



**Public Health Association**  
AUSTRALIA

## **Submission on the approach adopted by the Australian Government when negotiating trade and investment agreements with trading partners**

**Contact for recipient:**

Parliament of Australia Joint Standing  
Committee on Trade and Investment Growth  
**A:** PO Box 6021, Parliament House, ACT 2600  
**E:** jsctig@aph.gov.au **T:** (02) 6277 2233

**Contact for PHAA:**

Terry Slevin – Chief Executive Officer  
**A:** 20 Napier Close, Deakin ACT 2600  
**E:** phaa@phaa.net.au **T:** (02) 6285 2373

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## Preamble

### **The Public Health Association of Australia**

The Public Health Association of Australia (PHAA) is recognised as the principal non-government organisation for public health in Australia working to promote the health and well-being of all Australians. It is the pre-eminent voice for the public's health in Australia.

The PHAA works to ensure that the public's health is improved through sustained and determined efforts of the Board, the National Office, the State and Territory Branches, the Special Interest Groups and members.

The efforts of the PHAA are enhanced by our vision for a healthy Australia and by engaging with like-minded stakeholders in order to build coalitions of interest that influence public opinion, the media, political parties and governments.

Health is a human right, a vital resource for everyday life, and key factor in sustainability. Health equity and inequity do not exist in isolation from the conditions that underpin people's health. The health status of all people is impacted by the social, cultural, political, environmental and economic determinants of health. Specific focus on these determinants is necessary to reduce the unfair and unjust effects of conditions of living that cause poor health and disease. These determinants underpin the strategic direction of the Association.

All members of the Association are committed to better health outcomes based on these principles.

### **Vision for a healthy population**

A healthy region, a healthy nation, healthy people: living in an equitable society underpinned by a well-functioning ecosystem and a healthy environment, improving and promoting health for all.

The reduction of social and health inequities should be an over-arching goal of national policy and recognised as a key measure of our progress as a society. All public health activities and related government policy should be directed towards reducing social and health inequity nationally and, where possible, internationally.

### **Mission for the Public Health Association of Australia**

As the leading national peak body for public health representation and advocacy, to drive better health outcomes through increased knowledge, better access and equity, evidence informed policy and effective population-based practice in public health.



## Introduction

PHAA welcomes the opportunity to provide input to the Joint Standing Committee on Trade and Investment Growth inquiry into the approach adopted by The Australian Government when negotiating trade and investment agreements with trading partners.

The ability of present and future Australian governments to develop and implement policy that protects public health needs to be preserved in trade agreements. Trade agreements should not limit or override the capacity of Australian governments (including state and territory governments) to legislate and regulate systems and infrastructure that contribute to the health and well-being of the community.

PHAA adopted a policy position statement on [Trade Agreements and Health](#) in 2021. Key positions in this statement include the following:

- At the national and international levels, within international trade agreements, public health goals must be protected and promoted.
- Adverse impacts of trade agreements on human and planetary health in Australia and internationally must be prevented.
- A trade regime that ensures ecological sustainability and equity in population health, as well as economic development is required.

Among our key principles, which we urge the Committee to adopt as recommendations to government, are that a fair regime of regulating trade, investment, and intellectual property through trade and investment agreements should prioritise health, social, and ecological sustainability, as well as economic development.

Trade and investment agreements, and their dispute settlement mechanisms, should also be consistent with international law with regard to health, human rights, the environment, and worker protection.

Trade and investment agreements should specifically:

- prioritise equity within and between countries for global population health improvement
- not limit or override a country's ability to foster and maintain systems and infrastructure that contribute to the health and well-being of its citizens, nor penalise a government for doing so
- preserve policy space for governments to regulate to protect public health
- be negotiated in a transparent fashion, with opportunities for public and parliamentary scrutiny before commitments are made
- be subject to health and environmental impact assessments, carried out by parties independent of corporate interests.

Further, trade agreements should not further entrench and expand the existing global intellectual property regime, which fails to deliver affordable access to medicines for much of the world's population.<sup>1</sup>

Mechanisms for financing research and development that do not rely on intellectual property protection and monopoly pricing should be supported to facilitate access to essential medicines and the development of pharmaceuticals for diseases of the developing world.

Trade policy making processes should be highly transparent. Crucially, independent health, environmental, and human rights impact assessment should be undertaken during negotiations, before agreements are finalised, and after implementation.

Our submission addresses inquiry terms of reference (b) to (f).

## Comments on the Inquiry Terms of Reference

### **(a) How the Australian Government develops a negotiating mandate and framework which factors in whole of government priorities**

We have no comment on this matter.

### **(b) How the priorities for, States and Territory Governments, businesses, workers and other relevant stakeholders are considered and incorporated into a negotiating mandate**

A fair regime of regulating trade, investment, and intellectual property through trade and investment agreements should prioritise health, social, and ecological sustainability, as well as economic development. Trade negotiating mandates and frameworks should be consistent with the government's whole of government priorities in these areas.

Ensuring that negotiating mandates and frameworks reflect these whole of government priorities requires transparent and accountable processes. Trade agreements should be negotiated in an open and transparent fashion, with publication of government positions on key issues of public interest and negotiating drafts at key points in the negotiations. The text of trade agreements should be released for public and Parliamentary scrutiny before being signed by Cabinet.

PHAA also calls for the routine use of independent health, environmental and human rights impact assessment during negotiations, before agreements are finalised, and also after implementation.

### **(c) The consultation process undertaken with interested parties, including representatives of industry and workers throughout the process**

The current process for public and stakeholder consultation is very ad hoc. There should be requirements for trade negotiators to systematically consult with stakeholders. Position papers and composite drafts of treaty texts should be released at key points during the negotiations. At the very least, Australia's positions and textual proposals should be released, as is done by the European Union.

Systematic consultation with public health experts and independent analysis of the impacts of trade agreements on health is needed. PHAA includes members who are experts in assessing the health implications of policies (including policies outside of the health sector) and experts in the links between trade and health. Our members are very well aware that when it comes to legal treaty text, "the devil is in the detail". The exact wording is critically important. Because we cannot see the proposed wording of text under negotiation, our expert members cannot make an independent assessment of the potential consequences on the health of Australians.

### **(d) The steps taken to ensure transparency and parliamentary oversight**

As we have argued in our responses to other terms of reference above, trade agreements should be negotiated in an open and transparent fashion, with publication of government positions on key issues of public interest and negotiating drafts at key points in the negotiations. The text of trade agreements should be released for public and parliamentary scrutiny before being signed off by Cabinet.

### **(e) How the economic, social and environmental impacts of an agreement are considered and acted upon**

Trade agreements are a significant determinant of health. They can affect many aspects of health care and public health, including:<sup>2,3</sup>

- access to affordable medicines and other health technologies
- the equitable provision and quality of health care services
- the ability of governments to regulate health damaging products such as vaping products, tobacco, alcohol, gambling products, ultra/highly-processed foods, and unsafe medicines
- access to sufficient and safe nutritious food
- access to many of the social determinants of health such as employment and income
- a nation's ability to protect the natural environment, a fundamental determinant of human health, prosperity and wellbeing.

Given the significant impact that trade agreements can have on many aspects of health, we believe it is essential that health impact assessment of all treaties be undertaken during negotiation. Health impact assessment (HIA) is a systematic process that considers the potential health effects of a proposed policy, plan, or project, and offers recommendations to mitigate health harms and improve benefits.<sup>4</sup> HIAs have been used widely in countries such as Australia, the UK and the USA to inform decisions in a wide range of sectors, such as transportation, resource extraction, health services and energy development. A recent evaluation of HIA in Australia and New Zealand found that HIAs have been useful at informing, changing, or influencing decisions to better integrate health.<sup>5</sup> Guidance from the World Health Organization explicitly calls for the use of HIA to better integrate health into various policy decisions, particularly those that affect the social, economic, and environmental determinants of health.<sup>6</sup>

### **(f) The steps taken to ensure agreements protect and advance Australia's national interests, including the ability to regulate in the public interest**

The ability to regulate in the public interest is heavily entwined with public health. PHAA is particularly concerned about the emerging trend of trade agreements that aim to extend into areas that have previously been matters for domestic policy making. Over the last few decades, trade negotiations have gone beyond goods and services to include areas that affect government regulation including investment, economic and technical cooperation, and expanded intellectual property rights.<sup>6,7</sup> As a result, trade agreements have the potential to affect many aspects of health care and public health.

It is highly important that trade agreements ensure that Australia can still maintain regulatory control over medicines, vaccines and harmful products such as tobacco, alcohol and vaping products. It is in our national interest to protect the capacity of our Commonwealth and state and territory governments to ensure public policy is not impeded by trade commitments.

In order to ensure trade agreements protect and advance the health of Australia's population, and protect its ability to regulate in the public interest, we particularly recommend the following 3 policies:

#### **(1) Exclude Investor-State Dispute Settlement (ISDS) mechanisms and removing these from existing trade agreements and bilateral investment treaties**

ISDS clauses enable foreign investors to sue governments in international tribunals for perceived breaches of their investor rights under an agreement which includes this mechanism. ISDS can infringe on the ability of countries to regulate in the public interest.

Previously, Phillip Morris has utilised ISDS mechanisms to launch legal action against the Australian Government over tobacco plain packaging, and against Uruguay over enlarged warning labels and single brand only packaging, respectively.<sup>2</sup> In both cases, Phillip Morris' claims were ultimately dismissed, however, these challenges were drawn-out and costly to defend.<sup>2</sup>

ISDS cases have also been filed against governments in response to other health-related policy changes including in areas such as health insurance and pharmaceutical policy.<sup>2</sup> Due to the uncertainty of outcomes and the potentially high costs of defending ISDS cases, the mere threat of ISDS may deter and delay governments from implementing policies that may be effective at protecting public health.<sup>2</sup> Failure to exclude ISDS mechanisms from trade agreements and bilateral investment treaties poses a risk to Australia's ability to regulate in the public interest and leaves the Australian government susceptible to costly litigation from foreign investors.<sup>8</sup>

## **(2) Ensure that trade agreements do not impinge on access to affordable medicines and other health technologies**

Universal health coverage, ensuring that everyone has access to good quality and timely health care at an affordable cost, is a human right and a priority of World Health Organization (WHO).<sup>9</sup> Australia's trade policies should not infringe on this human right. The World Trade Organization's (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPS) requires Member States to provide patent terms of at least 20 years along with other intellectual property rights (IPRs), which enables high prices for new drugs and delays the availability of generic medicines and other health technologies, putting them out of reach of millions of people in developing countries.<sup>8, 10</sup> Trade agreements negotiated outside of the WTO should not further entrench and expand IPRs, putting access to essential medicines further out of reach.<sup>10</sup>

During COVID-19, access to vaccines and other pandemic countermeasures has proven to be crucial, yet much of the world has lacked timely access, partly due to the IPRs enshrined in TRIPS.<sup>11, 12</sup> Protracted negotiations at the WTO over a time-limited waiver of IPRs for COVID-19 products have produced disappointing outcomes.<sup>11, 12</sup> To ensure equitable access to pandemic countermeasures in future, it will be important to secure a comprehensive and workable waiver of IPRs that can be activated during pandemics.

## **(3) Ensure that trade agreement rules do not prevent governments from regulating unhealthy products, e.g., health warnings on tobacco, alcohol and foods**

Non-communicable diseases (NCDs) will continue to pose a considerable population health burden.<sup>13</sup> Modifiable risk factors such as tobacco consumption, unhealthy diet and harmful use of alcohol contribute heavily to this burden.<sup>13</sup> The alcohol and tobacco industries have a history of utilizing international trade and investment law as a means to fight to have public health measures withdrawn.<sup>14</sup> To address this, governments must maintain regulatory control over unhealthy products and their availability, pricing, marketing and labelling, and ensure that provisions in trade agreements do not constrain their policy space to do this.

## Conclusion

In conclusion, we emphasise the following key points in the public interest:

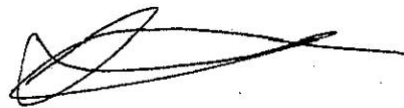
- Trade and investment agreements should prioritise health, social, and ecological sustainability, as well as economic development.
- Health Impact Assessments should be undertaken during negotiation of all trade treaties.
- Trade agreements should be negotiated in a transparent fashion with systematic consultation with stakeholders at all stages of negotiation.
- Trade agreements should not infringe on the ability of governments to maintain regulatory control of harmful products and must not infringe on access to affordable medicines and other health technologies.

PHAA appreciates the opportunity to make this submission regarding the approach adopted when negotiating trade and investment agreements with trading partners.

Please do not hesitate to contact us should you require additional information or have any queries in relation to this submission. We would be happy to appear before the committee to further elaborate on the public health implications of trade and investment agreements if that would assist you.



Terry Slevin  
Chief Executive Officer  
Public Health Association of Australia



Dr Deborah Gleeson  
Co-Convenor, PHAA Political Economy  
of Health Special Interest Group

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