

The Malaysia-Australia Free Trade Agreement: the issues

Introduction

- 3.1 This chapter will review the main issues that were identified through the inquiry process. Evidence presented to the Committee has identified four central issues:
- overlapping treaty commitments;
 - ‘Certificate of Origin’ *vs.* ‘Declaration of Origin’ documentation;
 - the (non) inclusion of environmental and labour standards in MAFTA; and
 - employment outcomes in Australia.

A tale of three treaties: overlapping treaty commitments

- 3.2 MAFTA will, along with the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), and the still to be completed Trans Pacific Partnership (TPP) agreement, be part of a troika of trade treaties between Australia and Malaysia.
- 3.3 Questions were raised as to how these three treaties would interact and, in particular, which treaty’s provisions would take precedence in trade agreements between both countries.
- 3.4 The Australian Council of Trade Unions (ACTU) raised the question of duplication in their submission and observed that there was a lack of clarity on how these treaties would interact and what the effects would be on Australia’s civil society. The ACTU commented:

The question of duplication and inconsistencies leads to a broader question of strategy with respect to bilateral and regional trade negotiations. Australia already has trading arrangements with Malaysia under the Australia-ASEAN-New Zealand trade agreement. With respect to the TPP, for many negotiating parties it will lead to the second or third trade arrangement with another party to the negotiations. Australia has already negotiated bilateral agreements with Chile, New Zealand, Singapore and the US. Australia also has an agreement with ASEAN which includes Malaysia, Brunei and Vietnam. Therefore if the TPP negotiations are finalised, Australia will have trading arrangements with Malaysia under three trade agreements.

There is no clarity from the Government on how the relationship between these multiple agreements will operate in practice; despite questions being asked by civil society, particularly with respect to the TPP.¹

- 3.5 The Australian Fair Trade and Investment Network (AFTINET) made similar observations regarding the three trade treaties that would apply between Australia and Malaysia. AFTINET commented:

We note that the MAFTA contributes to the “noodle bowl” of confusing overlapping agreements in our region. Australia already has a free trade agreement with New Zealand and the ASEAN countries, including Malaysia. Australia is also currently negotiating the Trans-Pacific Partnership Agreement, (TPPA) which includes Australia, the US, New Zealand, Peru, Chile, Singapore, Malaysia, Brunei, Vietnam, Canada and Mexico. If the TPPA is concluded, the MAFTA will be the third agreement between Australia and Malaysia, and it is unclear what the relationship between the different agreements will be.²

- 3.6 In response to these comments, the Department of Foreign Affairs and Trade (DFAT) responded that all three agreements were designed to be complementary and which agreement is actually utilised will be decided by the industry in question.

These agreements will co-exist. Decisions will need to be taken by the private sector on which of these agreements they wish to operate under. That will depend obviously on what is contained in each of these agreements...

1 ACTU, *Submission 4*, p. 6.

2 Australian Fair Trade and Investment (AFTINET), *Submission 9*, p. 1.

... You have to make an upfront decision. Let us use the example of a widget that has a tariff in the regional FTA [Free Trade Agreement] and an associated rule of origin and then you have the corresponding widget in the bilateral FTA with an associated rule of origin. In the AANZFTA context, it is a regional rule of origin that is not confined to sourcing it from Malaysia [rather] than from other countries, so that gives you a bit more flexibility, but then you may find in the bilateral FTA you have a lower tariff – perhaps a zero tariff as [opposed] to a tariff of 10 per cent – on the widget in the regional FTA, so it is a commercial decision... It gives flexibility to the private sector in the commercial world to decide where and how they wish to operate.

We also, as AFTINET has noted, [are] engaged in other negotiations such as the Trans-Pacific Partnership Agreement negotiations and there that is also pursuing further liberalisation. I have previously heard [Trade Minister] Dr Emerson explain that all these approaches should be viewed as complementary and mutually supportive in trying to achieve good outcomes...

We are seeking to achieve as much consistency and coherence across all these FTAs as possible...³

‘Certificate of Origin’ vs. ‘Declaration of Origin’

- 3.7 One issue raised was a bureaucratic one – ‘Certificate of Origin’ *vs.* ‘Declaration of Origin’⁴ documentation. The NIA explains that for Australian exporters, MAFTA originating status will be based on a written ‘Declaration of Origin’ by the exporter or producer. This is, according to the NIA, a more business-friendly arrangement than the more formal ‘Certificate of Origin’ issued by a third party that is required under

3 Mr Michael Mugliston, Special Negotiator, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 6.

4 “A Certificate of Origin is a specific document that identifies goods and contains express **certification by a government authority or other body** that the goods originate in a specific country.” (Emphasis added)

Victorian Employers' Chamber of Commerce and Industry (VECCI) website: <<http://www.vecci.org.au/business-solutions/global/export-documentation>>, accessed 3 October 2012.

In contrast, a ‘Declaration of Origin’ is not necessarily certified by a recognised third party. A further practical comparison between both positions can be found at the ‘World Customs Organisation’ website: <http://www.wcoomd.org/Kyoto_New/Content/body_spank.html>, accessed 3 October 2012.

AANZFTA. 'Certificates of Origin' will still need to be obtained by exporters from Malaysia.⁵

- 3.8 The Australian Chamber of Commerce and Industry (ACCI) is concerned that the use of 'Declaration of Origin' documentation rather than the customarily accepted 'Certificates of Origin' documentation will potentially increase the risk, complexity and cost of doing trade with Malaysia.⁶ ACCI argues:

...that if there is an Australian requirement for export documentation to prove origin under MAFTA, then it should be a standard used jointly. If the international standard of export documentation proving origin is the 'Certificate of Origin', which has not only been chosen by Malaysia for MAFTA, but is recognised by foreign Customs around the world, then it is in the interests of Australian exporters to retain in MAFTA the 'Certificate of Origin'.⁷

- 3.9 Conversely the dairy industry is positive about what it believes to be administrative benefits through streamlining of Rules of Origin declaration processes – i.e. that exported dairy products will be able to claim MAFTA tariff treatment on the basis of a 'Declaration of Origin' completed by the exporter on either the commercial invoice or on a company letter, rather than requiring a 'Certificate of Origin' as required for AANZFTA.⁸

...we are clearly of the opinion that this is a reduction in administrative overhead for exporters of dairy products, and we believe that that, therefore, is an advantage to people who are exporting dairy products to Malaysia because it will reduce the impost of obtaining that 'Certificate of Origin' that needs to be issued by a third party.⁹

- 3.10 DFAT essentially agrees with the dairy industry. The Department explained that its preferred option was the 'Declaration of Origin', as it reduced bureaucratic burdens on business, and was expected to be the accepted and standard method in the future.

...the key point we would make there is that Australia's general preference is for the use of 'Declarations of Origin'... It is what we

5 NIA, para 8.

6 Australian Chamber of Commerce and Industry (ACCI), *Submission 8*, p. 8.

7 Australian Chamber of Commerce and Industry (ACCI), *Submission 8*, p. 5.

8 Australian Dairy Industry Council, ADIC, *Submission 5*.

9 Mr Peter Myers, International Trade Development Manager, Dairy Australia, *Committee Hansard*, 12 October 2012, p. 1.

apply in the Australian system of tariff preferences... It is what we have in our FTA with Chile. And that is why in the MAFTA negotiations that was our preferred approach. The outcome, at least in terms of exports from Australia, reflects Australia's preferred approach...

We accept the reality that AANZFTA does have a 'Certificate of Origin' approach. That was a negotiated outcome. It was not our preferred approach. We saw that as a second-best outcome. But part of that was a reflection of where the ASEANs were at and the reality that they have a rather more bureaucratic approach. But, even within ASEAN, you actually have a movement towards looking at the adoption of 'Declarations of Origin'. Malaysia itself is already participating in a pilot project within ASEAN with Brunei, Singapore and Thailand using 'Declarations of Origin'.

When you look at MAFTA, at the way it is actually crafted, the default position is the use of 'Declarations of Origin'. It has an exception to allow Malaysia to use 'Certificates of Origin', but it is based on the assumption that, in coming years, Malaysia itself will move to the use of 'Declarations of Origin'....

There is an exception there at the moment to allow Malaysia to use 'Certificates of Origin', but it allows for Malaysia in future years to go to a 'Declaration of Origin' approach. That is our expectation, given the fact that it has already participated in a pilot project within ASEAN.¹⁰

- 3.11 DFAT also stated that 'Certificates of Origin' had also caused implementation problems: 'we have experienced far more problems with 'Certificates of origin' than we have with 'Declarations of Origin'.¹¹

Environmental and labour standards

- 3.12 Critics of free-trade agreements frequently cite environmental and labour standards as a subject of concern. Issues such as these are often discussed by economists as being 'externalities'.¹²

10 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 13.

11 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 13.

12 "Externality: An economic side-effect. Externalities are costs or benefits arising from an economic activity that affect somebody other than the people engaged in the economic activity and are not reflected fully in prices. For instance, smoke pumped out by a factory may impose clean-up costs on nearby residents; bees kept to produce honey may pollinate plants belonging

- 3.13 This Committee has already, as part of its review of AANZFTA, recommended that: ‘the Australian Government include consideration of environment protection, protection of human rights and labour standards in all future negotiation mandates for free trade agreements’.¹³ Similarly, the Joint Standing Committee on Foreign Affairs, Defence and Trade did, in its report on Australia’s relationship with ASEAN, recommend:
- ...that human rights, core labour standards, and the environment be pursued in future free trade agreements and, when existing free trade agreements which do not contain such issues are reviewed, these issues should be pursued; and
- ...that when the Department of Foreign Affairs and Trade reports annually to the Parliament under Recommendation 2, progress with regard to human rights, core labour standards, and the environment be included.¹⁴
- 3.14 MAFTA contains three legally binding side letters that form part of the agreement. The first ‘side letter’ is on alcoholic beverages. The remaining two ‘side letters’ on labour standards and the environment confirm both Governments’ commitment to environmental protection and to labour standards as members of the International Labour Organisation and under the *Declaration on Fundamental Principles and Rights to Work* and its follow-up (1998). As both countries are currently involved in negotiations in the Trans Pacific Partnership (TPP), it was agreed that Malaysia and Australia should, in the context of what is agreed to in the TPP,¹⁵ review the inclusion of labour and environment provisions in MAFTA within two years of MAFTA’s entry into force, or as otherwise agreed.¹⁶
- 3.15 The Certified Practising Accountants (CPA) Australia expressed concern over the inclusion of environmental and labour standards in the agreement, arguing that there were already sufficient mechanisms to address these concerns in other international forums.
- CPA Australia [is] concern[ed] over the proposal to incorporate provisions on labour and the environment into MAFTA at some

to a nearby farmer, thus boosting his crop.” See The Economist’s webpage: ‘Economics A-Z terms beginning with E’: <<http://www.economist.com/economics-a-to-z/e#node-21529743>>, accessed 3 October 2012.

13 Joint Standing Committee on Treaties, Report 102, Chapter 2, ‘Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area, Recommendation 5, p. 16.

14 Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Inquiry into Australia’s relationship with ASEAN’, June 2009, p. xxii.

15 See ‘Associated correspondence: Letters’ which are also published and part of this agreement: <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/14august2012/tor.htm>, accessed 3 October 2012.

16 NIA, para 22.

point in the future. CPA Australia considers there are more appropriate international forums in place where discussions related to labour and the environment can take place. Trade treaties should be singularly focused on facilitating growth in international trade. The introduction of peripheral non-trade issues can only undermine this objective.

Furthermore, where there are genuine concerns over possible environmental impacts arising from international trade, the World Trade Organisation's General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), both of which Australia and Malaysia are signatories to, already provide appropriate and sufficient environmental protections under the General Exceptions provisions. As such, CPA Australia considers that the attempt to introduce labour and environment provisions into Australia's trade treaties is an entirely unwelcome development.¹⁷

- 3.16 As the peak union organisation in Australia, the ACTU disagreed with the CPA Australia's assessment. The ACTU believes that the inclusion of labour laws is a mechanism through which the benefits of such agreements can be fairly distributed and that certain minimum standards should be observed. The ACTU commented:

International labour rights are important for distributing the benefits of trade to workers. It is essential, therefore, that trading partners uphold the fundamental rights of workers – including freedom of association and the right to collectively bargain – because it is consistent with a commitment to ensuring the benefits of trade are fairly shared with workers. Respect for fundamental labour rights is also a responsibility of ILO membership and as signatories to the UN Declaration on Human Rights...

Therefore, it has been the long-held position of the ACTU that all bilateral and regional trade agreements negotiated by Australia include an enforceable labour rights chapter that requires trading partners to adopt and effectively enforce international labour rights. At a minimum, the labour rights chapter should:

- clearly demonstrate that commitment to implement fundamental labour rights, as articulated in core ILO conventions on rights at work, is a fundamental and integrated part of the agreement;
- include a commitment by parties to not weaken but to improve labour rights;

17 Certified Practising Accountants (CPI), *Submission 2*, p. 2.

- provide for this obligation on labour rights to be monitored and enforced, including a role for trade unions; and
- include procedures for alleged breaches of core labour rights and settling disputes.¹⁸

3.17 Similarly, AFTINET also expressed support for the inclusion of labour and environmental standards in the main body of the agreement. This should apply, AFTINET believes, not only to MAFTA but to all trade agreements. AFTINET commented:

The most glaring omission from the MAFTA is the lack of labour and environment chapters...

AFTINET's view is that all trade agreements should contain a labour rights chapter which commits the parties to implement fundamental rights at work as expressed in ILO conventions, includes commitments to improve, not weaken, labour rights, and provides mechanisms for monitoring and enforcement of labour rights, including access to the government-to-government disputes settlement process of the agreement.

Environment chapters should include commitments by the parties to implement relevant United Nations environmental agreements, to improve, not weaken, national environmental protections and include mechanisms for enforcement of environmental protections, including access to government-to-government disputes settlement processes of the agreement...

In the absence of enforceable labour rights and environmental protections, rapid trade liberalisation intensifies competition and can lead to a race to the bottom on labour rights and environmental standards.¹⁹

3.18 DFAT's response to these concerns was to explain that Government policy was that the inclusion of environmental protection and labour standards issues in FTA negotiations was done on a case-by-case basis. Furthermore, the inclusion of these issues as 'side-letters' was already a step forward as Malaysia has not included labour provisions in any of its other trade agreements. Finally, although included as 'side-letters', labour and environmental standards are in no way diminished as they are, like the rest of the agreement, legally binding.

...the government's April 2011 trade policy statement... articulated the rationale behind seeking these provisions in respect of both environment and labour in FTAs and concluded that a

18 ACTU, *Submission 4*, pp. 2-3.

19 Australian Fair Trade and Investment (AFTINET), *Submission 9*, pp. 1 - 2.

case-by-case approach be taken for each FTA under negotiation with the government's general approach applied to the circumstances of each negotiation. What is important to appreciate with Malaysia is there are no labour or environment provisions in AANZFTA. So the concept of MAFTA is AANZFTA-plus and we, consistent with the policy, sought the incorporation of environment and labour as well as government procurement in MAFTA.

We did pursue this but Malaysia pointed out that it has not included labour provisions in any of its other trade agreements, although it did agree a co-operation and dialogue oriented side agreement with New Zealand in 2009. Malaysia then joined the TPP negotiations in October 2010, and then after exploring elements of a possible chapter text and other options such as a side agreement Malaysia concluded that it could not agree to include labour provisions in the MAFTA treaty text at this point in time, because of concerns that it had about possible duplication and conflicting commitments with possible TPP outcomes on those issues. So Malaysia suggested the side letter approach. I should note that the effect of both of those side letters on labour and environment issues is that they are an integral part of the agreement. They are not chapters, but they are legally binding elements of the overall package.²⁰

- 3.19 With regard to the two-year delay until the TPP negotiations are complete, DFAT reassured the Committee that the agreement to re-examine these commitments was not conditional or dependent on other outcomes. DFAT stated:

all participants in the TPP are very committed to pursuing very ambitious and solid outcomes for the TPP. Let me just note that the formulation agreed with Malaysia, as reflected in the side letter, is that we will review the inclusion of labour provisions no later than two years after entry into force of the MAFTA. So it is not conditional on any other development. Within two years we will do it and we will obviously need to take into account developments and deliberations in other fora.²¹

- 3.20 DFAT also argued that the commitments were firm and not vaguely worded:

20 Mr Michael Mugliston, Special Negotiator, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 7.

21 Mr Michael Mugliston, Special Negotiator, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 7.

[The side-letters] affirm certain commitments that both parties make, both in respect of labour and environment. They are spelt out in the letter. So there are in fact some commitments there affirming both parties' commitments as members of the ILO under the *Declaration on Fundamental Principles and Rights at Work* and its follow-up et cetera. It is spelt out. So we did not keep it to one simple paragraph saying that we are going to review this within two years.²²

- 3.21 The Committee re-iterates its recommendation that labour and environmental standards be included in FTAs and, despite DFAT reassurances, the Committee expects that every effort will be made to include provisions on labour and environmental standards in the main body of FTAs, rather than in 'side-letters'. The Committee also notes the commitment to review MAFTA's labour and environmental provisions in two years' time and anticipates examining the final outcomes.

Employment outcomes in Australia

- 3.22 There has been concern expressed that free trade has played a role in job losses, particularly in manufacturing, and the stagnation of middle-class incomes.
- 3.23 On 29 August 2012, the respected US foreign policy think-tank, the *Council on Foreign Relations*, published an article²³ that indicated there may now be some evidence that supports this argument – at least in the United States during the past decade. Although conceding that 'the evidence is still not conclusive', they cite a series of publications which provide some support for the proposition.²⁴

22 Mr Michael Mugliston, Special Negotiator, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 7.

23 'Globalization, Job Loss, and Stagnant Wages: The Evidence Is Changing', <<http://blogs.cfr.org/renewing-america/2012/08/29/globalization-job-loss-and-stagnant-wages-the-evidence-is-changing/>>, accessed 3 October 2012.

24 These include: "The Evolving Structure of the American Economy and the Employment Challenge," <<http://www.cfr.org/industrial-policy/evolving-structure-american-economy-employment-challenge/p24366>>, accessed 3 October 2012.

"The China Syndrome: Local Labor Market Effects of Import Competition in the United States", <<http://economics.mit.edu/files/6613>>, accessed 3 October 2012.

"U.S. Trade and Investment Policy", <<http://www.cfr.org/trade/us-trade-investment-policy/p25737>>, accessed 3 October 2012.

- 3.24 Concerns over the impact of trade agreements on domestic employment are not limited to the United States. In Australia, this too has been a theme in debates over free trade.
- 3.25 In terms of MAFTA, the Federal Chamber of Automotive Industries (FCAI) is concerned about the non-tariff barriers and local content rules that are in place in Malaysia and believes that under the current MAFTA criteria, it is unlikely that Australian built vehicles will be exported to Malaysia. Conversely, the FCAI believes that MAFTA will facilitate a significant increase in Malaysian vehicle imports to Australia.²⁵
- 3.26 The Construction, Forestry, Mining and Energy Union of Australia (CFMEU) expressed concerns about MAFTA and Australian manufacturing employment. The CFMEU considers the Government's analysis of MAFTA to be deficient in terms of the treaty's impact on domestic employment, and stated that job losses were expected in the wood products sector. The CFMEU commented:
- Australian manufacturing jobs are currently being decimated by import competition including products exported from Malaysia. Employment in the timber, wood products, pulp and paper and furniture manufacturing industries has fallen by 54,900 in the last ten years. These job losses have been in the context of tariff reductions. In the next five years employment in these industries is already projected to fall by a further 26,900.
- There is real potential of manufacturing job losses and the loss of diversified capacity in the economy as a result of this agreement according to initial analysis from the CFMEU. The National Interest Analysis (NIA) and Regulation Impact Statement (RIS) tabled in parliament with MAFTA do not adequately consider this or the negative impact on workers, their families and their communities...²⁶
- 3.27 On the issue of automotive employment and the concerns raised by the FCAI, DFAT responded by providing the following context:
- The reality is that at this point in time Malaysia does not have an internationally competitive automotive industry. It is very much an internally focused, highly protected automotive sector. When you look at exports of fully built passenger cars, Malaysia's exports tend to be around 25,000 units a year. When you look at Australia over the last three years – this is even after the global financial crisis and the drop in our exports – you find that we

25 Federated Chamber of Automotive Industries (FCAI), *Submission 7*.

26 CFMEU *Submission 3*, p. 1.

export around 80,000 passenger motor vehicles a year. So we are a significantly bigger exporter of fully built cars than Malaysia is. I am just putting it into perspective here: this is not a case of a big, competitive Malaysian automotive industry.²⁷

- 3.28 DFAT conceded, though, that Australian automotive exports would be dependent on further reforms and social changes:

...if Malaysia continues down that reform path of trying to open up or trying to modernise and make its automotive industry competitive – there will be opportunities for collaboration, including for parts and components for vehicles. I think a lot of it is dependent on Malaysia becoming a more middle-class society. Again, it is about the quality of the cars people buy in Malaysia; that is also an issue. As for the question of whether there will be an opportunity for Australian car exports there, who knows? Certainly there are non-tariff barriers there, particularly on the excise tariffs. But, again, just as you saw in Australia, we would see the pressure for that reform to continue, both through Malaysia's domestic process of opening up and trying to become internationally competitive and also through other free trade agreement negotiations.²⁸

- 3.29 On the broader question of manufacturing employment in Australia and the impact of FTAs, there does not appear to be a clear answer. DFAT responded that it was difficult to analyse the specific impact of FTAs on manufacturing employment as a number of other factors, such as the broader structural shift in the economy towards services and the higher Australian dollar, also influenced manufacturing employment outcomes. DFAT also observed that manufacturing employment had been broadly stable between 2000 – 2008, and that falls in manufacturing employment had coincided with the 2008 – 2009 Global Financial Crisis.²⁹

- 3.30 DFAT pointed to some broader international studies conducted by the Organisation for Economic Co-operation and Development (OECD) which indicated that in open trading economies, manufacturing workers benefitted from higher pay rates when compared to closed economies and that trade plays an independent and positive role in raising incomes.³⁰

27 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 9.

28 Dr Milton Church, Coordinator, South-East Asia Goods Branch, Free Trade Agreement Division, Department of Foreign Affairs and Trade, *Committee Hansard*, 12 October 2012, p. 10.

29 DFAT, *Submission 11*, p. 1.

30 DFAT, *Submission 11*, p. 2.

- 3.31 DFAT did not provide any studies specific to Australia and they noted that unemployment is likely to result when low-skilled workers find it difficult to transition to the new expanding sectors of the economy. The studies showed the importance of complementary policies to support inclusive growth and job creation –macroeconomic policy, a positive business environment, flexible labour market, high quality education, skills training systems and adequate safety nets.³¹

31 DFAT, *Submission 11*, p. 2.

