



# An ASEAN - Australia & New Zealand Free Trade Agreement

Australian Industry Group submission to the  
Department of Foreign Affairs and Trade

February 2005

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## **SUMMARY AND RECOMMENDATIONS**

### **Executive Summary**

The Australian Industry Group (Ai Group) supports the negotiation between the ASEAN Free Trade Area (AFTA) and the CER trade area (Australia and New Zealand) for an FTA that is able to deliver clear benefits to Australian industry.

Unilateral liberalization of the Australian economy has opened Australia to the (virtually) free flow of imported goods and services. It is critical that industry gains reciprocal and unimpeded access to export markets, and furthermore, that this access provides Australia with competitive positioning in the complex web of international trade agreements. Australia must not be out-manoeuvred in ASEAN markets by intra- or extra-ASEAN treaty partners.

Australia has long-standing and enduring links with ASEAN member countries in trade and investment, as well as education, defence, police and intelligence cooperation, tourism and cultural exchanges. Further, ASEAN is an important regional neighbour and economic partner for Australia, and is Australia's fastest growing two-way trading partner after China.

While many of the ASEAN economies are becoming more open, there is scope for improvement in trade in goods and services, including investment flows, which could gainfully be addressed by an FTA. It is important that the Government undertake an up to date econometric study to clarify and quantify the impact of an FTA.

The Agreement should be comprehensive in nature, and provide immediate liberalization across merchandise trade to all but a minimum of sensitive items, to which transitional tariff reduction arrangements should be applied. These transitional arrangements must be no longer than those applied under intra-ASEAN trading arrangements, or awarded to any external treaty partners. The rules of origin for preferential tariff treatment should follow the product-specific methodology employed in the Thailand-Australia FTA.

Defensive tools of trade including safeguard measures, anti-dumping and countervailing measures should be assured to ensure trade occurs on an equitable basis.

Apart from tariff barriers, non-tariff barriers should also be addressed, including issues relating to conformity to technical and other standards. Mechanisms to provide more equitable treatment of Intellectual Property issues, access to Government procurement and investment opportunities are also critical. General issues of the transparent administration of laws and regulations are also key to addressing the area of non-tariff barriers.

Finally, it is Ai Group's recommendation that a regular review mechanism, to be attended by industry representatives, be incorporated into any agreement to ensure the agreement evolves in a manner that continues to facilitate trade to the fullest extent possible.

## **Summary of Recommendations**

1. *Ai Group welcomes the commencement of negotiations between the two trade areas and fully supports the conclusion of an equitable AFTA-CER FTA. The deal must however, deliver clear benefits to Australian industry.*
2. *The negotiations to be integrated with Australia's global trade strategy encompassing simultaneously multilateral, sub-regional and bilateral activities.*
3. *Urgent study to be undertaken to update the CIE 2000 report on the impact of an AFTA-CER FTA, based on more realistic timeframes.*
4. *Australia's goal must be to win meaningful access conditions for its exporters to the ASEAN market, which, as a minimum, matches the preferences awarded any intra-ASEAN trade or other ASEAN trading partners.*
5. *The Agreement be comprehensive, covering all sectors of trade, services and investment. Negotiations for all aspects of the Agreement should occur concurrently, so that nothing is settled until everything is settled.*
6. *The FTA to deliver immediate tariff elimination on the largest number of products possible, while accommodating transitional arrangements for a limited number of goods. For those items for which phased tariff reduction is necessary, the CER and ASEAN (6) countries should eliminate all tariffs by 1 January 2010, and CLMV countries by 1 January 2015.*
7. *Rules of Origin to follow the product-specific methodology employed in the Thailand-Australia FTA.*
8. *Transitional safeguards to be in place and readily accessible to support industry from import surges that cause or threaten to cause serious injury.*
9. *Rights to WTO-consistent anti-dumping and countervailing mechanisms to be preserved.*
10. *Elimination of non-tariff barriers and close attention to standards and conformity issues, including inconsistencies in Government rulings and regulations and Customs issues.*
11. *Intellectual Property laws to be harmonised to ensure universal protection.*
12. *Equitable access to Government procurement arrangements should be achieved.*
13. *Barriers hindering investment flows should be removed and supported by provisions facilitating the temporary entry of business people.*
14. *Industry representatives to be included in review mechanisms incorporated into the Agreement. This will ensure that as the Agreement evolves, it continues to facilitate trade and investment to the fullest extent possible.*

## **BACKGROUND**

### **Agreement to launch AFTA-CER FTA negotiations**

Heads of Governments at the ASEAN-Australia-New Zealand Leaders Summit announced on 30 November 2004 the agreement to launch negotiations on an FTA.

The negotiations are to commence in February 2005 and are to be concluded within two years. Further, the FTA is to be fully implemented within 10 years.

Importantly, the leaders have committed to a comprehensive agreement covering goods, services and investment, as well as the progressive elimination of all forms of barriers to trade.

The Leaders issued the following statement of guiding principles.

#### **Guiding Principles for Negotiation on ASEAN-Australia and New Zealand Free Trade Area.**

The FTA will be mutually beneficial for all parties. With that objective in mind, the negotiations will be guided by the following principles:

- (a) The FTA should be comprehensive in scope, covering trade in goods, services and investment.
- (b) The objective of the FTA should be to move towards deeper economic integration between the two regions through progressive elimination of all forms of barriers to trade in goods, services and investment; and through trade and investment facilitation and economic cooperation measures.
- (c) The FTA should, where relevant, build on members' commitments in the WTO.
- (d) Due consideration should be given to the different levels of development and capacity of the Member Countries to participate in comprehensive trade and investment liberalisation. The FTA should therefore include provision for flexibility, including special and differential treatment, especially for the newer ASEAN members.
- (e) Recognising the different levels of development among the Member Countries of the two regions, provision should be made for technical assistance and capacity building programs to enable all parties to participate fully and to obtain full benefit from the FTA.
- (f) The FTA will be designed to enhance and improve transparency in trade and investment relations between the parties.
- (g) The modalities and timeframes of the FTA, including differentiated timeframes for Australia and New Zealand, ASEAN-6 and CLMV, and products, should be settled at an early stage of the negotiations.
- (h) The FTA will be open to inclusion of issues not covered by the existing AFTA and CER Agreements, to be agreed by all parties.
- (i) The terms of the FTA will be subject to periodic review.

- (j) The FTA should be consistent with WTO provisions, including GATT Article XXIV and GATS Article V.
- (k) The FTA should draw, as appropriate, on elements of the economic integration agreements of ASEAN and CER. In addition, the elements of any FTAs involving ASEAN Member Countries, Australia and New Zealand may be used as reference points.
- (l) AFTA and CER will continue to exist as distinct, functioning agreements, as will the FTAs between ASEAN Member Countries, Australia and New Zealand. No provision in the FTA will detract from the terms and conditions of bilateral and plurilateral FTAs between ASEAN Member Countries, Australia and New Zealand.

The FTA will be fully implemented within 10 years. The negotiations will commence in early 2005 and be completed within two years.

### **ASEAN and AFTA**

The Association of Southeast Asian Nations (ASEAN) was established in 1967 and comprises ten countries:

- Indonesia, Malaysia, the Philippines, Singapore, Thailand and Brunei Darussalam – also referred to ASEAN (6) and
- Cambodia, Laos, Myanmar and Vietnam – also referred to as CLMV.

ASEAN's purpose is described by its official Declaration, of 8 August 1967: "The Association represents the collective will of the nations to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom, and prosperity."

The ASEAN Free Trade Area (AFTA) was established in 1993, with the objective of increasing the ASEAN region's competitive advantage as a single production unit. AFTA focuses on trade and investment liberalization and regional economic integration.

A significant aspect of AFTA is the lowering of intra-regional tariffs through the Common Effective Preferential Tariff (CEPT) Scheme. More than 99% of the products in the CEPT Inclusion List (IL) of ASEAN (6) are now in the 0-5% tariff range.

Products that remain out of the CEPT-AFTA Scheme are those in the Highly Sensitive List (i.e. rice) and the General Exception List.

CLMV countries are not far behind in the implementation of their CEPT commitments with almost 80% of their products having been moved into their respective CEPT ILS. Of these items, about 66% already have tariffs within the 0-5% tariff band. Vietnam has until 2006 to bring down tariff of products in the Inclusion List to no more than 5 percent duties, Laos and Myanmar in 2008 and Cambodia in 2010.

AFTA is party to discussions or negotiations for ASEAN-China, ASEAN-India, ASEAN-Japan and ASEAN-ROK free trade agreements.

## **CER**

CER refers to Closer Economic Relations, a subset of ANZCERTA – the Australia New Zealand Closer Economic Relations Trade Agreement.

CER entered into force in 1983 and seeks to expand free trade by eliminating barriers to trade and promoting fair competition. It is essentially a Free Trade Agreement. In a WTO review, CER was 'recognised as the world's most comprehensive, effective and multilaterally compatible free-trade agreement.'

By 1990, five years ahead of schedule, all tariffs and quantitative restrictions had been removed from trans-Tasman goods trade.

## **AFTA – CER relationship**

The AFTA and CER regions have a long-standing formal relationship extending over many years.

Initial relations between the ASEAN and CER regions took the form of an “AFTA - CER Linkage”, which was established in September 1995 to facilitate trade and investment flows between the two regions. This relationship was further formalized at the 7th annual consultations in September 2002, when the Ministerial Declaration on the AFTA-CER Closer Economic Partnership (CEP) was signed. As a commitment to ensuring that the CEP is ambitious and results-oriented, Ministers agreed to adopt a target for doubling ASEAN-CER trade and investment by 2010.

Australia's formal relations with ASEAN go back to 1974, when Australia became ASEAN's first dialogue partner.

## **The trade relationship**

ASEAN accounts for over 11% of Australian exports, almost 16% of our imports, and is a substantial market of 545 million people.

Australia has a trade deficit with ASEAN of \$8,293 million (2003-04), as a result of exports totalling \$12,263 million and imports from ASEAN of \$20,555 million.

Australia's merchandise trade with ASEAN has seen positive growth over the last five years (FY1999-FY2004), with exports to ASEAN countries increasing by 2.8% and imports from ASEAN countries by 10.2%

More than a quarter of ASEAN's imports of refined copper, dairy produce and unwrought aluminium come from Australia.

Further, Australia supplies 93% of ASEAN's wool imports, 84% of its live cattle imports, and accounts for over 50% of ASEAN's pork, salt and alumina imports.

<b>Top 5 exports to ASEAN</b>	<b>Top 5 imports from ASEAN</b>
Crude petroleum	Crude petroleum
Aluminium	Refined petroleum
Milk and Cream	Computers
Copper	Non-monetary gold
Non-monetary gold	Motor vehicles for transporting goods

Malaysia, Singapore, Indonesia and Thailand are by far our most important trading partner countries in ASEAN, accounting for 87% of Australian exports. Put otherwise, the ASEAN (6) countries account for over 95% of our exports, and CLMV countries for less than 5%. Of Australia's merchandise exports total to ASEAN in 2003-04 of \$12, 263 million, the breakdown by country is as follows:

Singapore	\$3,056 million
Indonesia	\$2,983 million
Thailand	\$2,465 million
Malaysia	\$2,225 million
Philippines	\$931 million
Vietnam	\$511 million
Brunei D.	\$36 million
Cambodia	\$20 million
Laos	\$18 million
Myanmar	\$17 million

Trade in services is much more balanced with a deficit of only \$58 million.

Australia is an important destination for ASEAN tourism and students, with over half our export earnings coming from these two sources: Australia received 75,730 ASEAN student enrolments and 625,500 tourists. In 2003, ASEAN took 15% of Australia's service exports.

An important aspect of the trade relationship between Australia and ASEAN are the existing bilateral Free Trade Agreements Australia holds with Singapore and Thailand. The Singapore-Australia FTA entered into force on 28 July 2003, and the Thailand-Australia FTA on 1 January 2005. Australia and Malaysia are also currently undertaking scoping studies on a potential Malaysia-Australia FTA.

### **The Investment Relationship**

From 1997-98 to 2002-03, the total stock of financial investment between Australia and ASEAN more than doubled from A\$25.3 billion to A\$56.3 billion.

ASEAN is not a major investment destination for Australia, with total FDI stock in ASEAN in 2003 at only \$3.5 billion. Only two ASEAN countries have significant FDI stock in Australia: Malaysia (A\$3.2 billion) and Singapore (A\$2.6 billion).

## KEY RECOMMENDATIONS

- 1. *Ai Group welcomes the commencement of negotiations between the two trade areas and fully supports the conclusion of an equitable AFTA-CER FTA. The deal must however, deliver clear benefits to Australian industry.***

Through the last two decades of unilateral trade liberalisation, Australia has become one of the most open economies in the world with average tariffs at a little lower than 3.9%. As the scheduled tariff reductions in the automotive and TCF sectors take place over the next few years, this average will be lower still. Under these circumstances, it is imperative that Australia negotiates improved offshore market access to ensure the commercial realities of international trade are more equitable.

While FTAs are an excellent tool to obtain this critical market access, particularly in light of the slow progress of liberalisation under the WTO, each FTA must be assessed on its own merits. It is imperative that each FTA delivers a balance of benefits that is in Australian industry's favour.

Clearly, there are existing barriers to trade with ASEAN that could be gainfully addressed via an FTA. There are also enormous benefits for Australia in being more economically aligned with ASEAN economies, particularly if we are able to provide assistance with the development of institutions and governance.

- 2. *Urgent study to be undertaken to update the CIE 2000 report on the impact of an AFTA-CER FTA, based on more realistic timeframes.***

The Department of Foreign Affairs and Trade has featured on its website a June 2000 report by the Centre for International Economics (CIE) titled: "Economic benefits from an AFTA-CER free trade area". The study found that there are economic benefits (in terms of productivity, investment, income and welfare) for all countries involved in forming the proposed trade area.

Specifically, it found that:

- gains were estimated to be US\$48.1 billion of GDP, at year 2000 prices over the period 2000 to 2020. The gains for Australia were US\$19.1 billion, for AFTA US\$25.6 billion and New Zealand US\$3.4 billion.
- In terms of investment flows, AFTA was estimated to benefit from extra capital inflows of US\$30.9 billion over the decade to 2010, and for CER by \$7.7 billion.

The study modelling, however, was based on an FTA that achieved zero tariffs on goods and services by 2005.

It is important that the Federal Government commission an updated econometric analysis based on more realistic timeframes for liberalisation. In addition, the study should include sectoral level analyses to assess the impact on the various sub-sectors within agriculture, resources, manufacturing and services.

**3. *The negotiations to integrated with Australia's global trade strategy encompassing simultaneously multilateral, sub-regional and bilateral activities.***

Ai Group believes any FTA with ASEAN must not only stand on its own merits, but also be complementary to Australia's position in negotiations in simultaneous multilateral, sub-regional and bilateral activities.

The Australian Government is clearly committed to progressing WTO negotiations to achieve liberalisation and expansion of international trade under agreed and enforceable rules for reciprocal benefit. Simultaneously, Australian Government policy holds that pursuing FTAs is favoured if there are clear commercial and trade policy benefits and if better results can be secured more quickly than is possible in the WTO negotiations. FTAs must be consistent with WTO guidelines.

The WTO and the multilateral trading system have generated significant benefits for Australia and the world economy. Since World War II average tariffs on manufactured goods in industrialised countries have fallen from 40% to 4%. In the same period, whilst there has been some growth in non-tariff barriers, world trade has increased 18-fold.

The role of the WTO is an evolving one to some extent, and with membership of over 140 countries, over two-thirds of which are made up of developing countries, reaching final agreements can be a time consuming process.

While Australia has seen advantage to date in complementing its multilateral and subregional trade action with bilateral FTAs, nonetheless Ai Group reiterates to Government the critical importance in simultaneously progressing all these avenues in order to improve market access for Australian industry.

**4. *Australia's goal must be to win meaningful access conditions for its exporters to the ASEAN market, which, as a minimum, matches the preferences awarded any intra-ASEAN trade or other ASEAN trading partners.***

The rules and conditions of international trade have become more complex in recent years with the proliferation of preferential trade agreements. As individual countries within ASEAN, and ASEAN itself, enters into bilateral and regional agreements, it has and will award preferential market access arrangements to treaty partners. As a result, countries are competitively advantaged or disadvantaged, depending on whether they have an agreement with an ASEAN country/ASEAN, and if so, according to the relative benefits they were able to obtain, and indeed, when they obtained them.

Consider the various ASEAN trade agreements:

- ASEAN-China (goods only) FTA – signed in November 2004, will eliminate tariffs in most sectors by 2010;

- ASEAN-Japan FTA – negotiations will commence in April 2005 for tariff reductions to be phased in by 2012;
- ASEAN-ROK FTA – negotiations with South Korea are to begin this year and deliver zero tariffs on most products by 2009; and
- ASEAN-India cooperation agreement – will deliver zero tariffs on most goods by 2007.

Add to this Australia's trade agreements in ASEAN:

- Singapore-Australia FTA, which came into effect in July 2003;
- Thailand-Australia FTA, which came into effect in January 2005;
- Vietnam has agreed to extend Most Favoured Nation (MFN) treatment to Australia in relation to the reductions in tariffs which came into force for US goods on 10 December 2004;
- Australia-least developed countries – Cambodia, Laos and Myanmar have received duty free access to Australia since July 2003; and
- Malaysia-Australia FTA – currently in scoping study stage.

This web of relationships has two important implications for Australia:

1. Australia must not fall behind its competitors in terms of preferential access to ASEAN countries. This means any access rights accorded to intra-ASEAN trade or current or prospective ASEAN treaty partners (China, India, Japan and Korea).
2. The provisions of an AFTA-CER FTA must deliver elements which can be harmonised wherever possible with the provisions of existing agreements with individual ASEAN countries (Thailand, Singapore and possibly Malaysia), and at the same time build on the preferences negotiated via these bilateral agreements.

**From an Australian industry point of view, the positioning of China is of crucial importance. Australia must ensure that the ASEAN-China agreement in particular not be a means for China to out-manoeuvre Australia's competitive positioning in the ASEAN markets.**

It is worth noting the findings of the Ai Group's survey on the impact of China on Australian manufacturing (refer "Australian Manufacturing and China: Opportunities and Challenges" available at [www.aigroup.asn.au](http://www.aigroup.asn.au)):

- Ai Group estimates the impact of China translates into a financial loss for the domestic manufacturing sector in the order of \$560 million over the past year (or 0.21% of total turnover);
- A significant element of this negative impact was the estimated loss of \$190 million as a result of Chinese competition in Australia's export markets.

**5. The Agreement be comprehensive, covering all sectors of trade, services and investment. Negotiations for all aspects of the Agreement should occur concurrently, so that nothing is settled until everything is settled.**

In order for the Agreement to have real merit, it needs to cover all sectors of trade, services and investment. It is critical that all of these aspects are negotiated concurrently: an effective agreement should weigh “whole of country” issues simultaneously.

Ai Group takes a rigorous position with regard to the definition of a WTO-compliant FTA, which stipulates, “substantially all trade” should move to free trade as well as “substantial sectoral coverage” in services trade to eliminate “substantially all discrimination”. Exceptions to free trade should only be under highly limited and extenuating circumstances, in which the overall economic benefit to Australia remains clear.

Liberalisation of trade between AFTA and CER would also have a positive impact on the current round of negotiations in the WTO. Australia is a strong advocate of the WTO Doha Round negotiating mandate, and must therefore be seen to apply these principles rigorously so as not to undermine our negotiating position within the WTO.

**6. The FTA to deliver immediate tariff elimination on the largest number of products possible, while accommodating transitional arrangements for a limited number of goods. For those items for which phased tariff reduction is necessary, the CER and ASEAN (6) countries should eliminate all tariffs by 1 January 2010, and CLMV countries by 1 January 2015.**

While the overriding goal would be to eliminate tariffs on the largest possible number of tariff lines immediately, certain items within manufacturing will require a phased tariff reduction period.

Ongoing and extensive consultation with industry is necessary to provide a definitive list of items requiring transitional arrangement. Nonetheless, it is expected that transitional arrangements may be necessary for items such as certain TCF (textile, clothing and footwear), automotive, furniture and chemical products.

Certainly the Australian automotive and TCF sectors are currently undergoing unilateral tariff reduction (in line with Australian government policy) and require some consideration. This does not preclude the possibility of zero-for-zero tariff arrangements being suitable on certain items within these manufacturing sub-sectors, as agreed by industry on both sides. Further, a margin of preference allocated by Australia on ASEAN goods on items with retained tariffs, should be matched by ASEAN.

Australian tariff rates on passenger motor vehicles, their derivatives, original equipment components and replacement components are 10% (from 15%) and are set to be reduced to 5% in 2010, and remain at that level until (at least) 2015.

As for the TCF industry:

- apparel and certain finished textiles are now 17.5% (from 25%),
- cotton sheets, footwear, carpet and woven fabrics are 10% (from 15%),
- sleeping bags, table linen and footwear parts are 7.5% (from 10%).

These rates will not change until 2010, at which time the 17.5% tariff lines will reduce to 10% and all other items to 5%. In 2014 all items will be at 5%.

As for tariffs on the ASEAN side, liberalisation will be of benefit to Australian exporters. While the average tariff is moderate, substantial tariff peaks remain.

For example:

- Malaysia: while the average tariff rate is 9.3%, substantial tariff peaks remain, with 16.9% of tariff lines having tariffs above 20%.  
Motor vehicles face a 92% tariff, with certain lines up to 300%. Other examples include: aluminium plates, sheets, tubes etc (HS 7606) 30%; paints and varnishes 25%; flat rolled iron or non-alloy steel products 25%, copper wire 25%, chocolate 16%, wine RM120/decalitre.
- Indonesia: while the average tariff rate is 7.3%, substantial tariff peaks remain. For example: automobiles 80%, passenger car kits up to 50%, automotive components 15%, dairy products 10%, aluminium products up to 20%. Iron, steel and chemical products have tariff bindings in excess of 40%. In the agricultural sector, 1,342 tariff lines have bindings at or above 40%.
- Philippines: the government initiated a reversal in tariff policy in early 2004 and began increasing tariffs in several sectors and slowing down tariff reduction plans in others. Chemicals fertilizers, cements, apparel, footwear and raw material tariffs rose from between 3% and 10% to between 5% and 20%. For example: chocolate up to 15%, finished automobiles 30%. High tariff rates on sensitive agricultural products, including grains, livestock and meat products, sugar, frozen and processed potatoes, onions, coffee, fresh vegetables (lettuce, broccoli, cauliflower rates 20-25%) and fresh citrus fruits are also applied.
- Vietnam: the average tariff rate is 18.2%.

Under the Thailand-Australia FTA (TAFTA), Thailand has agreed to eliminate its relatively high tariffs (averaging 18%), which include significant tariff peaks (such as passenger motor vehicles at 80%) and tariff rate quotas on several commodities. Thailand agreed to:

- Eliminate 49.4% of tariffs immediately (very few of which were already 0%).
- Eliminate 43.7% of tariffs by 2010
- Eliminate 6.9% of tariffs between 2015 and 2020.

The items in the longest phase reduction (third) category, which are predominantly TCF and agricultural products, could be gainfully addressed in an ASEAN-CER FTA.

## **7. Rules of Origin to follow the product-specific methodology employed in the Thailand-Australia FTA.**

Extensive research undertaken by Ai Group has found that industry considers a Change in Tariff Classification (CTC) based methodology such as the one employed in the Thailand-Australia FTA (TAFTA) to be acceptable.

As Australia will employ the CTC based methodology in our FTAs with Thailand and the USA (and it appears with New Zealand in the near future), we believe that a similar principle should be used in all future FTAs. It is desirable that we achieve the highest level of harmonization between the various trade agreements that Australia has or will be party to, so as to reduce the complexity of world trade rules in which Australian companies must operate.

The Rules of Origin (ROO) under TAFTA largely employ CTC tests to confer origin. In other words, CTC tests, which differ slightly for each tariff code, state that, if the imported inputs come from “different parts” of the Customs tariff schedule, then the finished product has undergone sufficient transformation to be deemed as originating. The classifications of the “different parts” of the tariff schedule from which imported inputs may be derived impacts the degree of tariff classification change required.

Some 15% of tariff lines have a local content percentage test applied in addition to the CTC test. The local content test utilises a so-called “Build-Down” formula, which starts at the customs value of the goods (excluding international transportation costs), and subtracts the value of the non-originating materials. The total is divided by the customs value to get the qualifying percentage.

## **8. Transitional safeguards to be in place and readily accessible to support industry from import surges that cause or threaten to cause serious injury.**

WTO members may take a safeguard action (i.e., temporarily restrict imports of a product) to support a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to domestic industry.

An import “surge” justifying safeguard action can (and should in this case) be a real increase in imports (an absolute increase); or an increase in the imports’ share of a shrinking market, even if the import quantity has not increased (relative increase).

Australian industry would want to have in place strong safeguard provisions to provide manufacturing ready recourse against import surges from ASEAN. This tool of international trade is extremely important, as it is one of the last few defensive measures available to industry, and can be invoked rapidly.

## **9. Rights to WTO-consistent anti-dumping and countervailing mechanisms to be preserved.**

Access to appropriate anti-dumping and countervailing mechanisms is essential to ensure industry is not disadvantaged as a result of unfair trading practices.

"Dumping" occurs when:

- a company exports its goods at a price below that of the sales price in the country of origin;
- a company exports its goods at a price that is lower than the cost of production.

A "countervailing subsidy" occurs when:

- a government provides financial assistance to benefit the production, manufacture, or exportation of goods.

If dumping or a countervailing subsidy is alleged, an investigation may be initiated, and ultimately, if the allegations are proven, duties assessed against imports of the product entering the country that initiated the investigation.

## **10. Elimination of non-tariff barriers and close attention to standards and conformity issues, including inconsistencies in Government rulings and regulations and Customs issues.**

There needs to be a firm commitment in the FTA that all parties to the agreement will not apply non-tariff measures (except in cases where such measures are in accordance with GATT regulations) and will provide one another non-discriminatory treatment.

For example:

- Indonesia:
  - the government imposes de facto quantitative restrictions on imports of meat and poultry products by requiring an "Importer Letter of Recommendation", which allows for arbitrary alterations to the quantities approved for entry.
  - Indonesian Customs Services uses a schedule of arbitrary "check prices" rather than actual transactions prices when calculating import duties on food products. The result is higher duties are imposed.
  - Wines and distilled spirits imports are restricted to three registered importers (one of whom is a state-owned enterprise), not to mention the 170% tariff, 10% VAT and 35% luxury tax.
  - 141 tariff lines are subject to import licensing restrictions.
  - Lack of transparency and widespread corruption remain an enormous problem for foreign companies: demands for irregular fees to obtain required permits, government awards of contracts and concessions based on personal relations, and an often arbitrary legal system.

- Malaysia:
  - 17% of tariff lines (principally in the construction equipment, agricultural, mineral, and automotive sectors) are subject to non-automatic import licensing designed to protect domestic industries.
  - As with many aspects of Malaysian legislature, the Customs laws and regulations are considered to be appropriate, however their practical implementation is found to be somewhat lacking. Specifically: HS classifications of goods are not applied consistently, and there is a lack of rigor in enforcing regulations.
  - Prohibitive taxes on imported autos when Malaysian automotive manufacturers Proton and Perodua receive 50% rebate on excise taxes.
  - Rice imports are regulated to ensure domestic crops are purchased as a first priority.
  - Lack of transparency of Malaysian government decision-making procedures.
  
- Philippines:
  - Barriers in relation to Customs administration, specifically, inconsistent application of customs rules and procedures, undue and costly processing delays and corruption.
  - A number of sensitive agricultural products are subject to a minimum access volume (MAV) and tariff-rate quotas (TRQs). The allocation and distribution of import licenses for TRQs has been questionable and gives the appearance of discretionary licensing.
  - The excise tax regime treats domestically produced and imported spirits very differently, discriminating heavily against imported spirits.
  - The National Food Authority administers quantitative restrictions on rice imports.
  - Corruption is a pervasive and longstanding problem in the Philippines. Harsh penalties have been enacted for infringements and yet enforcement of anti-corruption laws has been inconsistent.

Another area that is of particular concern relates to Technical Barriers to Trade – barriers that occur as a result of technical regulations and standards.

Technical Barriers are an impediment to free trade and investment, and as such a commitment to reciprocity and transparency is important. As with AUSFTA (Australia-US FTA) it will be necessary to establish an ongoing review mechanism to facilitate communication and the exchange of information on technical standards and regulations. It is particularly important that the mechanism provides a framework for exporters to work with government on tackling barriers. It is also vital that the mechanism include clear time frames and targets for progress, and sufficient impetus to achieve harmonisation with international norms, and mutual recognition of standards and conformance testing.

The parties should also agree to work towards harmonisation of standards, including food standards. Particular attention needs to be given for example, to Halal certification standards. Australia is an obvious and qualified raw material supplier to

the Halal food industry, and as such cooperative development of standards is critical to ensure Australia can maximize this opportunity.

In general, the agreement should seek to facilitate trade and investment through cooperative efforts that minimise the impact of technical regulations and or assessments and build on mutual recognition arrangements. This includes:

- Working together wherever possible to harmonise respective technical regulations and seeking to accept as equivalent each other's technical regulations; and
- Making compatible wherever possible the conformity assessment procedures.

### ***11. Intellectual Property laws to be harmonised to ensure universal protection.***

Improved protection of intellectual property systems needs to be included in the FTA, and achieved via harmonisation of respective laws.

Harmonisation of the national intellectual property laws in export markets within agreed international frameworks (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered under the WTO) is necessary to bring the benefits of intellectual property protection within the practical reach of Australian enterprises.

This offers the best mechanism to improve the global intellectual property environment for Australian companies.

While the intellectual property laws in some of the ASEAN countries are quite robust; there is often inadequate implementation of those laws. The abundance of pirated goods throughout the region is clear evidence that work remains to be done to protect intellectual property rights.

To illustrate this point:

- Apart from significant problems in Malaysia with piracy of copyrighted materials (particularly optical media products), and sales of counterfeit pharmaceuticals, foreign companies have also suffered as a result of the manufacture and sale of counterfeit consumer products.

According to the US Government *National Trade Estimates Report on Foreign Trade Barriers, 2004*: "Enforcement by the local government is hampered by lack of training and the scarcity of information about ongoing counterfeiting activities. Complicating enforcement of trademark-related violations is a Court of Appeals interpretation of the trademark law that requires enforcement officials have a "Trade Description Order" to conduct criminal raids when the counterfeit product seized is not identical to the trademarked original. Penalties meted out to offenders are small, although higher penalties have been adequately provided for in the Malaysian legal system."

- As per the same US report, Indonesian IPR enforcement continues to be weak, with IPR concerns including “rampant software, audio, video disk and book piracy; pharmaceutical patent infringement; counterfeiting; trade secret protection; data protection; apparel trademark counterfeiting; an inconsistent and corrupt law enforcement regime; and an ineffective judicial system.” It goes on to say... “prosecution of violators has been difficult due to inadequate police action, prosecutor and judge unfamiliarity with the new law, as well as the Indonesian public’s limited understanding of the importance of IPR protection, and rampant corruption.”

Clearly while many ASEAN member countries have tightened their laws on intellectual property, enforcement and prosecution remain an ongoing challenge.

### ***12. Equitable access to Government procurement arrangements should be achieved.***

In general terms, the Agreement should seek to impose practices which promote and apply transparency, open and effective competition, fair dealing, accountability and due process and non-discrimination in their government procurement practices.

Many Governments utilise policies that support national policy objectives, and as a result discriminate against foreign competitors. For example:

- Indonesia: the presidential decree of February 2000 grants special preferences to domestic sourcing. Regional decentralization also introduces some further barriers as local and provincial governments adopt their own procurement rules. In the last five years the Indonesian government has conducted audits of the state owned electricity, oil and gas and logistics agencies and identified serious irregularities in procurement, however, no legal action has been taken.
- Malaysia: a considerable proportion of government projects and procurement is awarded without transparent bidding processes. Procurement policies are also designed to encourage greater participation of Bumiputra, transfer technology to local industries, reduce the outflow of foreign exchange and enhance Malaysia’s export capabilities. As a result, foreign companies are disadvantaged, and in most cases, are required to take on a local partner before their bids will be considered.
- Philippines: preferential treatment of local suppliers of pharmaceuticals, rice, corn and iron/steel materials for use in government projects and in locally-funded government consulting requirements.

### ***13. Barriers hindering investment flows to be removed and supported by provisions facilitating the temporary entry of business people.***

As in Australia's other FTAs, an obligation to provide national treatment to the investors and investments of each Party (except where specific reservations are listed) should be followed. Protections against expropriation should be included as well as guarantees regarding full repatriation of funds.

Some examples of current restrictions to investment flows, which should be addressed in the FTA, are as follows:

- **Malaysia:**  
While Malaysia encourages direct investment, particularly in export-oriented and high-tech industries, it retains considerable discretionary authority over individual investments. This is especially the case when the investment is aimed at the domestic market, and the Government has used this authority to restrict foreign investment to around 30% and to require foreign firms to enter into joint ventures with local partners.  
  
Most foreign firms also face restrictions in the number of expatriate workers they are allowed to employ. Manufacturing companies with foreign paid-up capital of at least US\$2 million receive automatic approval for up to 10 expatriate posts.
- **Indonesia:**  
The World Economic Forum's 2003 competitiveness rankings scored Indonesia 97<sup>th</sup> of 102 countries. It's poor investment climate is typified by burdensome bureaucratic procedures and requirements on foreign investors, and exacerbated by differences of opinion between the central and local governments about which has authority on certain issues.  
  
Indonesia blocks or restricts foreign investment in a number of sectors, including a number of service sectors.
- **Philippines:**  
A comprehensive range of restrictions on foreign investment in the Philippines is maintained in order to reserve certain areas for Philippine citizens. For example, the practice of licensed professions such as engineering, medicine, accounting, environmental planning and law is fully reserved for Filipino citizens. Enterprises engaged in retail trade, mass media, small-scale mining, private security, utilization of marine resources, among others, are also reserved for Filipino citizens. Limited foreign ownership (from 25% to 60%) is permitted in most other forms of enterprises.

Provisions facilitating the temporary entry of business people (and their families) are also important in achieving the benefits of the investment provisions. The FTA should include provisions to improve the conditions and time periods that apply to temporary entry of business people and their spouses within the AFTA-CER region.

***14. Industry representatives be included in review mechanisms, which are incorporated into the Agreement. This will ensure that as the Agreement evolves, it continues to facilitate trade and investment to the fullest extent possible.***

It is important that industry representatives are party to review mechanisms in the course of each year, so that they can feed vital information into the annual Ministerial review process. We suggest that such review mechanisms that involve industry could meet between Ministerial conferences to monitor the progress of the agreement and identify where the impediments to trade and investment continue to be, as the relationship develops.