



SUBMISSION

to the

Foreign Affairs, Defence and Trade Select Committee

on the

**INTERNATIONAL TREATY EXAMINATION OF THE TRANS-
PACIFIC PARTNERSHIP AGREEMENT (TPPA)**

16 March 2016

ABOUT PPTA

PPTA represents over 17,000 secondary teachers, principals, and manual and technology teachers in New Zealand; this is the majority of teachers engaged in secondary education – approximately 90% of eligible teachers choose to join PPTA.

Under our constitution, all PPTA activity is guided by the following objectives:

- (a) To advance the cause of education generally and of all phases of secondary and technical education in particular;
- (b) To uphold and maintain the just claims of its members individually and collectively; and
- (c) To affirm and advance Te Tiriti O Waitangi.

PPTA is not affiliated to a political party and our members individually support a broad spectrum of political parties in Parliament. However, PPTA have consistently promoted policies that promote progressive economics, social policy and employment relations policy.

1. General comments

- 1.1. PPTA has expressed concern at elements of the Trans Pacific Partnership Agreement during the protracted negotiations that led to its development. Some of the concerns could have been allayed by a more transparent process. When we had the opportunity to meet with MFAT officials, we had some of the specific issues that we raised addressed and answered satisfactorily. It is our impression that more effort could have been made by the government to conduct these negotiations openly and enable interested parties to be briefed by officials.
- 1.2. PPTA supports the submission from the Council of Trade Unions, which represents the interests and concerns of New Zealand working people and union members.

2. Treaty of Waitangi concerns

- 2.1. The issues that Maori organisations and individuals have raised about the TPPA and its Treaty of Waitangi implications are of concern to PPTA. The lack of engagement with Maori during negotiations could be seen to breach commitments made under the UN declaration on the rights of indigenous peoples. Expert analysis from Jones, Eruetu, Charters and Kelsey¹ has argued that the Treaty of Waitangi exception does not go far enough to maintain the ability of future governments to make Treaty of Waitangi consistent legislation.

3. Sovereignty implications of the TPPA

- 3.1. While PPTA does not have a specific remit or expertise to comment on the political or economic ramifications or assumptions in international agreements such as the TPPA, we do have a particular interest in the New Zealand government pursuing educational policy which places the 'common good' of New Zealand citizens, and young people in particular, at the centre.
- 3.2. Logically, all international agreements involve some restriction of national sovereignty, and the TPPA is no different. In many cases this is justified and welcome, as it contributes to global peace, environmental protection or human rights. The concern with the TPPA is that (some degree of) sovereignty is being ceded to unaccountable, opaque and distant tribunals, whose independence from global corporations (the only organisations that can use them) is at best questionable. The implications of this is that the TPPA indirectly cedes sovereignty to the corporates who can access those

¹ Jones, C, Charters, C, Erueti, A, Kelsey, J. 2015. Maori Rights, Te Tiriti o Watangi and the Trans-pacific Partnership. Available from <https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf>

tribunals, which is qualitatively different to, for example, an agreement under United Nations auspices.

- 3.3. The main mechanism in this regard is the Investor State Dispute Settlement (ISDS) process, as established in the Investment Chapter. Current cases underway globally using similar mechanisms raise serious concerns, such as the Veolia v. Egypt dispute which includes issues arising from the government's decision to raise the minimum wage, and the Lone Pine Resources v. the Canadian province of Quebec dispute about the province's banning of hydraulic fracking.

3.4. An alternative to ISDS

The lack of transparency, accountability and autonomy of the ISDS tribunals are of such concern that the agreement currently being negotiated between the USA and the EU, the TTIP, looks likely to introduce a new type of international judicial mechanism to overcome these problems. This casts doubts on the claim that the TPPA is a "high quality, 21st century" agreement, when central provisions are already being superseded. As Joseph Stiglitz writes, "Those seeking closer economic integration have a special responsibility to be strong advocates of global governance reforms: if authority over domestic policies is ceded to supranational bodies, then the drafting, implementation, and enforcement of the rules and regulations has to be particularly sensitive to democratic concerns."²

3.5. Regulatory convergence

It is also PPTA's contention that the regulatory convergence that TPPA is pushing also poses threats to national sovereignty. As Colin James, who takes a reasonably balanced view towards the TPPA, has noted, "Regulatory convergence raises global governance issues."³ Concrete examples of our concerns in this regard are explored below.

4. Chapter 9. Investment

4.1. Exclusions for public education

The chapter on investment includes exceptions for education services "supplied... for consumption of the general public" (9-4). A further provision, in Annex II of the investment chapter also makes clear the protection afforded for public education, stating, "New Zealand reserves the right to adopt or maintain any measure with respect to to... the following, to the extent they are social services established for a public purpose... Public

² Stiglitz, J. 'In 2016, let's hope for better trade agreements, and the death of TPP'. Available from <http://www.theguardian.com/business/2016/jan/10/in-2016-better-trade-agreements-trans-pacific-partnership>

³ James, C. 2016. Notes for comments at an Institute of International Affairs forum on the Trans-Pacific Partnership. Personal correspondence, available on request.

education”. These exceptions are welcomed by PPTA and are consistent with what MFAT informed us would they intended the final text to include, which is heartening.

4.2. Definitions of public education

- 4.2.1. Nevertheless, there are a number of concerns that we still hold about how these exclusions will be defined in practice.
- 4.2.2. There are numerous enterprises and services associated with education that are significant for the sector yet are not provided for the “consumption of the general public”. These would appear to not be covered by this exception, and therefore may be subject to the full terms of the agreement. An example of this lack of clarity would include the provision of school buildings and property maintenance through a public private partnership (PPP), which may fall under the ‘investment agreement’ definition as a building management services, rather than education services.
- 4.2.3. Furthermore, provision of education by private operators through privately owned enterprises, such as ‘partnership schools’ could potentially be argued are not “social services established for a public purpose” nor intended for the “consumption of the general public”, in particular if these institutions are targeted for a very narrow and specific body of students, as several of them currently are. As private enterprises (one of the existing partnership school contracts is with a privately owned company) they are arguably not primarily ‘social services’.

4.3. Risks to provision of non-core education sector services

- 4.3.1. Important services in the education sector which are not clearly for the “consumption of the general public” include professional learning and development for teachers and assessment services provided by private providers. Maintaining the capacity of the New Zealand government to unilaterally change the terms under which these operate, consistent with evolving public policy positions, is worthwhile for the education sector. While Annex II gives some protections in regards to this, ISDS provisions again would not be excluded and could still apply.
- 4.3.2. An example of how this could have a negative impact would be in regards to provision of examination marking services, a growing market globally. In New Zealand this is currently publicly provided, but were a future government to contract this out and a foreign investor to gain the contract, the investment chapter would make reversing this decision difficult, and potentially open New Zealand up for the ISDS provision, which as explained above, has significant problems.

5. Chapter 15. Government procurement

5.1. Education exclusions

PPTA is pleased to note the exclusion from this chapter (under the New Zealand Government Procurement Annex, Section E) of “public health, education and welfare services”. This is significant for the pursuit of national educational policy goals, that, for example, could and should favour development of local capacity.

5.2. Areas that are not covered by exclusions

5.2.1. However, we have some concerns that the definition of “educational services” used (from WTO documents MTN.GNS/W/120) does not appear to cover a range of services that are increasingly significant parts of the education sector, and have tens of millions of dollars a year of public money spent on them. The areas covered by MTN.GNS/W/120 are primary, secondary, higher, adult and other education services. This leaves a number of areas, in particular provision of professional learning and development to teachers (around \$90 million a year) and, potentially, early child-hood education (over \$1.5 billion a year), apparently still covered by the chapter, and not subject to the exclusion . Another area which may also not fall under this exclusion is the development and delivery of educational resources, such as assessment or testing services. The lack of clarity around areas like this is a concern. We believe it would be valuable for the Committee to ask officials to clarify exactly which areas MTN.GNS/W/120 cover.

5.2.2. Delivery and procurement of services in ECE, professional learning and development for teachers and assessment and testing have significant bearing on the overall quality and capacity of the education sector as a whole. The government limits its ability (and the ability of future governments) to make significant policy changes by subjecting these areas to the government procurement chapters provisions. PPTA urges the committee to clarify that these areas will also be covered by the general exclusions.

6. Chapter 18. Intellectual Property

6.1. Extension of copyright

6.1.1. The stated objective of this chapter, to promote and enforce intellectual property (IP) rights to contribute to the technological innovation and dissemination of knowledge, fails to recognise a tension between these two goals. It is our belief that on balance this chapter falls more on the side of promoting and enforcing IP rights rather than promoting

innovation and dissemination of knowledge and is in fact likely to stifle them.

- 6.1.2. PPTA supports the LIANZA submission on this chapter. The extension of copyright to 70 years after death will restrict access for New Zealand students and teachers to useful material that could otherwise have been freely available.

6.2. Technological Protected Measures

- 6.2.1. While the Technological Protected Measures (TPM) Article (18.68) provides protection for educational users to avoid criminal prosecution for breaches of this section, this is not entirely reassuring. The Civil and Administrative Procedures would still apply, which can provide for financial damages to be paid to rights holders amongst other penalties, unless the teacher (for example) was clearly acting without knowledge of the breach and in good faith. This may be a challenging test, and could well have a chilling effect on teachers' use of materials that may be educationally valuable but of unclear copyright status.
- 6.2.2. Teachers regularly, and increasingly, are expected to access educationally relevant and current materials from around the world and occasionally encounter technological protections on them, such as region locks on DVDs or web-based geo-blocks. Using software to get around these is something that many teachers would do when the material is educationally worthwhile and not accessible in another way. The TPM article potentially cuts across one of the emerging roles of teachers as facilitators and brokers for students of relevant (often digital) content. It could undermine this role and make teachers more cautious about their potential liability for making mistakes in this area, encouraging their return to using traditional resources, such as the available textbooks, at the expense of innovative teaching practices.