SUBMISSION ON THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AMENDMENT BILL

I am a Professor of Law at the University of Auckland who specialises in international economic regulatory agreements, including the Trans-Pacific Partnership Agreement (TPPA). I also teach and publish in the area of law and policy, including the appropriate processes for the development and adoption of legislation and regulation.

This submission should be read in conjunction with my previous submission on the TPPA itself, including the numerous appendices that contained critical analysis of the agreement. I was surprised by the claim by the chair of the Foreign Affairs, Defence and Trade (FADT) committee in his speech to the House that my submission was not … and presume that he was referring only to my oral presentation, which I trust does not mean that the written submission and its annexes were not read. My oral presentation recognised the futility of canvassing the substantive issues in any detail, given the government's obvious intention to push the process through at a rapid pace that did not allow for considered review of the submissions.

The committee's peremptory report and the absence of any debate on it in the House confirmed that view.

That report was in stark contrast to Australian committee reports on such treaties, examples of which I have forwarded to members of the FADT committee from the different parties. I reiterate the need for an independent process of review conducted outside the control of the Ministry of Foreign Affairs and Trade, including inquiries during the course of negotiations. The current negotiations on Regional Comprehensive Economic Partnership (RCEP) and the Trade in Services Agreement (TiSA) and the pending EU New Zealand negotiations make this a matter of urgency to address.

With the government having truncated consideration of the Agreement itself, the Minister of Trade claimed at a meeting on RCEP last week that the lengthy period for consideration of this legislation by the committee shows the government's commitment to the parliamentary process and people's ability to have their say. That is, of course, nonsense. The decisions to adopt such laws were made during the course of the secretive TPPA negotiations, despite protests raised over the content of leaked texts. The government has already signaled its intent to ensure the legislation is adopted to enable ratification of the TPPA. Parliament, and submitters, will only have an effective say to the extent that any proposed changes do not alter the fundamental substance of the legislation and its compliance with the TPPA.

Lack of evidence to support the legislation

This Bill is the epitomy of bad law making. There is no evidence base produced to support the overall legislation. The partisan and deeply flawed NIA is not a substitute for a proper regulatory impact analysis, even of the partisan kind currently deployed as part of New Zealand's regulatory management regime.

The only Regulatory Impact Statement that has been prepared is by the Ministry of Business, Innovation and Employment (MBIE) and confined to the intellectual property (IP) provisions

in the Bill.[1] That RIS starts by reiterating the assumption from the flawed NIA that there are overall net benefits from the TPPA. Clearly MBIE itself feels compromised by this process, as discussed below.

Inappropriate select committee

It appears that the only part of the legislation being considered by the relevant specialist select committee is the amendment to the Agricultural Compounds and Veterinary Medicines Act 1997, which has been referred to the Primary Production Committee. Critically important changes to patent and copyright law should not be considered by FADT, but should be referred as provided by Standing Orders to the Commerce and/or Health committees to enable a more balanced and substantive evaluation of the implications of the legislation for New Zealanders, with the power to reject the proposed legislation. That cannot happen given the government's predetermination that this legislation will be passed.

Part 8: Patents

I am not an expert on intellectual property law, so will address only the process and presumptions in those parts of the Bill. However, I stress that stronger intellectual property monopoly rights have nothing to do with 'free trade'. The changes in the TPPA service rent seeking IP holders who seek to transfer income from other people to themselves without any net addition to social wealth.

The Bill's provisions on patents are clearly inconsistent with the views of the responsible Ministry about best practice regulation, and the paper tabled by New Zealand early in the TPPA negotiations that argued against IP provisions that exceeded the Agreement on Trade-related Intellectual Property Rights (TRIPS) in the WTO. MBIE sets out to identify the option that will minimise the negative impacts within the parameters set by the TPPA outside the democratic parliamentary process. That is not how our patent laws should be made.

I note that the RIS observes the rationale for longer monopoly rights through patents is not convincing:

> '*Most patents are granted to offshore applicants and, given the small size of the New Zealand market compared with world markets, an extension of patent term in New Zealand will make no difference to foreign innovators' decisions to invest in innovation*.'[2]

MBIE recognises that implementation of the IP obligations can impose costs on New Zealand, and observes that the price of medicines may drop by 80% to 90% once generics become available. Hence:

> '*Extensions of patent term could have a significant impact on the Pharmaceutical*

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[1] Ministry of Business, Innovation and Employment, *Regulatory Impact Statement: Analysis of Options Relating to Implementation of Certain Intellectual Property Obligations under the Trans-Pacific Partnership Agreement*, April 2016

[2] MBIE RIS Para 15

Management Agency (PHARMAC) as well as businesses and consumers. The actual costs will depend on the nature of the invention concerned, and the length of any extension granted.'[3]

'In light of this, providing extensions of patent term could result in very large net costs to the New Zealand economy, particularly if the patent relates to a pharmaceutical.'[4]

The TPPA will inevitably impact on Pharmac's budget, reducing the amount if can buy and undermining its bargaining power, or requiring increased budget allocations as has already occurred for biologics, even under the existing level of marketing protection.

Part 2: Copyright

In 2003 the Labour government scheduled a review of the Copyright Act to take place five years after the Act came into force, being 2014. The current government delayed that review pending conclusion of the TPPA.

The Cabinet paper that recommended that delay acknowledged there was significant demand for a review and '*a public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content as they wish in a digital environment*'.[5] Instead of a substantive review that would consider the interests of consumers and innovative industry, MBIE's RIS assumes the TPPA will come into force and that New Zealand will bound.

A proper evidence-based review would have been likely to reject the proposals for an extended copyright term in the Bill, as required by the TPPA.

Australia Productivity Commission draft report on IP 2016

In the absence of that review I draw the committee's attention to the draft report of the Australian Productivity Commission on *Intellectual Property Arrangements*, released in April 2016. I have extracted a number of pertinent extracts that should lead this committee to reject the proposed legislation.

Problem of norm-setting through FTAs

The Commission highlights fundamental imbalances between IP rights holders and users, which they say inhibit creativity and fostering of an innovation economy.

> '*For countries such as Australia, which continue to be strong net importers of IP, strengthening IP protection can impose a net cost if the benefits of greater protections afforded to rights holders are exceeded by the higher cost of access for users of IP*.' [6]

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[3] MBIE RIS Para 14
[4] MBIE RIS para 16
[5] Office of the Minister of Commerce, Delayed Review of the Copyright Act', undated, para 3
[6]Australian Productivity Commission, *Intellectual Property Arrangements*, draft report, April 2016, p 470

It expresses concern that IP provisions in preferential trade agreements are becoming the norm, sometimes resulting in overlapping and complex rules.

'As highlighted above, a consequence of embodying so much of our IP provisions in international agreements is that Australia is significantly constrained in reforming its IP arrangements. A number of stakeholders commented on this issue: [7]

> *New international rules have also closed off various sources of flexibility Australia would otherwise have had to reform domestic IP law, and as a result have created real barriers to reform of Australian IP law in ways that would make domestic law more effective, efficient, and adaptable. (Weatherall, sub. 99, p. 11)*
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> *"IP rights" provisions in treaties ... are written as old-fashioned heavy-handed regulation. A modern approach to regulation specifies desired outcomes that should be achieved and leaves it to the person or institution implementing the regulation to determine how best to achieve this ... the AUSFTA and the proposed Trans Pacific Partnership Agreement are extremely detailed, leaving no room for each signatory nation to frame the approach that will best achieve agreed goals, given their institutions, culture and laws. (Moir, sub. 137, p. 15)*
>
> *Even where obligations have not necessitated legislative amendment, submissions to this and other inquiries have raised concerns that such obligations bind Australia's domestic system and make our IP regime less adaptive to change (for example, Business Council of Australia, sub. 59).*

The Commission repeated its calls for caution about signing up to such agreements.

<u>*Copyright*</u>

The Commission considers the rationale that royalties provide incentives for artists to create more cannot apply life plus 50, let alone life plus 70. Only a small amount of the monopoly profits from copyright go to encouraging Australian artists. Most goes overseas. Submitters note there are other more effective ways to support local artists (many of which the New Zealand government eschews.) The evidence supports a much shorter term of around 25 years after creation of the work.

> *Numerous studies have attempted to estimate the 'optimal' duration of copyright protection. Landes and Posner (2002) argue a term of around 25 years enables rights holders to generate revenue comparable to what they would receive in perpetuity (in present value terms), without imposing onerous costs on consumer and suggests that a term of around 25 years is sufficient to incentivise creative effort. However, this is only an indicative period because the lower the discount rate used, the greater the term should be, and the authors used a relatively high real discount rate. In addition, any estimate of optimal term duration must make assumptions about the pattern of demand for the works over time — a difficult task. The truly 'optimal' period may*

[7] Australian Productivity Commission, draft report, p 471

accordingly be more or less than 25 years after creation but it is completely implausible it could ever be 70 years after death. [8]

This view informs ***'DRAFT FINDING 4.2: While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.'***[9]

<u>*Lack of consultation*</u>

The Productivity Commission reiterated concerns over the lack of any robust process for decisions that are predetermined through free trade agreements, previously expressed in its 2015 Trade and Assistance review and in the Senate committee's inquiry into the treaty making process in 2015 (referred to in my previous submission). The Commission's review found:

> *... current processes fail to adequately assess the impacts of prospective agreements. They do not systematically quantify the costs and benefits of agreement provisions, fail to consider the opportunity costs of pursuing preferential arrangements compared to unilateral reform, ignore the extent to which agreements actually liberalise existing markets and are silent on the need for post-agreement evaluations of actual impacts*.[10]

The Commission's IP report recorded wide-ranging concerns from patent and trademark attorneys, CHOICE (the equivalent of Consumer NZ), health professionals, the digital industry and media about lack of consultation and input into redrafting the IP regime through international agreements.[11] This contrasts to the active participation of US industry in drafting such legislation through the USTR's trade advisory committees.

This committee must be prepared to conduct a similar to review of the merits of the proposed legislation, and not rubber stamp its passage because the government agreed to it in secret in the TPPA.

Part 7: Foreign investment regulation

The next matter I wish to address is the ratchet mechanism of most-favoured-nation (MFN) treatment that requires raising the foreign investment thresholds for investments from countries that are parties to agreements that precede the TPPA.

While the current provisions are limited, making such changes by regulation rather than formal amendment to the Overseas Investment Act sets a bad precedent given the relative lack of parliamentary oversight of that process.

Similar MFN provisions, coupled with ratchets that automatically lock in any more liberalized foreign investment regime, are also proposed for TiSA and New Zealand is strongly advocating

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[8] Australian Productivity Commission, draft report, p 116

[9] Australian Productivity Commission, draft report, p 117

[10] Australian Productivity Commission, *Trade and Assistance Review 2013-2014,* 2015, p. 82, cited at p.432

[11] Australian Productivity Commission, draft report, Box 16.2, p.431

for them in RCEP, while other countries are seeking to resist it. The impact is a one-way street: there is no ability to retract such commitments in the future without breaching the obligations to other state parties and opening New Zealand to an investor-state dispute. Other countries for whom New Zealand presumably had good reason to provide more restrictive rights not only receive the benefits, but get them 'for free'.

I urge the Committee to object to this approach as further fettering the ability of future governments to review the foreign investment regime.

UPOV 1991

One matter not addressed in this Bill, but which will require future legislation, is compliance with the obligation under Annex 18-A to Article 18.7.2 of the TPPA either to adopt The international Convention for the Protection of New Varieties of Plants (UPOV 1991) or a *sui generis* plant variety rights system that gives effect to it. This raises complex issues relating to the Wai 262 claim *Ko Aotearoa Tenei* on indigenous knowledge and there is a special provision that gives the government three years to satisfy that obligation.

The Waitangi Tribunal in its report on the urgent claim on the TPPA did not address this issue directly but required the Crown to inform it by 17 June of the process and timeline it intends to adopt to progress this matter. It is of concern that the Crown has sought further time even before it is able to propose a process.

I wish to speak to this submission in Wellington.