



Australian Government

Australian Government response to the
Joint Standing Committee on Treaties' report:

Report 130

*Malaysia – Australia Free Trade Agreement done at
Kuala Lumpur on 22 May 2012*

June 2014

Recommendation 1: That prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives including independent analysis of the anticipated costs and benefits of the agreement. Such analysis should be reflected in the National Interest Analysis accompanying the treaty text.

The Government does not accept this recommendation.

The powers to negotiate and enter into treaties are executive powers within section 61 of the Australian Constitution. Accordingly, formal responsibility for treaty making and negotiation lies with the Executive. The Government nevertheless considers that the Parliament has a significant role in scrutinising treaties prior to binding treaty action being taken and in passing legislation to give effect to them where necessary. The Joint Standing Committee on Treaties (JSCOT) plays an important part in fulfilling Parliament's role in this respect. The Government remains of the view that its capacity to effectively pursue the national interest while allowing for appropriate public consultation is best met by current parliamentary and consultation processes.

The Government currently provides information about treaties under consideration or negotiation in a variety of ways. The nature and extent of public consultation is determined by the scope and importance of the proposed treaty and can include statements to the Parliament, press releases, information published on agency websites, calls for public submissions and face-to-face consultations with industry and civil society representatives. The purpose of such consultations is to inform the public about the Government's priorities and objectives and to afford an opportunity for comment. In addition, regular consultations are conducted with the States and Territories through the Standing Committee on Treaties.

Notwithstanding its commitment to stakeholder consultation, the Government is constrained in what it can disclose about prospective and ongoing treaty negotiations. Making detailed information about Australia's negotiating position publicly available prior to the commencement of negotiations would limit Australia's room for manoeuvre in the negotiations. Adopting the Committee's recommendation could circumscribe the capacity of Australia's negotiators to secure the best possible outcomes for Australia in the treaty negotiations.

Any statement of negotiating priorities and objectives made at the outset of treaty negotiations would be of limited value in assessing the eventual treaty outcomes. Negotiating priorities commonly develop over the course of negotiations, and eventual treaty outcomes reflect compromises acceptable to all Parties. While negotiators operate within defined parameters, it is generally not possible to predict accurately the full range of commitments which will be incorporated into the final agreement until negotiations are concluded. Similarly, any advance assessment of costs and benefits would necessarily be based on a range of assumptions which may or may not prove correct. The Government considers the current practice of tabling treaties after they are concluded enables the Parliament to make a more meaningful assessment of their impact on the national interest, based on the actual rights and obligations they contain.

Treaties do not become legally binding on Australia until the Government formally undertakes to perform the obligations set out in the treaty by taking binding treaty action (ratification, acceptance, approval or other formal mechanism provided for in the treaty). Until binding treaty action is taken, Australia is only obliged to refrain from acts which would defeat the object and purpose of the treaty¹. Other than in exceptional circumstances, the Government does not take binding treaty action, or introduce legislation to give legal effect to treaty provisions in Australia, until after JSCOT has reviewed and reported on the treaty and its advice has been taken into account. Existing treaty tabling arrangements therefore afford ample opportunity for the Parliament to express its views on treaties well before a final decision is made on whether they become binding on Australia.

The Government notes Recommendation 1 does not state what would constitute 'independent analysis' of the anticipated costs and benefits of the agreement. If it is intended that the Government commission econometric or other modelling on proposed treaty negotiations prior to their commencement, this could delay the start of negotiations and further impinge on the Government's negotiating flexibility. The Government further notes the recommendation does not make any allowance for urgent or sensitive treaties. Finally, adding another step to the treaty process would have resource implications for the responsible agencies, which the Government does not consider to be justified.

Recommendation 2: That after 24 months of the treaty coming into effect, an independent review of MAFTA be conducted to assess actual outcomes of the treaty against the claimed benefits and potential negative consequences noted in this report. The review should consider the economic, regional, social, cultural, regulatory, labour and environmental impacts. Such a review should serve as a model for future free trade agreements.

A period of 24 months after the entry into force of MAFTA is brief in the context of the implementation of such a treaty. Any conclusions drawn from such a review would necessarily be limited in terms of the overall assessment envisaged by this recommendation. A longer period following MAFTA's entry into force would allow for a more insightful review of the agreement. It would also be important for any review to take into account the fact that MAFTA was concluded in the context of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), and that MAFTA complements and builds on the commitments applying to trade and investment between Australia and Malaysia in AANZFTA.

In addition, the Government considers that it is important that a review of the type proposed in the recommendation is used to provide input into the general review of the Agreement mandated by MAFTA within five years of entry into force and at least every five years thereafter unless otherwise agreed by the parties (Chapter 21 – Final Provisions). This general review provides an avenue to identify and address any problems experienced by business in taking advantage of the Agreement and to seek to enhance MAFTA's contribution to increased economic integration of our two economies.

¹ *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969), Article 18

The Government will, therefore, undertake a review through the general review process provided for in the Agreement. The first general review of MAFTA will provide a basis for an initial assessment of the Agreement's implementation, which could be followed up at the subsequent five-yearly reviews. The Government will seek the views and input of stakeholders independent of the Government ahead of those reviews on the extent to which MAFTA is delivering expected outcomes, and seek input on areas where the Agreement's provisions could be enhanced. The nature of the review undertaken at each of these periods will be subject to discussion with Malaysia.

In addition to the general review, MAFTA contains other review mechanisms. For instance, MAFTA incorporates a requirement to establish an FTA Joint Commission. The FTA Joint Commission will meet annually, or as otherwise determined by the Parties, to review implementation and operation of MAFTA and, *inter alia*, to explore measures to improve MAFTA and to expand trade and investment between the two parties (Chapter 19 – Institutional Provisions). Certain chapters in the Agreement also contain their own specific review provisions. For example, the Rules of Origin Chapter provides for review of the provisions of that Chapter within three years of the entry into force of the Agreement. The Services Chapter provides for a review of commitments on trade in services to be undertaken within three years of entry into force and thereafter every five years.

Additional review provisions are contained in side letters to the Agreement that provide for reviews on the inclusion of labour and environment provisions and on customs duties and other charges applied to certain alcoholic beverages no later than two years after the entry into force of the Agreement.

Recommendation 3: The Committee supports the Malaysia-Australia Free Trade Agreement done at Kuala Lumpur on 22 May 2012 and recommends that binding treaty action be taken.

This recommendation was implemented by the former Government and MAFTA entered into force on 1 January 2013.