifically, the TPPA provisions will result in longer patent periods for some drugs. For example, a drug company will be able to patent "new uses of a known product, new methods of using a known product, or new processes of using a known product" (Article 18.37). As New Zealand Nurses' Organisation (NZNO) President Grant Brookes has pointed out, there have been many cases in the past of drugs which were developed to treat one condition and later put to new uses. If such a clause existed when aspirin was found to be effective in reducing the incidence of heart attacks and strokes, the original patent holder of aspirin could have applied for a new patent to cover the new use of the drug, enabling the company to ratchet up the price until the patent expired.¹

The ASMS agrees with the NZNO President that the greatest impact on PHARMAC, however, is likely to come from extended market exclusivity for new kinds of medicine called "biologics". Currently in New Zealand patent protection for biologics, or "specialty drugs", lasts for five years, during which time the pharmaceutical companies can name their price (eg, Merck reportedly charges \$300,000 per patient for its patented, potentially life-saving melanoma drug Keytruda).

However, the Minister of Health has indicated the effect of the TPPA will be to extend market exclusivity to these drugs by a further three years as the time required for the current Medsafe approval process for biosimilar agents must be added.² Each additional year to the monopoly period for biologics could add many millions of dollars to New Zealand's drugs bill.

To impose extra costs on an already cash-strapped health system will ultimately see patients bearing the consequences.

Impact on DHB Services

The provisions in the TPPA must be considered alongside the Director-General of Health's Health Funding Review, currently being considered by Government, which recommends opening up DHB services to competitive tendering.

If the Government adopts these recommendations, then large parts of our health system could become subject to TPPA "Chapter 10: Cross Border Trade in Services". This chapter applies wherever a service is supplied on a commercial basis or in competition with one or more service suppliers.

Article 10.3 (National Treatment) says: "Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers".

This opens the door to more involvement of multinational health insurance companies. These companies can afford to make loss-leading bids to secure a contract, with the aim of making a profit over the longer term by cutting costs. As a country we really do not want to be going back to the failed market-driven policies of the 1990s, especially under a deeply flawed TPPA that allows international corporations to move in. The wrong move could prove very costly for New Zealand because once multinational companies get their hooks into our public health service contracts, they may be very difficult to dislodge.

Public health

The TPPA enables multinational companies to obstruct and delay effective action on key health issues such as tobacco, obesity, alcohol-related harm and climate change.

Marginal changes to the Investor to State Dispute Settlement (ISDS) mechanism in the TPPA contain loopholes and do nothing to stop multinational companies resisting government policies that reduce company profits.

Legal ‘carve-outs’ from ISDS, such as for tobacco control policies and PHARMAC, simply close one door for multinationals to challenge and obstruct government policies, while leaving others open.

Analysis of the text by Louise Delany and George Thomson of the Department of Public Health at the University of Otago reveals the so-called ‘tobacco carve out’, for example, is ineffective.³

There are a number of issues. First, despite the partial exemption of ISDS, the TPPA as a whole still applies to tobacco. This is because the TPPA provides mechanisms to pursue complaints for breaches of its obligations *in addition* to ISDS. These other mechanisms remain unaffected by the partial exclusion of ISDS. Secondly, the provision that allows the exclusion of ISDS is *optional* rather than a blanket exemption, and the New Zealand Government has not yet announced whether it is opting into this exemption for policies to reduce smoking. Thirdly, the TPPA allows disputes about tobacco control measures to be pursued by means *other* than ISDS – that is, by *states* (‘Parties’ in TPP language) initiating complaints rather than investors. So a state that may have an interest in tobacco exports, for example, may initiate complaints that New Zealand’s policies on tobacco breach the TPPA.

In addition, Chapter 25 (Regulatory Coherence) says that, “in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives... The Parties affirm the importance of... taking into account input from interested persons [including corporations] in the development of regulatory measures” (Article 25.2).

The TPPA, then, requires our government to allow tobacco cigarette companies to have input into the planning, designing, issuing, implementing and reviewing of our policies on tobacco. This contradicts Article 5.3 of the World Health Organization’s Framework Convention on Tobacco Control (of which New Zealand is a signatory), which requires the removal of such tobacco industry influence state policymaking. As Delany and Thomson found, the outcome of the TPPA for tobacco control is that governments will continue to be vulnerable to pressure from the tobacco industry over tobacco control measures and that this may lead to expensive disputes, and lead to delays or permanent postponement for such measures.

Their findings echo the concerns expressed by the Director General of the World Health Organization, Dr Margaret Chan, in her 2014 address to the World Health Assembly:

“One particularly disturbing trend is the use of foreign investment agreements to handcuff governments and restrict their policy space... In my view, something is fundamentally wrong in this world when a corporation can challenge government policies introduced to protect the public from a product that kills”.

Conclusion

The ASMS notes the Government has a responsibility “to achieve for New Zealanders...the improvement, promotion, and protection of their health”, as set out in the New Zealand Public Health and Disability Act 2000. We call on the Government to uphold its responsibilities to the New Zealand public by postponing the ratification of the TPPA until a formal independent health impact assessment is carried out and then re-assessing its position according to the outcome of that assessment.

References

- ¹ <http://nznogrant.org/2016/02/02/a-toxic-combination-the-health-impacts-of-the-tpa/>
- ² http://www.parliament.nz/en-nz/pb/business/goa/51HansQ_20151013_00000006/6-trans-pacific-partnership%E2%80%94pharmac
- ³ <https://blogs.otago.ac.nz/pubhealthexpert/2015/12/21/the-trans-pacific-partnership-treaty-and-tobacco-no-cause-to-celebrate/>