

ACTU Submission on Proposed Free Trade Agreement with Malaysia

1 The ACTU welcomes the opportunity to comment to the Department of Foreign Affairs and Trade on the proposal for a free trade agreement between Australia and Malaysia. The ACTU wishes to raise several issues for consideration by the Department as part of the scoping study for the proposed agreement.

2 The ACTU has expressed concern in a number of submissions to the Department and relevant parliamentary bodies about the problem of increased complexity and compliance costs to exporters as a result of differences in rules of origin in bilateral free trade agreements (FTAs). The relevance of this issue to the proposed agreement with Malaysia is that, as Australia and New Zealand have well-established rules of origin and the CER approach is also reflected in the Singapore-Australia agreement, it would appear to be desirable to adopt a similar negotiating position with Malaysia.

3 While the Thailand-Australia agreement contains different rules, the CER formula was Australia's starting point for those negotiations. The issue of Australia's negotiating position with Malaysia has additional significance because of the foreshadowed negotiations for an ASEAN-CER FTA. It would be preferable for Australian firms that export to New Zealand and also to Singapore, Malaysia, and other ASEAN countries to have to deal with similar if not common rules of origin.

4 Nevertheless the Issues paper released by the Department for Industry Consultations on the proposed FTA states that the product specific approach in the Thailand and US agreements with Australia is "widely considered to involve lower transaction costs for business and greater transparency". This appears to be a signal that the Department intends to promote a product-specific approach for the negotiations with Malaysia, and presumably also with ASEAN. The reasons for this require elaboration, notwithstanding the fact that the ASEAN Free Trade Association uses the product-specific approach.

5 A further concern that the ACTU has with the product-specific approach is that depending on the product in question, a change of tariff classification could occur in the territory of one of the two parties to an FTA that represented less than 50%, and indeed potentially quite a small proportion, of the total cost. The lion's share of the cost could be due to operations in the territory of a third party, either before or after the change of tariff classification that is used to qualify for tariff-free entry. While it is possible to supplement such rules with regional value content requirements for specific tariff lines, the number of such lines needs to be negotiated and is unlikely to encompass an extensive range of products. In the event that the conclusion of the scoping study is that negotiations proceed with a view to basing rules of origin upon the change of classification approach, the Department should consult with the ACTU and its manufacturing sector affiliates on which products should also be subject to regional value content requirements.

6 The ACTU's policy is that bilateral and other free trade agreements should uphold and support the core labour standards set by the International Labour Organisation. Further, the ACTU sees little practical value in clauses of the kind contained in the Australia-US FTA, which effectively permitted reductions in domestic standards to achieve a trade advantage and neither required the parties to ratify all of the core ILO conventions nor allowed for the use of dispute resolution over breaches of those conventions that each party had ratified.

7 The ACTU is concerned about Malaysia's legal limitations on the right to unionise and to bargain collectively, on the matters that may be contained in collective agreements, and on the issues over which industrial action can be taken. While Malaysia has ratified ILO Convention No 98 on the Right to Organise and Collective Bargaining, it has not ratified Convention No 87 on Freedom of Association and Protection of the Right to Organise. Moreover the right to join or form a trade union under Malaysian law is denied to migrant workers. The right to form a union is also denied to particular groups of employees regardless of whether they are Malaysian citizens, such as academics in the public universities.

8 Even in the case of employees who are permitted to unionise, the union registration processes can take up to 20 months, and legal action by employers to can delay registration for a number of years. Formal rights to unionise are also undermined in practice by prohibitions on existing unions organising particular areas. For example, workers in the electronics industry are unable to join national unions but must create from scratch enterprise-specific unions.

9 Limitations on the provisions of collective agreements and the right to take industrial action also undermine the right to organise and bargain collectively. Unions cannot strike over illegal dismissals, including dismissals of local union leaders, and agreements cannot deal with transfers, dismissals and reinstatements. Additional limitations on the matters that can be included in agreements apply to companies designated by the Government as having pioneer status.

10 The ACTU understands that Malaysia maintains service sector trade barriers that both the Department and Australian service providers wish to remove through the FTA negotiations. Australian service providers have competitive strengths in a range of areas and the ACTU accepts that increased trade in services is part of Australia's trade strategy. Nevertheless, there are other considerations that need to be highlighted.

11 There is a potential boomerang effect from Australian negotiating proposals for Malaysia to liberalise services in areas for which no GATS commitments have been given by Australia, and for Malaysia to commit to a higher standard of liberalisation than Australia has given for the relevant sector in the GATS schedule of commitments. Should Malaysia agree to such an Australian proposal it could conceivably require equivalent commitments from Australia under the FTA. DFAT is

therefore requested to liaise with relevant service sector unions where the Department is contemplating proposals that are likely to lead to an extension of Australia's current commitments.

12 The ACTU reiterates its view that public services and 'public goods' social services, whether delivered by government agencies or private providers, should be excluded from FTAs. Exclusion does not necessarily mean that trade does not occur. Australia has extensive trade in education services with Malaysia notwithstanding the omission of education from Malaysia's schedule of GATS commitments.

13 It may be argued that the fact that trade occurs in a public goods service highlights the need for FTA or GATS commitments for the relevant sector. However a country may legitimately decide to admit to its territory foreign service providers as a way of boosting domestic capacity, without wishing to limit its regulatory options, such as the application of a needs test to the admission of new foreign providers, through GATS or FTA commitments. There are also alternative sources of regulation for transnational provision of public goods services, such as UNESCO in the case of education, or the WHO for health services.

14 In the event that the conclusion of the scoping study is that negotiations for an FTA with Malaysia proceed, the ACTU draws the Department's attention to earlier ACTU submissions where recommendations were made on the conduct of negotiations. The ACTU's recommendations for other FTA negotiations included the importance of publicly available impact statements for proposed commitments to liberalise Australian arrangements, and of involving relevant ACTU affiliates as well as employer industry groups in detailed and final stage consultations. An important additional dimension for consultations over an FTA with Malaysia, given the likelihood of considerable overlap between such negotiations and the ASEAN-CER process, will be the extent of clarity on the part of the Department as to which proposals are confined to the FTA with Malaysia, and which are also likely to be advanced in the CER-ASEAN process.

15 Finally, as the ACTU has emphasised in previous submissions on FTAs, there should be, in parallel with this proposed scoping study, discussions with all the relevant groups in Australia concerning:

how Australia intends to activate and resource a more sophisticated trade, investment and industry development policy as part of new forms of engagement with Malaysia and other East Asian economies.

The ACTU looks forward to such discussions occurring in parallel with this scoping study.