



AFTINET
Australian Fair Trade &
Investment Network Ltd

**Submission to the Productivity Commission Inquiry into
Intellectual Property Arrangements Draft Report**

June 2016

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements.

AFTINET is a network of 60 community organisations and many more individuals that advocates for fair trade based on 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.

However, as noted by the Productivity Commission's draft report, many trade agreements negotiated by Australia have locked policymakers into intellectual property arrangements that benefit global companies at the expense of consumers and reduce future policy flexibility for the Australian government.

In particular, we are concerned about the potential impact of the Trans-Pacific Partnership Agreement (TPP) to further lock in and extend monopoly rights for pharmaceutical companies, and the impact of Investor-State Dispute Settlement provisions (ISDS).

This short submission endorses the submissions and recommendations made by public health expert Dr Deborah Gleeson from La Trobe University.

More extensive arguments on the TPP, intellectual property rights and ISDS can be found in AFTINET's submission to the Joint Standing Committee on Treaties inquiry into the TPP (AFTINET 2016).

The TPP locks in monopoly rights for pharmaceutical companies at the expense of consumers and taxpayers

As a result of Intellectual Property (IP) clauses in many of Australia's trade agreements, pharmaceutical companies already have 20 years of patent monopoly rights in Australia. During this time they can charge high prices on new medicines before cheaper generic versions become available. This already incurs high costs to the Australian Government, which subsidises many medicines through the Pharmaceutical Benefits Scheme.

The recently concluded, but not yet ratified Trans-Pacific Partnership Agreement (TPP) locks in these strong monopoly rights for pharmaceutical companies. It will also effectively increase monopoly rights on expensive biologics medicines by extending data protection.

During the period of data protection, competitors who wish to manufacture cheaper versions of a medicine when its patent expires cannot use the clinical trial data from the original medicine to obtain marketing approval for their cheaper version.

Australia's law on data protection will not change immediately, but the TPP contains legal obligations for measures to ensure a future extension of this period to at least eight years.

Biologic medicines are a growing share of Pharmaceutical Benefits Scheme expenditure. Each year of delay in the availability of cheaper versions would cost the PBS hundreds of millions of dollars (Gleeson *et al* 2015).

The TPP is the first trade agreement to contain additional data protection for biologic medicines. This is a dangerous precedent because it is likely to be used as a model for other trade agreements in the future (MSF 2015, Gleeson 2016).

The TPP also further entrenches existing patent monopolies for medicines and reduces the flexibility of the Australian Government to reduce delays in the availability of cheaper medicines and obtain better value for money.

If ratified, the TPP would entrench many of the intellectual property rules that the Productivity Commission's draft report has recommended for review.

Trade agreements have reduced policy flexibility on copyright at the expense of consumers

Similarly, trade agreements have increased and entrenched copyright rules which benefit copyright holders at the expense of consumers.

These agreements have reduced policy flexibility for governments at a time when flexibility should be maintained so as to best respond to rapidly changing technology and consumer expectations (Weatherall, 2016).

ISDS provisions in the TPP will impede future reform

The investor-state dispute provisions (ISDS) in the TPP will make intellectual property reform more difficult because they offer foreign corporations the right to claim millions or even billions of dollars of compensation from governments in international tribunals if they can argue that a law or policy harms their investment.

These provisions apply to the intellectual property section of the TPP and, if the agreement is ratified, could allow new policy or legislation to be challenged in international tribunals with no independent judges, no precedents and no appeals.

The only clear exclusion from ISDS in the TPP is that governments can choose to exempt future tobacco regulation. But this is the exception that proves the rule. Other claimed ISDS 'safeguards' in the agreement will not be effective in preventing cases being brought over health and other public interest legislation (AFTINET, 2016).

An example of a pharmaceutical company using ISDS in a trade agreement to challenge medicine patent legislation is provided by the US pharmaceutical company Eli Lilly. This company is using ISDS provisions in the North American Free Trade Agreement to sue the Canadian government over a court decision that refused a patent for a medicine that was not more medically effective than existing medicines (Eli Lilly vs Government of Canada 2012).

If ratified, the TPP will be the first Australian trade agreement with the US to include ISDS clauses. US companies are the most frequent users of ISDS and many major pharmaceutical companies are headquartered there.

Recommendations

AFTINET endorses the recommendations by Dr Deborah Gleeson in her February 2016 submission and also recommends that:

- The current secret process for negotiation of trade agreements prevents proper assessment of their implications for domestic policy, and should be changed.
- The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations. The final text should be released for public and parliamentary debate before it is authorised for signing, to enable full assessment of its implications for government policy.
- After the text is completed but before the decision is made to sign it, comprehensive independent studies of the likely economic, health and environmental impacts of the agreement should be undertaken and made public for debate, consultation and review by parliamentary committees.
- Parliament should vote on the whole text of agreements, not just the implementing legislation.
- Monopoly rights for pharmaceutical companies are already extremely generous and should be reviewed. The Australian Government should not agree to further strengthening of monopolies on medicines in trade agreements.
- Australian governments should not agree in trade agreements to extension of copyright and other intellectual property rules at the expense of consumers.
- Investor-state dispute settlement is both unnecessary and damaging to Australian democratic processes. ISDS should not be included in any future trade agreements and the Australian Government should review all existing agreements containing ISDS clauses.
- The Australian Government should not ratify the TPP on the basis that it locks in damaging monopolies on medicines at the expense of affordable medicines, locks in monopolies for copyright holders at the expense of consumers, contains ISDS clauses, and has not been subject to independent analysis of its economic, health and environmental impacts.

References

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