Submission

Administrative Law & Human Rights Section

To: Malaysian FTA Scoping Study, Trade and Economic Analysis Branch, Department of Foreign Affairs and Trade

Submission: Study of a Bilateral Free Trade Agreement between Australia and Malaysia

A submission from: International Law Briefing Committee of the Law Institute of Victoria

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1. PRELIMINARY COMMENTS

The Law Institute of Victoria (***LIV***) is pleased to make this submission to the Malaysian-Australia FTA Scoping Study (***Scoping Study***) by the Trade and Economic Analysis Branch of the Department of Foreign Affairs and Trade (***DFAT)*** as part of its study on a bilateral free trade agreement between Australia and Malaysia (***Proposed FTA***).

The International Law Briefing Committee (***ILBC***) of the LIV has prepared this submission. The LIV has previously made submissions regarding Australia's proposed free trade agreement with the United States (***AUSFTA***) and with the People's Republic of China (***PRCFTA***). Those submissions also incorporated commentary on Australia's free trade agreement with Thailand (***TAFTA)*** and Australia's free trade agreement with Singapore (***SAFTA***).

2. SUMMARY

2.1 General support of a broad Free Trade Agreement

As DFAT would appreciate, a 'basic' free trade agreement only covers the removal of tariffs on the import and export of goods between countries that are the parties to the agreement. However, the LIV supports broader-based free trade agreements aimed at removing other non-tariff barriers to trade.[1] The LIV recognises that the Proposed FTA must be consistent with each of the parties' World Trade Organisation (***WTO***) obligations, as set out in Article XXIV of the General Agreement of Tariffs and Trade (***GATT***) (for goods) and Article V of the General Agreement on Trade in Services (***GATS)*** (for services).

2.2 Recognition of no 'perfect' free trade model

Notwithstanding that the LIV embraces the notion of broad free trade agreements, it also recognises there is no such thing as 'perfect' international 'free trade'. Any consideration of the Proposed FTA must be treated in the context of recognised tensions such as, legitimate national interest (eg border security maritime security and quarantine) and recognised standards for human rights, labour and environment protection laws. It is fundamental that the Proposed FTA takes account of these tensions and contains processes to resolve them.

2.3 Areas of commentary on legal issues

In summary, this submission provides comments on specific legal issues, including:

(a) legal services;
(b) dispute resolution mechanism;
(c) court enforcement of foreign judgments;
(d) cross-jurisdictional court access;
(e) Customs duties;
(f) Customs administration;
(g) import and export permits and quotas;
(h) corruption;
(i) Rules of Origin;
(j) anti-dumping and countervailing measures;

(k) safeguards;
(l) corporate regulation, investment and capital raising;
(m) corruption; and
(n) application and enforcement of law.

2.4 Tensions to the Proposed FTA

This submission also raises a number of potential tensions and restrictions that may exist between Australia and Malaysia under the Proposed FTA including:

(a) legitimate national interests;
(b) other international obligations and treaties;
(c) environmental protection;
(d) protection of human rights; and
(e) preservation of Australia's public interest.

3. GENERAL ENDORSEMENT OF THE PROPOSED FTA

3.1 Support for the Proposed FTA

As a general proposition, the LIV endorses the process of the Scoping Study and believes that having observed that process, the interests of both nations would be served by the Proposed FTA. The LIV believes that Malaysia has made significant efforts to remove restrictions on international trade, especially in relation to foreign investment in Malaysia.

3.2 Specific areas for improvement through the Proposed FTA

This submission does not consider all aspects of a Proposed FTA. Rather, it concentrates on specific areas of interest and concern to the legal profession. As set out above, the LIV acknowledges that the Proposed FTA must be compliant to the WTO obligations of the parties. However, the LIV also endorses the comments on page 4 of the DFAT ***Issues Paper for the Scoping Study*** (***Issues Paper***) that the Proposed FTA should be 'WTO Plus', delivering liberalisation more rapidly and more fully than that achieved through the WTO process. This applies especially in relation to the market for legal services in Malaysia where Malaysia's current 'Offers' under GATS are substantially limited.

Without limiting the extent of the comments elsewhere in this submission, the LIV believes that the most significant gains from the Proposed FTA can be achieved in the following areas.

(a) reducing Malaysia's high tariff rates on Australian products, especially textiles, clothing, motor vehicles and motor vehicle components;
(b) improving access for the export of Australian legal services to Malaysia;
(c) adopting measures to return Australia investment in Malaysia to the levels existing before the Asian financial crisis in 1997; and
(d) establishing measures to aid trade facilitation between the two countries, by way of coordinating customs administrations and permitting direct electronic reporting of the movement of goods.

3.3 Consideration of other trade initiatives

The LIV believes that a Proposed FTA should not be at the expense of Australia's ongoing initiatives to secure multilateral freedom of trade through other international free trade forums, such as the WTO, APEC and (possibly) ASEAN. This is especially important given the significant breakthroughs at the Doha round negotiations of the WTO, which concluded on 31 July 2004 and the opening of negotiations for Australia to join ASEAN. Accordingly, the LIV submits that the current focus of a Proposed FTA with Malaysia should not detract from those multilateral endeavours.

It is also noted that Malaysia has signed bilateral trade agreements with more than 60 countries (including an agreement with New Zealand signed in 1997). These agreements grant 'most favoured nation' treatment with respect to customs duties and import and export administration. They also provide for the smooth transit of commercial goods and facilitate implementation of promotional programs.

3.4 Further submissions

Finally, the LIV welcomes the opportunity to be involved in making further submissions regarding the Proposed FTA and in the drafting and negotiation of the Proposed FTA.

4. CONSIDERATION OF SPECIFIC ISSUES

Without limiting the generality of our endorsement of the Proposed FTA, the LIV sets out below some commentary on specific issues that need to be addressed in any negotiations for the Proposed FTA with Malaysia. These issues reflect the LIV's practice areas and the interests of its member clients. The majority of these issues relate to the liberalisation of the means of access to the Malaysian economy and the way in which Australian entities are permitted to operate within that economy.

4.1 Legal services

Australia's legal sector trade involves not only legal and related services, but also the cross-border movement of Australian lawyers, judicial and other dispute resolution services, and law and legislative models[2]. As described in the Issues Paper, it is worth noting that there appears to have been significant recent increases in the export of legal services to Malaysia. However, the LIV believes that barriers to entry to the market for legal services remain too high.

4.1.1 Access to Australian market

In Australia, a regulatory path for creating a substantially uniform path for foreign lawyers practising in Australia is in place. Australia has also made a binding, non-reciprocal offer under the GATS to provide foreign lawyers with access to the Australian legal services market.[3]

4.1.2 Access to the Malaysian market

However, the LIV understands that access to the Malaysian market for legal services is significantly more restricted. The following issues are relevant for consideration:

(a) Foreign lawyers may currently only be admitted to practice in Malaysia either by an Order of the High Court pursuant to section 18 of the ***Legal Profession Act*** 1976 (***LP Act***) or by section 28A of the LP Act.

(b) The Legal Profession Committee of the Malaysian Bar Council has drafted amendments to the LP Act as well as Rules on Admission of Foreign Lawyers. The LIV understands that the Committee is considering a proposal which will allow foreign lawyers to practice in Malaysia in permitted areas of practice, in the form of either a Joint Law Venture or a Formal Law Alliance. Even though this suggests some form of liberisation, these measures would still protect the Malaysian legal profession by requiring a link to Malaysian practitioners and limiting areas of practice. In any event, the LIV also understands that the amendments and rules have yet to be finalised and adopted by the Malaysian Bar Council.

(c) Malaysia has listed legal services in its Schedule of Commitments pursuant to the GATS. However, this only covers advisory and consultancy services relating to home country laws, international law and offshore corporation laws of Malaysia market areas is allowed only in the Federal Territory of Labuan. Legal services can only be supplied by a corporation in the Federal Territory of Lauan to offshore corporations established there. Improvements to access by the Proposed FTA would therefore be 'WTO Plus'.

(d) The LIV understands that Malaysia has received a number of Requests under GATS relating to the legal services sector. Most Requests have related to the removal of geographical limitation on market access (ie. market access limited to Labuan) in Malaysia's Schedule of Commitments. However, the LIV does not believe that Malaysia has made any Offers.

(e) The ASEAN countries have established the ASEAN Framework on services which is working to improve the form of services through its Coordinating Committee.

Taken together, the LIV believes that these considerations demonstrate a reluctance by Malaysia to provide improved access to markets for legal services. The Proposed FTA represents a significant opportunity for liberalisation in this market and a Proposed FTA would be deficient if it did not provide specifically for liberalisation. The LIV presumes that bodies representing other providers of professional services (such as accountants) would also endorse increased access.

4.1.3 Access only sought in specific areas

The LIV is aware, through a meeting held on 1 June 2004 with representatives from the Malaysian Bar Council, of deep concerns held by the Malaysian legal profession in relation to foreign access to its legal services sector. On this basis, the LIV makes the following acknowledgments regarding any liberalisation:

(a) Access is only being sought for certain types of legal services relating to intellectual property, commercial, corporate, financial services, customs, trade and international law. The LIV does not seek access for Australian legal practitioners to provide legal services for domestic issues such as conveyancing and family law.
(b) The LIV accepts that the liberalisation may need to be 'staged' or 'phased' to allow the Malaysian domestic market to manage the transition in a manner consistent to that contemplated by Article XIX of the GATS.

For these purposes, there may be merit in starting the process by a review of the material drafted by the Malaysian Bar Council as discussed in paragraph 4.1.2(b) to determine whether that material affords an adequately broad basis for negotiations on market access.

4.1.4 Proposals to improve access in Malaysia

The LIV believes that any negotiation of the Proposed FTA should seek to minimise market access barriers to the practise of law, and that regulation should simply seek to promote professionalism and consumer protection rather than operating as a barrier to entry. In particular, where voluntary commercial association is desired between Australian and Malaysian lawyers or law firms, "domestic regulation should not unreasonably obstruct such commercial association nor integrated forms of trans-national practice"[4].

Articles II(I) and V of the GATS permit the formation of agreements between and among member countries to remove discriminatory measures and provide an environment to permit the free flow of trade in services. These provisions would allow Australia and Malaysia to liberalise trade in services beyond that offered to member countries pursuant to GATS.

Therefore, the LIV proposes the need to improve market access to Malaysia's legal markets through the following initiatives to be incorporated into a Proposed FTA:

(a) ease restrictions on Australian lawyers who wish to work as lawyers in Malaysia;
(b) permit Australian law firms to open up a law offices in Malaysia;
(c) ease restrictions on visa requirements for Australian lawyers to work for extended periods in Malaysia; and
(d) provide more opportunities for mutual exchange of law students and practising lawyers between Australia and Malaysia.

The improvements in access should be for the types of services described below at paragraph 4.1.3. As stated in paragraph 4.1.3, a starting point for the aims set out in paragraphs 4.1.4(a) and 4.1.4(b) may lay with the material drafted by the Malaysian Bar Council referred to in paragraph 4.1.2(b).

4.2 Dispute resolution mechanism

The LIV submits that there needs to be a workable relationship between Australia and Malaysia for the Proposed FTA to achieve its objectives. However, disputes between the countries may arise from time to time. It is, therefore, crucial that an appropriate and effective dispute resolution mechanism is developed to deal with disputes and bring efficient and effective resolutions without the need for protracted litigation.

The Proposed FTA must provide a transparent, balanced and open dispute resolution process at all levels to ensure that the aims of the Proposed FTA will not be undermined. The LIV proposes that most disputes should be dealt with by an independent international arbitral body that can adjudicate expeditiously and provide full public access to its proceedings and decisions[5]. Establishing such a dispute resolution mechanism in the context of the aims of the Proposed FTA will ensure that certain issues are addressed including:

(a) the jurisdiction of such a dispute resolution mechanism;
(b) the requirement that such a dispute resolution mechanism operates effectively to address disputes on either private or public levels that may arise under the Proposed FTA; and
(c) the provision for amicus curiae submissions (where necessary).

Each of these issues is discussed in more detail below.

4.2.1 Jurisdiction

A dispute resolution mechanism under the Proposed FTA should deal with:

(a) standing;
(b) the interpretation of the Proposed FTA;
(c) how to deal with any breaches of the Proposed FTA; and
(d) the application of appropriate remedies.

4.2.2 Addressing different levels of disputes

The Proposed FTA should further substantiate the existing bilateral relationship between Australia and Malaysia and result in the development of a variety of commercial relationships between:

(a) individual nationals, or groups of nationals, of the one state on the one hand and the other signatory state on the other (national-state disputes); and
(b) different individual nationals or groups of nationals in the separate states (national-national disputes).

It is strongly recommended that a dispute resolution mechanism allow accessibility to both public authorities and private entities, whose interests will be subject to its provisions. To this effect, the LIV endorses an approach to dispute resolution similar to that in the TAFTA.

It is submitted that the Proposed FTA should be consistent with all existing and future multilateral obligations of both Australia and Malaysia, and ensure that its dispute resolution mechanism does not provide an avenue for by-passing or circumventing multilateral commitments.

As mentioned above, the LIV considers that any dispute resolution mechanism should also deal with possible national-state (including corporations) disputes. Accordingly, a national should be allowed to file a claim against a Proposed FTA party before an international arbitral body.

The LIV suggests that the drafters of the Proposed FTA should be wary not to establish a dispute resolution mechanism that could result in the creation of tensions between a State's bilateral obligations and the right, under international law, of a sovereign state to regulate matters arising within its own nation. The dispute resolution mechanism will need to carefully protect the rights of the Proposed FTA party to legislate for legitimate national interests.

4.2.3 Amicus curiae submissions

It is submitted the Proposed FTA should provide for ***amicus curiae*** submissions, in the context of all disputes.

Essentially, ***amicus curiae*** submissions permit interested non-parties that believe they can make a contribution to a dispute hearing body to assist in the understanding of a particular problem or issue before such a hearing body. In so doing, ***amicus curiae*** submissions serve to:

(a) inform an adjudicating body about the interest of a particular issue to the wider community;
(b) facilitate creative, technical and legal solutions by providing ideas and information which may not be available through normal bureaucratic channels; and
(c) bring factual legal and specific technical information or expertise to the attention of the adjudicating body, which may not have been addressed by the parties to the dispute.

4.3 Court enforcement of foreign judgments

4.3.1 Means of enforcing judgments

In Australia, the primary means of recognition and enforcing foreign judgments is under the ***Foreign Judgments Act 1991*** (Cth). Generally, judgments from foreign courts will only be recognised and enforced in another country if an international treaty has been concluded between the two countries or each of the countries has established a reciprocal relationship in respect of the enforcement of judgments. As a consequence, if a dispute cannot be resolved, one party to the dispute will usually be forced to seek relief against the foreign party in the domestic courts of the foreign party.

Malaysia is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards (signed 5 November 1985) . This means that arbitration awards made by recognised arbitration institutes of other signatory countries will be recognised and enforced in Malaysia. Australia is also a signatory to the New York Convention (26 March 1975).

4.3.2 Proposal of means to enforce judgments

The LIV recommends that the Proposed FTA provide for the enforcement of foreign judgments by a process of registration and be based upon the principles of reciprocity. The question of enforcement should not be decided on a case by case basis. Instead, the Proposed FTA must ensure the principles of reciprocity, in respect of enforcement of foreign judgments, are codified.

Accordingly, a repository should be established in which judgments or court orders may be registered in the respective jurisdictions and in the proper courts. A judgment or order entitled to recognition in one jurisdiction will be enforceable in the same manner as the judgment of a court in the other jurisdiction. The enforceability of a judgment in the respective jurisdictions should be determined by the following principles:

(a) the foreign court, which grants (or delivers) a judgment, must have appropriately exercised its jurisdiction to try the case in accordance with its own rules; and
(b) in trying the case, the foreign court must have acted in accordance with due process.
Further, to be enforceable, a foreign judgment must be final in the originating jurisdiction. That is, the originating court has no further power to rescind or vary.[6]

4.3.3 Benefits to adoption of proposal

It is submitted that reciprocal recognition and registration of judgments or court orders will:

(a) eliminate delay;
(b) eliminate expensive disputes over jurisdiction;
(c) provide certainty and ensure uniformity of application and interpretation of the law in respect of jurisdiction;
(d) speed up dispute settlement;
(e) eliminate forum shopping;
(f) avoid duplication of proceedings; and
(g) allocate risks and potential litigation costs efficiently.

4.4 Cross-jurisdictional court access
In the LIV's view, the Proposed FTA should:

(a) allow for greater allowance of cross-jurisdictional court access [7]; and
(b) develop an agreed position for a standard conflict of law clause for inclusion in general commercial contracts between companies in Australia and Malaysia.[8]

4.5 Customs duties

4.5.1 Need to reduce tariffs

The traditional emphasis on the removal of tariff barriers in any discussions on free trade agreements, whether bilateral or multilateral, necessarily confers primary emphasis on Customs matters.

One of the basic requirements for the Proposed FTA is the elimination or reduction of Customs duties. The LIV acknowledges that Malaysia has reduced or abolished import duties on a substantial number of goods as part of Malaysia's WTO commitments. However, certain raw materials, used directly for the manufacture of goods for export, are exempted from import duties if those materials are not produced locally or if local materials are not of an acceptable quality and price.

The LIV appreciates that not all tariffs can be eliminated immediately and that the particular position of sections of the Malaysian economy may dictate that certain tariffs only be reduced over time. Similar considerations may dictate a phased reduction in Australian tariffs. However, the primary consideration is to reduce tariffs as early as possible, especially in the automotive, textiles and clothing industries. It is the LIV's view that slow tariff reductions do not serve the interests of either country. To support these reductions, both countries will presumably take some comfort from the fact that there will be protection in anti-dumping legislation and the availability of safeguards for certain industries as discussed below at paragraph 4.10.

4.5.2 Ability to accelerate reductions

In addition to agreed tariff reduction rates, both countries should have the right to ask for faster reduction from the other country or to reduce their rates unilaterally.

4.5.3 Free Trade Zones

The LIV notes that Malaysia has a comprehensive regime of free commercial zones and free industrial zones pursuant to the ***Free Trade Zones Act*** 1990. The LIV is concerned that these "Free Trade Zone" arrangements may afford preferential treatment to traders of some countries which are superior to those which may be afforded to Australian companies pursuant to the Proposed FTA. The LIV is also concerned that the benefits provided to Malaysia companies in the Free Trade Zones should not afford these companies an unfair advantage to the detriment

of Australian producers and manufacturers. Special attention needs to be paid to the treatment provided in the Free Trade Zones.

4.6 General Customs issues

4.6.1 General

For the purposes of the Proposed FTA, specific Customs related matters to be addressed include (but should not be limited to) [9]:

(a) removal of tariffs on all Australian and Malaysian goods passing between both nations;
(b) removal of other non-tariff barriers, including any quota and subsidy arrangements [10];
(c) consistency in the approach to anti-dumping and countervailing inquiries and procedures for imposing penalties;
(d) consistency in the way in which administrative penalties are imposed on parties that do not comply with legislative reporting or other requirements;
(e) consistency to the grant of powers to Customs services and the manner of exercise of those powers: Different regimes create confusion to new entrants, which is a non-tariff barrier to trade. This aspect could also include harmonising 'border security' approaches to cargo handling and other clearance issues such as, biometric technology initiatives and the ready exchange of information between authorities regarding cargo and passengers;
(f) proper consideration of the origin of traded goods, if tariffs are to be removed for trade in goods between Australia and Malaysia. The countries will need to adopt consistent approaches to determine the origin of the goods starting with the WTO Committee on Rules of Origin;
(g) consistency to approaches to classifications of goods: While tariffs are removed, the classification of goods is still important for national reporting and other requirements; and
(h) consistency in reporting requirements on goods being imported and exported between both countries.

4.6.2 Use of e-commerce

Both countries should embrace the use of e-commerce to ensure the accurate and timely reporting on the import and export of goods. This will also aid in border security issues and the harmonisation of the practices of Customs authorities.

To this effect, consideration should be given to the provisions of the Revised Kyoto Convention on the Simplification and Harmonisation of Customs Procedures (***Revised Kyoto Convention***) as a background document. For these purposes, Australia is now adopting a new 'Cargo Management Re-Engineering' process (***CMR Process***). Australia is also developing new software and procedures for industry to report and deal with the Australian Customs Service through the 'Cargo Connect Facility'

and the 'Integrated Cargo System'. These initiatives may serve as an appropriate basis for the adoption of a single window for reporting of goods being imported and exported between both countries.

Many of these matters are discussed in more detail below at paragraph 4.7. Issues regarding Rules of Origin are separately addressed below at paragraph 4.9

4.7 Customs administration

As a general proposition, the LIV sees significant merit in the Proposed FTA containing provisions similar to those in the AUSFTA regarding improvements in Customs administration. Australia and Malaysia are already working together on these issues. Without limitation, this should include the following.

4.7.1 Administrative fees and formalities

Other than fees and charges permitted under Article III of the GATT (Customs duties and internal charges) and anti-dumping and countervailing duties, any fees and charges should be limited to the approximate cost of those services and not represent indirect protection. Any practice of imposing inspection fees at ports of entry should be significantly curtailed.

4.7.2 Transparency

Both countries should commit to clear and transparent administration of Customs laws. These are vital in aiding trade. This includes the publication (in hard copy and electronic form) of relevant legislation and the issue of advisory opinions and binding rulings (both public and private, which are also addressed below). All commentary should be available in the languages of both countries so that traders in one country are able to determine entry requirements in the other country without difficulty. The LIV endorses the approach set out in the corresponding provision of the AUSFTA.

4.7.3 Clearance of cargo

The significant amount of cargo between the two countries requires agreement that there should be minimal delays to the clearance of cargo. The LIV recommends that specific criteria for normal and express cargo clearance in the AUSFTA should be adopted as a benchmark.

4.7.4 Exchange of information

It is in the interests of both countries that Customs authorities are able to exchange information on the arrival and departure of goods. This assists cargo management, border control, national statistics and identification of criminal activity and revenue collection. Standards of information exchange and cooperation, as set out in the AUSFTA, are recommended. This can provide for more extensive disclosure in the context of perceived illegal activities.

4.7.5 Customs broking

The existence of a properly trained and licensed Customs broking industry assists in the timely and accurate reporting of the passage of cargo. The LIV recommends the establishment of a national, licensed, Customs broking regime in Malaysia, similar to the Australian model.

4.7.6 Valuation

Valuation should adopt WTO practices and those dictated by the World Customs Organisation (***WCO***). As indicated throughout this submission, there should be provision for binding private and public rulings.

4.7.7 Classification

Malaysia follows the Harmonised Tariff System (HTS) for the classification of goods. Classification should also reflect practices of the WTO and WCO, together with the availability of rulings.

4.7.8 Use of information technology and modernisation

As discussed above, increased use of information technology in the reporting of the transport of goods aids trade and also aids the task of the Customs administration. For these purposes, both countries should continue to work to implement the provisions of the Revised Kyoto Convention. Work should also be undertaken to enable reporting parties in both countries to report electronically and directly into the systems operated by the Customs administrations of both countries. For example, parties in Australia should be able to report the import of goods directly into Malaysia's customs system. This will require exporters and importers to hold digital certificates to verify identities, which should be recognised by both countries.

4.7.9 Registration of exporters and provision of certificates of origin

The LIV appreciates that there are different approaches to whether it is an importer or exporter who must verify the qualifying ('originating') status of goods. In our view, the preferable approach is that set out in the SAFTA and the TAFTA, which oblige an exporter to be registered as producing 'originating goods' and for certificates of origin to be provided with each shipment. Such an approach permits preliminary verification of status of exporters and aids the tasks of persons reporting the import of goods. Although this is more rigorous than in the AUSFTA, the LIV believes that it assists certainty and compliance.

4.7.10 Availability of binding rulings

The LIV submits that trade in goods requires transparency in Customs administration and the adoption of measures to minimise uncertainties in Customs laws. This is especially important when dealing with technical issues such as:

(a) tariff classification;
(b) valuation of goods; and
(c) Rules of Origin.

The LIV suggests that many of these uncertainties can be addressed, in part, by a system enabling parties to apply for binding rulings to either Customs administration. This ruling system should operate in the same manner as set out in the AUSFTA.

4.7.11 Administrative penalties and prosecutions

The LIV considers there should be consistency in the application of administrative penalties and prosecutions. Traders in both Australia and Malaysia should have some comfort that they are subject to similar legislation and trading requirements in both countries. In terms of administrative penalties, the LIV recommends that the Proposed FTA reflect that administrative penalties should not be applied when a party voluntarily discloses errors as soon as it becomes aware of those errors and tenders any underpaid duty at the same time. This is consistent with the approach in the AUSFTA and is reflected in sections 243T and 243U of the ***Customs Act 1901*** (Cth).

4.8 Import and export permits

Permit restrictions constitute significant non-tariff barriers and should be reduced and phased out over a reasonable period. The LIV suggests that work needs to be undertaken to determine which of these restrictions is justified as a legitimate national interest. Both countries cooperate in developing agreed procedures for administration of quotas and to minimise the anti-competitive effect of quotas. Protections to specific industries can be found in 'provisions for safeguards', as set out below.

4.9 Rules of Origin

Although 'Rules of Origin' (***ROO***) are technically part of the Customs administration, the ROO deserve separate consideration as they represent the criteria for favourable tariff treatment.

Recent Australian practice has led to two separate approaches to ROO, the first being the approach in the SAFTA and the ANZCERTA, with the second approach found in the AUSFTA and the TAFTA. The AUSFTA approach also appears to be very similar to that of the TAFTA, subject to some different treatment in the AUSFTA requirements for 'regional value content' in the Textile Clothing and Footwear (***TCF***) and motor vehicle areas. The AUSFTA affords preference to goods wholly obtained or produced in a contracting party using products of that country. Goods from 'third countries' are allowed as inputs if those goods undergo a change in tariff classification.

In general, it is the LIV's view that the approach to ROO in the AUSFTA should be adopted as a means of determining the products of either nation that attracts preferential treatment. However, specific consideration should be given to whether the specific ROO (and associated regional value content for TCF goods or motor vehicle components) should be adopted in their entirety in the Proposed FTA. The LIV suggests that the specific 'regional value content' requirements for motor vehicle components may be warranted, but the specific rules for TCF goods in the

AUSFTA should not be adopted in the same form. They appear to be unnecessarily complex and contrary to the notion that all ROO need to be clear and easy to administer.

4.10 Anti-dumping and countervailing measures

The LIV notes Malaysia has put in place the ***Countervailing and Anti-Dumping Act 1993*** in accordance with the WTO Conventions. However, the LIV recommends that both countries reaffirm their commitment to the WTO Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures.

The LIV suggests that this could be the basis for establishing a revised system in which the countries agree on an accelerated process for reviewing complaints. This could be assisted by the establishment of investigative procedures involving officers from both countries and ready access to the economic information of both countries.

4.11 Safeguards

The LIV endorses general safeguard provisions consistent with other WTO agreements and free trade agreements. This issue may specifically arise for Australia in relation to TCF imports from Malaysia. There should be careful attention to the ability of a country to adopt transitional safeguards, requiring thorough investigation and consultation with the other country. However, the LIV has significant reservations about adopting extensive 'special' safeguard measures, such as under the TAFTA.

4.12 Technical barriers to trade

Both Australia and Malaysia are parties to the WTO Agreements on Technical Barriers to Trade. This affords an important framework to minimise technical regulations and standards that may otherwise constitute unnecessary barriers to trade. Both countries also cooperate on these issues through APEC.

The LIV endorses the suggestion in the Issues Paper (paragraph 2.7.2) that the Proposed FTA could provide an opportunity for further work between the countries to minimise these technical barriers. While it may be impossible to resolve this issue comprehensively in the Proposed FTA, the LIV believes that the Proposed FTA should set out a framework for these issues to be resolved. Presumably, this would involve creation of a Committee to advance the matter.

4.13 Intellectual property rights

Australia and Malaysia recognise intellectual property rights as a key component of business activity, research and development and their protection is key to success in higher technology sectors and services. In particular, the high priority accorded to the growth of the biotechnology sector by the Malaysian Government, highlights the importance of intellectual property rights. Accordingly, both countries are parties to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.

The LIV welcomes the cooperative approach to intellectual property protection agreed to by both countries and believes that the establishment of systems to

ensure mutual recognition of intellectual property rights established in each country would be enhanced through any free trade agreement negotiated between Australia and Malaysia.

However, such mutual recognition cannot be viewed in isolation from the wider issue of enforcement where breaches of such intellectual property rights occur. Continued vigilance in this regard is required to ensure that Australian companies and businesses can operate within Malaysia and share valuable intellectual property in an environment where the risk of that intellectual property being unreasonably exploited is minimised, and where such exploitation does occur, effective protection and enforcement mechanisms exist to minimise potential losses.

4.14 Corporate regulation, investment and capital raising

Given the interaction of international capital markets, significant problems can be created by different levels of regulation. The LIV submits that both countries can benefit from working together to improve corporate regulation and business ethics. Accordingly, the LIV recommends hat the Proposed FTA should include:

(a) options for direct mutual national treatment for investors or some form of mutual acceptance of accounting, corporate governance and prosecution requirements[11];
(b) requirements to be satisfied for stock exchange listings;
(c) similar disclosure requirements for listed companies, but on a continuous basis;
(d) similar 'conflict of interest' rules for officers of companies and their advisers, including proper disclosures of related-party transactions;
(e) requirements for licensing of those offering securities and financial advice;
(f) similar rights to shareholders against companies; and
(g) consistent treatment for the taxation and repatriation of investment profits.

The Proposed FTA should incorporate provisions that also bind all levels of government in Malaysia to these new 'rules'.

The LIV suggests that Australia should be seeking to receive favourable treatment for its investors in Malaysia in addition to that currently afforded. While there have been some relaxation on investment in recent times, there needs to be further liberalisation in many other sectors, including the telecommunications, financial and banking sectors. That treatment should address practical issues such as excessive regulation, national competition issues and the inflexibility of some available investment structures for foreign investors.

The LIV submits that a significant concern for potential foreign investors is expeditious and cost effective resolution of investment disputes. The LIV recommends that Australia investigate the feasibility of establishing a bilateral investment (and trade) dispute resolution mechanism that would enjoy the confidence of business in both countries, and which could be incorporated into a Proposed FTA.

4.15 Corruption

Corruption poses a significant threat to trade and human rights between and within nations. Inconsistencies in laws relating to corruption may afford offenders protection in one nation for offences within another nation.

The LIV acknowledges the signing of the UN Convention against Corruption by Australia and Malaysia on 9 December 2003. However, we note that neither country has yet to ratify the convention. The Convention needs to be ratified by 30 countries to come into force.

Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption. Accordingly, the LIV recommends that the Proposed FTA reflect:

(a) an agreed position on the prevention of corruption in the public and private sectors that is consistent with the Convention;
(b) the establishment of criminal and other offences to cover a wide range of acts of corruption;
(c) the development of an appropriate and effective dispute resolution mechanism (as discussed above at paragraph 4.2);
(d) provisions for asset recovery and mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders; and
(e) the ability to enforce penalties in the nation where the breach occurs.

5. RECOGNITION OF TENSIONS AND RESTRICUTIONS

5.1 Legitimate national interests

The LIV recognises that legitimate national interest will act to qualify the free trade process. These restrictions include:

(a) political restrictions;
(b) national security;
(c) border protection;
(d) consumer protection;
(e) health; and
(f) quarantine.

Clearly, much work will be required to identify legitimate national interests as opposed to specific sectional requirements. The LIV recognises there may be difficulties in determining what are legitimate national interests and what are non-tariff barriers put forward as legitimate national interests. This places a premium on an efficient mechanism to resolve disputes on these issues.

5.2 Other international obligations and treaties

Both Australia and Malaysia are parties to other international free trade or preferential trade agreements beyond the WTO. For example, Malaysia is part of ASEAN Free Trade Area (***AFTA***) and APEC and is pursuing a number of free trade agreements, both directly and through ASEAN. AFTA aims to reduce trade barriers among member countries (Malaysia, Indonesia, Singapore, Thailand, the

Philippines, Brunei, Vietnam, Laos, Burma, and Cambodia) over a 15 year period. In May 2000, Malaysia received approval from its ASEAN partners for an extension until 2005 of a grace period to meet its commitments under AFTA to reduce 218 tariff lines in the automobile sector and on selected agricultural products. Australia is party to ANZCERTA and SAFTA, has recently negotiated the AUSFTA and TAFTA, is a party to a Trade and Economic Framework with Japan and is in preliminary discussions regarding entry to the ASEAN Group. The Australian Government has suggested that it will continue to pursue bilateral free trade agreements and regional initatives. [12] These potential free trade agreements will place further obligations on the negotiation of the Proposed FTA. The LIV recommends that the Australian Government ensure that existing (and prospective) arrangements are not unnecessarily compromised by the Proposed FTA.

5.3 Environmental protection

The LIV recognises that laws dealing with environmental issues may impact on free trade agreements. The LIV notes environmental concerns of particular concern in Malaysia including (but not limited to), air pollution from industrial and motor vehicle emissions, water pollution and deforestation.

Malaysia has signed and ratified the Kyoto Protocol to the UN Convention on Climate Change (***Kyoto Protocol***), which entered into force in Malaysia on 11 October 1994. As Australia has not yet acceded to the Kyoto Protocol (a decision that has attracted significant criticism domestically and internationally), negotiations between the two countries may be constrained due to Kyoto Protocol limitations imposed on Malaysia as a signatory.

Accordingly, the LIV submits that the Australian Government should undertake a detailed analysis of the potential environmental benefits and costs of the Proposed FTA before any negotiations begin. Accordingly, the LIV supports the adoption of a formal environmental review process such as that conducted by the United States in accordance with subsection (2102)(c)(4) of the ***US Trade Act***. Such a requirement, if properly implemented, could achieve the twin aims of integrating environmental considerations into Australia's trade policy and facilitating significant public involvement in the negotiation process.

5.4 Human rights and labour laws

The LIV submits that the Proposed FTA must advance, rather than detract from, Australia's rights and obligations to develop laws and policies to promote the recognition and protection of human and labour rights and the environment Trade liberalisation through free trade agreements offers opportunities for increased economic growth and development. It has been noted that the unprecedented removal of barriers to trade in the last half century has been accompanied by higher standards of living in participating countries.[13] However, trade liberalisation presents challenges to the enjoyment of human rights.[14]

The LIV submits human rights, labour and environment protection laws should not be subjugated to the economic objectives of trade agreements. The LIV believes the Proposed FTA should be negotiated and drafted on the basis that trade liberalisation is not an end in itself. The Proposed FTA should advance the public

interest, especially in respect of human rights (including labour laws) and the environment.

In order to support human rights commitments by Australia, the Proposed FTA should contain express and effective provisions to preserve Australia's right and obligation under UN treaties to develop laws and policies to promote recognition and observance of human rights (including labour rights) and to protect the environment.

5.5 Preservation of Australia's public interest

The suggests that the Proposed FTA should contain express preservation of the right and obligation under UN treaties of Australian governments (Federal, State and local) to regulate in the public interest by passing and enforcing laws and regulations to recognise and advance human and labour rights and environmental protections. In the event of any inconsistency between such regulation and the Proposed FTA, the regulation should prevail and no rights to compensation should arise under the Proposed FTA.

Any claims for compensation should be determined in the courts under section 51(xxxi) of the Australian Constitution. Similar rights and obligations on the part of Malaysia should be recognised.

It is impossible to anticipate what public interest regulation will arise in future years. Both countries should therefore have unfettered rights under the Proposed FTA to legislate in the legitimate public interest without liability to pay compensation to foreign investors, absent expropriation, which would be compensable, as provided in section 51(xxxi) of the Australian Constitution.

In addition, obligations by Australia and Malaysia under UN treaties that they have ratified, or may ratify in the future, should be recognised as basic human rights standards incorporated into the Proposed FTA, breaches of which, would be actionable. As an example, Article 32 of the Convention on the Rights of the Child prohibits the employment of children in work that is likely to be hazardous or harmful to their health. Australia and Malaysia have both ratified this Convention and consequently are obliged to take steps to prevent such employment. Therefore, trade in Australia in goods produced in contravention of Article 32 should be prohibited under the Proposed FTA.

It will require considerable negotiating skills and vision by Australian negotiators to ensure that the protection of human rights (including labour rights) and the environment is not subjugated to narrow trade considerations. As discussed above, the need to provide for legitimate national or public interests as a limitation to the Proposed FTA places a premium on an efficient mechanism to resolve disputes as to which restrictions are legitimately in the national interests.

6. CONCLUSION

The establishment of the Proposed FTA has some significant advantages and the LIV endorses its possible establishment. The LIV endorses the notion of a broad-based FTA with Malaysia generally on the terms and conditions set out in this submission.

The LIV welcomes the opportunity to be involved in the future steps to be taken to implement the Proposed FTA and looks forward to the opportunity of making further submissions and being involved through other consultation processes.

ENDNOTES

1 Recent examples of more broadly based free trade agreements, which will doubtlessly assist the Malaysia FTA Study Taskforce, are the general agreements for free trade agreements between Australia and Singapore, Thailand and the United States respectively.

2 For example, Australian intellectual property and patent law, and the commercial law of New South Wales have been adapted for local purposes and enacted by Singapore and Malaysia respectively.

3 Ian Govey, General Manager – Civil Justice and Legal Services, Attorney General's Department in an address to the International Legal Services Advisory Council Conference, Sydney (20 March 2003).

4 Govey, above.

5 However, certain matters may need to be dealt with by the superior Court in the respective jurisdictions due to the constitutional or other legislative requirements, public interest issues or to ensure the equitable treatment of person such as exporters from non-FTA countries.

6 It is likely that where a foreign judgment is under appeal in the originating jurisdiction, a court in Australia will usually choose to stay its decision regarding enforceability, pending the decision of the foreign appellate court.

7 If an agreed position could be obtained for cross-jurisdictional court access this will decrease 'forum shopping'.

8 This will be very useful for Internet commercial contracts between persons in Australia and Malaysia.

9 This list should not be construed as a comprehensive list merely an indicative one with the intention that all relevant items are separately reviewed and covered.

10 This may pose significant difficulty in that it strikes at protections long afforded to particular interest groups such as primary producers.

11 For example, a prospectus issued in Australia complying with Australian requirements should be sufficient for US investors.

12 See ***Trade 2004. Australia's export success and the Government's policy goals for trade in the coming year***. A statement by Mark Vaile as Minister for Trade available on the website of the Department of Foreign Affairs and Trade <www.dfat.gov.au/trade/trade2004/index.html>.

13 ***An Australia-USA Free Trade Agreement: Issues and Implications***, Report for the Department of Foreign Affairs and Trade by the Australian APEC Study Centre, Monash University (August 2001), p viii.

14 ***Liberalisation of trade in services and human rights***, Report of the High Commissioner for Human Rights to the Economic and Social Council of the United Nations (25 June 2002).