

# **Customs Amendment (Malaysia Australia Free Trade Agreement Implementation and Other Measures) Bill 2012**

*Introduced into the House of Representatives on 1 November 2012*

*Portfolio: Home Affairs*

## **Committee view**

1.29 The committee seeks further clarification from the Minister for Home Affairs about the safeguards that will apply to any personal information provided pursuant to proposed sections 126ALC or 126ALD of the bill, when records or the answers to questions are disclosed to a Malaysian customs official.

1.30 The committee considers that the proposed new powers to require the production of records or the provision of answers to questions appear to be compatible with human rights. The committee notes that the statement of compatibility should have referred to the potential impact of the bill on the right not to incriminate oneself. The committee also reiterates its position set out in Practice Note 1 that a statement of compatibility should read as a stand-alone document and that all issues relating to compatibility with human rights should be addressed in the statement of compatibility.

1.31 The committee shares the concerns expressed by JSCOT that the MAFTA does not include express protections for labour rights, human rights or environmental rights and hopes that this omission will be rectified.

## **Purpose of the bill**

1.32 This bill amends the *Customs Act 1901* to introduce new rules of origin for goods imported into Australia from Malaysia to give effect to the Malaysia-Australia Free Trade Agreement, which will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

1.33 This bill is part of the legislation required to give effect to the provisions of the Malaysia-Australia Free Trade Agreement (MAFTA) (see also the Customs Tariff Amendment (Malaysia-Australia Free Trade Agreement Implementation) Bill 2012, below). The entry into and implementation of free trade agreements (FTAs) gives rise to a number of broad human rights issues, including the impact of FTAs on the enjoyment of the right to work and other rights in Australia.

1.34 The MAFTA was recently the subject of an inquiry by the Joint Standing Committee on Treaties (JSCOT). In its October 2012 report the JSCOT recalled its earlier recommendations, made in the context of the ASEAN, Australia and New Zealand Free Trade Agreement (AANZFTA) 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'.<sup>1</sup> The Joint Standing Committee on Foreign Affairs, Defence and Trade had made a similar recommendation in its report on Australia's relationship with ASEAN.<sup>2</sup>

1.35 In relation to the MAFTA, the JSCOT noted that there was no chapter on labour rights, human rights or environmental rights, though in one of the 'side letters' to the agreement the two Governments affirmed their commitment to international 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)' and, as noted in the explanatory memorandum (para 152), undertook to consider in two years the inclusion of a labour standards chapter in the agreement. The ILO Declaration covers four fundamental principles and rights at work: freedom of association and recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of occupation and employment. All of these rights are guaranteed by one or more of the human rights treaties listed by the *Human Rights (Parliamentary Scrutiny) Act* 2011.

1.36 The JSCOT recommended that an independent review of the MAFTA be conducted 24 months after its entry into force 'to assess actual outcomes of the treaty against the claimed benefits and potential negative consequences' and that the review should consider 'the economic, regional, social, cultural, regulatory, labour and environmental impacts.'

### **Compatibility with human rights**

1.37 A separate statement of compatibility is provided within the body of the explanatory memorandum (p 57). It address only issues relating to compatibility with the right to privacy in article 14 of the ICCPR, but does not address issues relating to the right of a person not to incriminate oneself (article 14(3)(g) of the ICCPR) raised by the bill, although some of these are addressed in other parts of the explanatory memorandum.

### ***Specific issues***

1.38 The statement of compatibility notes that the bill provides for the making of regulations to impose record-keeping obligations on exporters (or producers) of goods bound for Malaysia who claim they are Australian originating goods for the purpose of obtaining a preferential tariff treatment in Malaysia (new section 126ALB). New section 126ALC requires a person to produce those records when

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<sup>1</sup> Joint Standing Committee on Treaties, Report 102, Chapter 2, 'Agreement Establishing the ASEAN – Australia – New Zealand Free Trade Area, Recommendation 5, p. 16

<sup>2</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into Australia's relationship with ASEAN', June 2009, p. xxii

requested to do so by an authorised officer. An authorised officer<sup>3</sup> may disclose these records to a Malaysian customs official.<sup>4</sup>

1.39 The bill also provides for a new section 126ALD under which an authorised person may require a person who is an exporter or producer of goods that are exported to Malaysia and that are claimed to be Australian originating goods for the purpose of obtaining a preferential tariff in Malaysia, to answer questions in order to verify the origin of the goods. The effect of section 243SA of the *Customs Act 1901* is that a failure to answer such a question may be an offence.

*Right to privacy (article 17, ICCPR)*

1.40 The statement of compatibility notes that the right to privacy is engaged by the requirement to keep and produce records, where they involve the collection and disclosure of personal information. It states that the collection and disclosure is for a limited and legitimate purpose, namely the verification for a claim of eligibility for preferential treatment, and is therefore justified and reasonable. The statement of compatibility also notes that the ‘the collection and disclosure of personal information is protected under Australian law and the existing protections will not be altered in any way by the Bill.’ The statement of compatibility does not explicitly address the issue in relation to the power to question and the answers to such questions, but the same issues would arise and the same justification would presumably apply.

1.41 While the statement of compatibility notes that Australian privacy laws apply to any use made by an authorised officer of such information, it is not clear whether the same or equivalent safeguards apply when the authorised person makes such records available to a Malaysian customs official.

*Right not to incriminate oneself (article 14(3)(g), ICCPR)*

1.42 Neither the statement of compatibility nor the explanatory memorandum refer to the engagement of the bill with the right not to incriminate oneself guaranteed by article 14(3)(g) of the ICCPR. Section 243SB of the *Customs Act 1901* will make it an offence for a person to refuse to provide records requested by an authorised officer under the new section 126ALC. Similarly, section 243SA of the *Customs Act 1901* will make it an offence to refuse to provide answers to questions asked by an authorised officer under the new section 126ALD.

1.43 However, section 243SC of the *Customs Act 1901* provides that, unless a person has waived the right to not incriminate oneself, the person is not obliged to

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<sup>3</sup> ‘**authorised officer** ... means an officer of Customs authorised in writing by the CEO to exercise the powers or perform the functions of an authorised officer under that section.’ *Customs Act 1901*, s 4.

<sup>4</sup> ‘**Malaysian customs official**’ is defined in the proposed new section 126ALA as meaning ‘a person representing the customs administration of Malaysia.’

answer a question or to produce documents or records under sections 243SA or 243SB respectively, if doing so would tend to incriminate the person or result in further attempts to obtain evidence that would tend to incriminate the person.