

# **Negotiating the ASEAN-Australia–New Zealand Free Trade Agreement**

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## **1. INTRODUCTION**

The purpose of this paper is to focus on the recently concluded Agreement Establishing the Association of Southeast Asian Nations<sup>1</sup> (ASEAN)-Australia-New Zealand Free Trade Area (AANZFTA) as a case study of Australia's engagement in external intergovernmental relations.

The approach taken in this paper to the case study is to provide the general context by explaining Australia's trade policy agenda; to set out the Commonwealth Government's legal authority to undertake international trade negotiations and to outline the typical phases of free trade agreement (FTA) negotiating processes. The paper then outlines AANZFTA's negotiating process and outcomes.

## **2. AUSTRALIA'S PARTICIPATION IN TRADE NEGOTIATIONS**

### **2.1 Australia's Trade Policy Agenda**

The Government has articulated an integrated, whole-of-nation and whole-of-government approach to improving Australia's trade performance – what the Minister for Trade, Mr Crean, has referred to as the 'Twin Pillars' of trade policy. The first pillar focuses on opening up new markets 'at the border' through trade liberalisation, creating new export opportunities in the process. The second pillar consists of domestic reform 'behind the border' in Australia aimed at raising productivity and making our exports more globally competitive.

Regarding the market access pillar, Australian trade policy over the past five or so years has been driven by a few key understandings. The first is a recognition that multilateral liberalisation through the World Trade Organization (WTO) Doha Round represents the greatest opportunity for Australia to increase access to a wide range of overseas markets – and is therefore the first priority.

The second understanding is a recognition that the simultaneous pursuit of Australia's WTO and FTA agendas is mutually reinforcing. This is the approach taken by the current government where work on the Doha Round is supplemented by the negotiation of bilateral and plurilateral FTAs. By delivering faster access gains to key

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<sup>1</sup> The member countries of ASEAN are Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, The Philippines, Singapore, Thailand, Vietnam.

markets, comprehensive trade-creating bilateral and regional trade agreements can act as building blocks for WTO liberalisation. In addition, through their coverage of non-WTO provisions such as investment and competition policy, FTAs can further facilitate trade in goods and services by contributing to the stability, predictability and transparency of the international business environment. Finally, there is the practical recognition of the fact that many of our competitors are pursuing their own trade agendas through FTAs and Australia's competitiveness in overseas markets risks being eroded if we are unable to secure terms of access through our own FTAs at least as favourable as those of our competitors.

AANZFTA is one example of an increasing global trend over the past decade towards the negotiation of FTAs. For the reasons outlined above Australia has participated actively in this trend. In addition to AANZFTA, Australia has bilateral FTAs in place with New Zealand, Singapore, Thailand, the United States and Chile, all of which, with the exception of that with New Zealand, were negotiated since 2001. The countries with which Australia has concluded FTAs collectively accounted for around 30 per cent of Australia's 2008 total two-way trade in goods and services. Australia is currently negotiating FTAs with China, Japan, Korea, Malaysia and the Gulf Cooperation Council, which collectively accounted for a further 34 per cent of Australia's total 2008 trade. The Australian Government has also announced that it will be participating in Trans-Pacific Partnership (TPP) negotiations, which are likely to comprise Singapore, Brunei, New Zealand, Chile, Peru, the United States and Vietnam. A joint feasibility study on a possible bilateral FTA has been concluded with Indonesia and a study is underway with India. Pacific Island Forum Leaders will consider a recommendation at their early August meeting in Cairns to commence negotiations for a new Pacific regional trade and economic agreement, known as PACER Plus.

## **2.2 Negotiating Authority**

The power to enter into treaties (including trade agreements) rests exclusively with the Commonwealth Government as an exercise of the executive power within section 61 of the Constitution. Under the Constitution, treaty making is the formal responsibility of the Executive rather than the Parliament. Decisions about trade negotiations, including determination of objectives, negotiating positions, the parameters within which Australian negotiators tasked with prosecuting trade negotiations must operate, and the final decision as to whether to sign and ratify, are taken at Ministerial level and, normally, by Cabinet.

Under international law the Commonwealth Government is responsible for implementing all treaty obligations accepted by Australia. However, in some subject areas Australia's treaty obligations may be implemented through state and territory laws and regulations, and the subject matter of a treaty may require compliance of state and territory laws and measures to comply with its obligations. Nevertheless it is the Commonwealth Government which bears responsibility under international law for ensuring the proper implementation of a treaty. Australian practice relies on close consultation between the Australian and State and Territory governments on treaties of sensitivity and importance to the states and territories.

The Minister for Trade is responsible for Australia's participation in trade negotiations and leads Australian delegations when negotiations are at ministerial level. The Department of Foreign Affairs and Trade (DFAT) advises the Minister for Trade and has lead responsibility for trade negotiations at officials level. Trade negotiations, however, are conducted on a whole-of-government basis, and other government ministers and agencies which have particular responsibility for specific subject areas covered by the negotiations (e.g. telecommunications, customs procedures) play an important role. Mechanisms are in place to ensure that the States and Territories are consulted about proposed treaty action, particularly in relation to areas of the negotiation that may involve state and territory action to implement, and are kept well informed of developments during the negotiation process (see section 2.3.3 below). Where appropriate, State and Territory Governments may also participate in Australian delegations.

### **2.3 FTA Negotiating Process: five phases**

In Australia the negotiating cycle for plurilateral and bilateral free trade agreements can comprise five broad phases: feasibility assessment; decision to launch negotiations; substantive negotiations; conclusion of negotiations and legal verification; and Ministerial signing and parliamentary scrutiny (see Attachment for a summary of the steps that comprise the negotiating cycle). It should be noted that these phases are not followed rigidly in each case or the same way in all instances, particularly with respect to plurilateral negotiations, because of the range of factors impacting on particular trade negotiations.

#### *2.3.1 Feasibility assessment*

Formal consideration of whether to possibly initiate FTA negotiations with another country in many cases start with governments agreeing to prepare a feasibility study. DFAT is often responsible for arranging feasibility studies for Australia. For a bilateral FTA, the feasibility study is often prepared jointly with the relevant trading partner and involves an iterative process of exchanging information and analysis, commenting on respective written inputs and scheduling meetings to resolve specific issues.

The feasibility study aims to examine the merits of negotiating an FTA, in order to inform the decision on whether or not to proceed. Agreed terms of reference will frame the scope of the feasibility study and will generally instruct the authors of the study to consider the costs and benefits of an FTA between the parties in the following areas:

- comprehensive tariff liberalisation;
- enhanced trade between the prospective parties by addressing non-tariff measures (such as improved customs procedures, quantitative restrictions, import licensing);
- broad-based liberalisation of the services sector;
- impediments to the two-way flow of investment;
- temporary movement of natural persons;
- electronic commerce;
- greater access to government procurement contracts;

- strengthening intellectual property regimes;
- competition policy reform; and
- capacity building/economic cooperation (in the case of some FTAs with developing countries).

Terms of reference can also instruct the authors of a feasibility study to consider the broader trade, political and strategic implications of an FTA, including consistency with the respective trade policies of the prospective FTA parties; the impact of an FTA on economic growth and welfare; trade, investment and commercial linkages and competitiveness; the value of an FTA as a framework for pursuing bilateral trade concerns, and the potential for an FTA to enhance support for the WTO.

Economic modelling of the costs and benefits involved in the potential FTA may be commissioned by DFAT from external consultants, in addition to qualitative assessments prepared by DFAT.

Consultation with key stakeholders is accorded high priority during a feasibility study, as the views of stakeholders assist in informing both the broad judgements and the detail of a study. Stakeholders consulted include different levels of government, business and other interested groups such as unions and other non-government organisations. Following an Australian Government public announcement that it intends to undertake an FTA feasibility study, calls for submissions will be made via newspapers and the DFAT website, targeted letters to groups expected to be interested, and consultation rounds in States and Territories.

### *2.3.2 Decision to launch negotiations*

After the feasibility assessment, all potential parties to the FTA consider the findings of any studies or assessments, with a view to reaching a decision on whether or not to launch FTA negotiations. In the case of Australia, this decision is taken at Cabinet level. Cabinet's decision is informed not only by the feasibility study and its recommendations, but also by a Regulation Impact Statement (RIS) which outlines how the FTA could affect business regulation or competition. The RIS is prepared by DFAT, in consultation with relevant government agencies, and is required to be approved by the Office of Best Practice Regulation (part of the Commonwealth Department of Finance and Deregulation). (The RIS is eventually tabled in Parliament as part of the National Interest Analysis for Parliamentary consideration, following the signing of the FTA – see section 2.3.5 below.)

A decision to commence FTA negotiations must, of course, be made by all the potential negotiating partners. Similarly, any announcement to launch FTA negotiations will be made jointly with the other FTA partners.

The announcement to launch negotiations is accompanied by another public call for submissions.

There is a new practice introduced by the Government whereby the Minister for Trade makes a statement to Parliament on the launch and tables a summary of views expressed by domestic stakeholders.

Once the FTA has been launched the next step is the creation of a negotiating team of Australian officials and the appointment of a Chief Negotiator. The negotiations are led by DFAT which will also typically provide lead negotiators for all chapters covered by the FTA. In addition to DFAT resources, important contributions are made by other relevant government agencies which have particular responsibility for aspects of the FTA. Inter-agency coordination is managed through a centralised inter-departmental committee process led by DFAT throughout the negotiations, as well as participation by relevant agencies in the FTA negotiating team at each round of negotiations.

### *2.3.3 Substantive negotiations*

Before FTA negotiations move into the substantive phase, Cabinet approval is required for Australia's objectives for the FTA (i.e. the scope of the mandate for the negotiating team) and the offers Australia is authorised to make with a view to securing those objectives. While some of the more process-oriented issues (such as how best to structure the negotiations) are resolved by the negotiating team themselves, Cabinet approval is sought for substantive issues to guide the negotiators, including the sectoral coverage of the FTA (e.g. both traditional areas such as goods and services and also more contemporary issues such as investment and competition policy), possible timeframes for negotiations, the resources that will be required, Australia's priorities in the form of offensive and defensive objectives for the FTA, and the detail of the concessions that Australia may propose in the form of tariff, services and investment offers.

Input into the identification and articulation of offensive and defensive interests to inform Cabinet decision making is obtained from a number of sources. Previous FTA negotiations with other trading partners can be important in determining offensive and defensive interests across a range of market access and other issues, as can existing knowledge of the trading relationship with the FTA partner through experience at the WTO or at government and industry level in dealing with barriers in the market, responses to calls for public submissions, consultations with private sector stakeholders, and consultations with relevant Commonwealth Government agencies (including Austrade) and State and Territory governments.

The mandate agreed by Cabinet for the FTA negotiating team is determined on a case-by-case basis and commonly includes a balance of objectives along with guidance on desirable outcomes that can include identifying trade-offs between gains and concessions. The submission to Cabinet by the Minister for Trade allows for the creation of a whole-of-government approach to developing the draft negotiating mandate. Depending on the complexity of the negotiations and their evolution through the negotiating rounds, a review of the Cabinet mandate may be sought several times during the course of the negotiations and may result in revised negotiating mandates.

Throughout the negotiations, DFAT holds regular consultations with relevant Commonwealth agencies, State and Territory governments and a wide range of domestic stakeholders, including industry, unions and public interest groups, to ensure that their views continue to inform the development of the Australian Government's negotiating strategy.

The Government has created a Council of Australian Governments (COAG) Ministerial Council on International Trade (MCIT), chaired by the Minister for Trade, which is the primary vehicle for Commonwealth-State/Territory government consultations on trade issues, including FTAs. This is supported by regular meetings of senior officials (Standing Committee of Officials for the MCIT) jointly chaired by DFAT and Austrade, and the Commonwealth-States Standing Committee on Treaties (SCOT) meetings chaired by the Department of Prime Minister and Cabinet, teleconferences and regular visits by DFAT negotiators to state and territory capitals. Given their regulatory responsibilities, states and territories are specifically consulted on the detail of Australia's services, investment and government procurement offers during FTA negotiations and final draft schedules of services, investment and government procurement commitments.

DFAT's overseas posts also play an important role in FTA negotiations. Posts conduct research and provide valuable 'local knowledge' on the offensive interests and barriers to trade that exist in their host countries. They also undertake advocacy for the FTA, including outreach activities in the trading partner(s) concerned.

The role of Australian government ministers in FTA negotiations is critical. Scheduled ministerial level meetings with trading partners can provide a focal or pressure point for negotiators to advance difficult issues and review progress. Inter-sessional intervention at ministerial level has also proved necessary to resolve actual or potential impasses.

Securing a negotiating mandate from Cabinet signals the start of the substantive phase of FTA negotiations. This phase can take many months, or in some cases years, depending on the complexity of the negotiations and the political will on all sides to bring the negotiations to a successful conclusion. Other factors that can influence the length of negotiations include external factors (such as adverse developments in the global economy and developments in the WTO negotiations), and the need to take account of the electoral cycles.

#### *2.3.4 Conclusion of negotiations and legal verification*

Announcement of the conclusion of FTA negotiations is usually made by the Minister for Trade and the FTA package returns to Cabinet for formal approval. However, under Australian treaty practice and in accordance with international practice, the details of the FTA package are not released until the FTA has been formally signed (see section 2.3.5 below).

Following Cabinet approval, the agreement undergoes a process of legal verification between the negotiating parties. This process can be important in ensuring there is legal consistency across an FTA in the way certain types of provisions are drafted and that the language of the treaty text accurately reflects the negotiated outcomes. A high quality, rigorous verification process is important because it is difficult for parties to amend the documents to rectify technical or other errors after the FTA is signed and domestic approval processes have commenced (see next section).

### *2.3.5 Ministerial signing and parliamentary scrutiny*

Under the Australian Constitution, an FTA, as an international treaty, may not be signed without the approval of the Governor-General on the advice of the Federal Executive Council in accordance with Sections 61 and 62 of the Constitution.

Although the Executive has constitutional powers on treaty making, political practice has conferred on the Australian Parliament a more active role in recent years, through a series of changes introduced in 1996 relating to the treaty making process in Australia. The reformed treaty making process requires that all major treaty actions proposed by the Government are tabled in the form of a national interest analysis (NIA) in both Houses of Parliament for a period of at least 15 joint sitting days (20 sitting days in the case of a free trade agreement) before action may be taken that will bind Australia under international law to the provisions of the relevant agreement. When tabled in Parliament, the text of the signed FTA is accompanied by the NIA which explains why the Government considers it appropriate to enter into the treaty. An NIA includes information relating to:

- the reasons for Australia to take the proposed treaty action;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with state and territory governments, industry and community groups and other interested parties.

FTAs are also required to be tabled with a Regulation Impact Statement, setting out how the FTA could affect business regulation including, where necessary, a Trade Impact Assessment detailing the direct bearing on international trade or export performance.

After an NIA is tabled in Parliament, the Joint Standing Committee on Treaties (JSCOT) considers it, invites public submissions on the treaty, and may hold public hearings to which witnesses may be called to give evidence. In its report to Government (which is tabled in Parliament and then made available to the public) JSCOT may make recommendations to the Government in respect of taking binding treaty action. In some instances, further Parliamentary scrutiny of a given treaty action may be undertaken by another Parliamentary committee.

Prior to the FTA entering into force, legislative changes at the Commonwealth, State or Territory level necessary for the FTA to be implemented are arranged. Implementation of an FTA in Australia normally involves, at a minimum, amendments to Australia's customs legislation to ensure that eligible products imported from an FTA partner can benefit from the negotiated preferential tariff rates. New and amended legislation (including regulations) to implement the agreement is approved by Parliament (or its delegate).

Entry into force of an FTA is achieved after the Parties have notified each other of completion of all domestic requirements, necessary for entry into force, by third

person note consistent with the relevant article included in the final provisions of the agreement.

### **3. AANZFTA NEGOTIATIONS: A CASE STUDY**

#### **3.1 Negotiating AANZFTA**

The AANZFTA negotiations originated from efforts begun in the early 1990s to develop linkages between the ASEAN Free Trade Area (AFTA) and the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement.

##### *3.1.1 Feasibility assessment*

A High Level Task Force report in 2000, entitled ‘The Angkor Agenda’, argued in favour of the formation of a free trade area between AFTA and CER.<sup>2</sup> The report concluded that establishing an AFTA-CER free trade area was not only feasible but also advisable if both ASEAN and CER were to keep pace with global developments. Economic modelling by the Centre for International Economics at that time indicated gains of US\$48.1 billion of GDP (US\$19.1 billion for Australia). The report was produced against the background of: the 1997-98 East Asian Financial Crisis; the increasing competitive challenge from rapidly emerging economies such as China and India; and the global spread of FTAs that accelerated following the failure of the 1999 Seattle WTO Ministerial meeting to launch a new WTO Round.

The AFTA-CER FTA proposal was not taken up by ASEAN until 2004, as part of an ASEAN strategy to pursue a series of region-wide FTAs (including negotiations with China, India, Japan and the Republic of Korea). Consideration of whether to launch AANZFTA negotiations was informed by the High Level Task Force Report, rather than a separate feasibility study.

##### *3.1.2 Decision to launch negotiations*

The formal decision to launch the AANZFTA negotiations was taken by leaders at the ASEAN-Australia-New Zealand Commemorative Summit in November 2004. Leaders agreed to a comprehensive set of “Guiding Principles” for the negotiations and that the negotiations would commence in early 2005 and be completed within two years.<sup>3</sup> The Guiding Principles committed countries to negotiate an agreement that covered goods, services and investment; the progressive elimination of all forms of barriers to trade and investment; and full implementation within ten years.

Public submissions were sought prior to the commencement of the AANZFTA negotiations and around 50 written submissions were received, including from the South Australian, Victorian and Western Australian governments. Submissions from these governments recognised the potential benefits of an FTA between Australia and ASEAN, and agreed on the need to negotiate a comprehensive, high quality agreement.

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<sup>2</sup> The Angkor Agenda is available at:  
[http://www.dfat.gov.au/trade/fta/asean/aanzfta/angkor\\_agenda.pdf](http://www.dfat.gov.au/trade/fta/asean/aanzfta/angkor_agenda.pdf)

<sup>3</sup> The Guiding Principles are available at:  
<http://www.dfat.gov.au/trade/fta/asean/aanzfta/principles.html>



### *3.1.3 Substantive negotiations*

The initial phase of the negotiations concentrated on organisational and procedural issues, information exchange and capacity building. The task of setting up the structure for the AANZFTA negotiations was substantial in view of the large number of governments involved and the need for coordination between the ASEAN countries on the one hand and between Australia and New Zealand on the other. It was agreed that AANZFTA negotiations would be co-chaired by Australia, New Zealand, and Brunei (acting as ASEAN Coordinator), and that the hosting of negotiating rounds would rotate between Australia, an ASEAN member, and New Zealand. It was also agreed that responsibility for preparing records of meetings would be allocated to the host nation (with the ASEAN Secretariat performing this function when meetings were hosted by an ASEAN member country).

A Trade Negotiating Committee (TNC) was established as the peak decision-making body and negotiating forum for goods and issues not covered in other negotiating groups. From the early stages, detailed negotiations on a range of issues were conducted in working groups (Rules of Origin, Investment, Services, Legal and Institutional Issues) and sub-working groups (Standards Technical Regulations and Conformity Assessment Procedures; Sanitary and Phytosanitary Measures; Customs) that reflected the structure and coverage of the FTA.

Some issues, such as intellectual property and economic cooperation, were controversial and required considerable exploratory work before their coverage could be settled. This meant that the Working Group on Economic Cooperation and the Expert Group on Intellectual Property were only established in the final year of the negotiations.

The exchange of information on trade and investment regimes was a very important part of the initial phase of negotiations. Australia provided ASEAN with information on a range of issues covering trade in goods, services and investment, including trade and tariff data. The information provided by ASEAN countries varied in its detail. However, this did provide an adequate basis to engage on each other's policies, policy development and approaches to the various issues. This enhanced understanding of each other's regimes and objectives.

Economic Cooperation was an integral part of the AANZFTA negotiations. It included a number of capacity building activities, including workshops and seminars conducted by Australia and New Zealand, with the aim of helping ASEAN officials to participate more effectively in the negotiations. The workshops and seminars covered issues such as tariff and trade data analysis, rules of origin, intellectual property, telecommunications regulatory disciplines and the scheduling of investment and services commitments. These workshops enhanced ASEAN members' capacity to participate in FTA negotiations and helped countries to narrow differences and develop shared understandings.

As the negotiations moved into their substantive phase, the Working Groups were tasked with drafting chapters and reporting progress to the TNC. Issues within Working Groups were discussed plurilaterally, but also in bilateral meetings and in

small group formats. Formal negotiations and decisions took place in the TNC, but this was complemented and assisted by informal processes in the margins of negotiating rounds or between negotiating rounds (bilateral and small group meetings, emails and telephone contact, including SMS).

Negotiations on market access commitments were essentially conducted through bilateral 'offer' and 'request' processes based on largely agreed modalities for both the tariff and services negotiations. These negotiations took the form of Australia and New Zealand each conducting separate bilateral negotiations on tariff and services commitments with individual ASEAN countries. Negotiations were progressed through bilateral meetings at negotiating rounds and through visits to ASEAN capitals. The negotiations recognised the different stages of development of individual negotiating parties and achieved differentiation through different timeframes for implementing commitments; Australia and New Zealand having the shortest timeframes, followed by ASEAN's six more developed members (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand), with Vietnam having additional time, and the three Least Developed Country members (Burma, Cambodia and Laos) the longest timeframes.

DFAT's overseas posts also performed an important advocacy role with their host governments and other stakeholders, as well as keeping Australian negotiators informed of developments impacting on their host government's position and approach to the AANZFTA negotiations. Australian ministers also played a crucial role, directly negotiating with their counterparts at various times throughout the negotiations, particularly at the ASEAN Economic Ministers - Closer Economic Relations (Trade Ministers of Australia and New Zealand) (AEM-CER) consultations held annually in August and the informal AEM-CER held in Bali in May 2008, as well as separate ministerial engagement in other bilateral and small group meetings held throughout the negotiations and other contacts in the concluding stages of negotiations in 2008 (e.g. telephone contact).

At the same time as Australia was engaging ASEAN interlocutors, we also continued to consult domestically. Australian officials held regular consultations with state and territory governments and domestic stakeholders to ensure that their views informed development of the government's position and approach to the negotiations. In addition to over 100 one-to-one and smaller group meetings, there were five large roundtable meetings between December 2006 and December 2008 with peak organisations representing industry, trade unions, professional bodies and other interested groups. At the AANZFTA negotiating rounds in Perth (July 2007) and Brisbane (April 2008), representatives of these peak organisations met and exchanged views with senior ASEAN and New Zealand negotiators. As the market access negotiations progressed towards their conclusion, key industry stakeholders were informed, in broad terms, about emerging outcomes and the extent to which specific priority interests were likely to be met.

Commonwealth agencies were fully involved in the negotiations through regular inter-departmental committee meetings and participation of relevant agencies in the Australian delegation to negotiating sessions. DFAT's website was updated after each AANZFTA negotiating round, providing for wider dissemination of information to stakeholders.

State and territory officials were consulted through state and territory economic and trade officials meetings and the Commonwealth-States Standing Committee on Treaties (SCOT) process, teleconferences and regular visits by the AANZFTA negotiators to state and territory capitals. The Minister for Trade also consulted state Premiers and territory Chief Ministers on Australia's services and movement of natural persons schedules and briefed his state and territory counterparts at the COAG Ministerial Council on International Trade.

Reflecting disparities in development, both within the ASEAN group and between them and Australia and New Zealand, there were strong differences of view regarding what aspects of the negotiating mandates for both sides would represent a balanced outcome. In the goods sector, for example, ASEAN tariffs were typically much higher than in Australia and New Zealand – with the notable exception of Singapore which has essentially no border measures on goods. Tensions within the goods negotiations therefore centred on the much greater demands that Australia and New Zealand were making on ASEAN to eliminate tariffs or lower them as close to zero as possible, and the assessment of most ASEANs that the Australian and New Zealand markets were largely already open.

In the services area, the key issue related to the fact that services remains a sector where internal ASEAN liberalisation is less developed than on goods. The level of intra-ASEAN services liberalisation was viewed by ASEAN as setting the ceiling on what individual ASEAN member countries would commit to in an ASEAN-wide FTA with third countries like Australia and New Zealand (the so-called 'ASEAN first' principle).

There were some areas of the FTA where no progress could be made because the issues were too sensitive on the ASEAN side. For example, it was not possible to engage ASEAN on government procurement as this is an issue on which there are no existing intra-ASEAN commitments or cooperation, and therefore no ASEAN position. Several individual ASEAN countries strongly opposed the inclusion of provisions on government procurement in AANZFTA (or any ASEAN FTA). There were also areas of sensitivity for Australia, for example in relation to ASEAN's approach to negotiations on sanitary and phytosanitary measures.

Over the four year period of the FTA negotiations, and sixteen rounds of meetings held throughout the AANZFTA region, the trade-offs that would eventually define the balanced outcome both sides were looking for evolved. This is not to imply that progress always moved in a straight line. The AANZFTA negotiations certainly had their share of road bumps, but to a degree these were to be expected and should be seen as a necessary part of moving such complex negotiations forward as all sides searched actively for an outcome that balanced their assessed offensive and defensive interests.

At critical times, and as decisions needed to be made on whether and how far Australia should compromise on specific issues to conclude the FTA, it was necessary to seek further guidance from Cabinet to help ease through potential roadblocks and ASEAN 'red lines'. Where the interests of particular industries were affected, consultation with them became more intensive, and State and Territory governments

were consulted regularly, which was particularly important in view of the role that these governments play in commitments on services given their regulatory responsibilities in this sector.

For Australia, the largest hurdle to overcome came at the AEM-CER Ministerial meeting held in Singapore in August 2008. There was strong pressure from all sides to settle the small number of outstanding issues and for ministers to conclude the negotiations at that meeting. Accordingly, a major intensive effort was made to conclude the negotiations in the period leading up to the AEM-CER. This included ministers being involved in negotiations on a number of unresolved market access issues.

The August 2008 AEM-CER meeting reached agreement to conclude negotiations, but also noted the understandings Australia had reached with Indonesia and Malaysia to continue bilateral negotiations to improve their commitments on automotive tariffs. The agreement reached at the August 2008 AEM-CER was that there could be no backsliding on what was on the table, there could only be improvements. It was also agreed that any negotiations to secure improvements would need to proceed in parallel with legal verification work.

Australia's separate bilateral negotiations with Indonesia and Malaysia on unresolved automotive issues inevitably engaged other issues and continued through the September to November 2008 period. These negotiations were finalised in November 2008 following separate meetings between Mr Crean and his Indonesian and Malaysian counterparts. Australia was unable to reach agreement with Thailand to extend to AANZFTA parties the Thai automotive tariff commitments in the Thailand-Australia FTA.

#### *3.1.4 Conclusion of negotiations and legal verification*

AANZFTA was substantially concluded at the AEM-CER Ministerial meeting in Singapore in August 2008 (and finally concluded, as noted above, in November 2008). The negotiations on automotive tariffs were tough and resulted in Australia agreeing to eliminate tariffs on passenger motor vehicles (PMV) for all ASEAN countries. However, the phase-out arrangements for tariffs on vehicles manufactured in Indonesia, Malaysia and Thailand, will be slower in response to the longer periods over which they are reducing or eliminating their PMV tariffs.

Legal verification of the AANZFTA text was completed in September 2008 and legal verification of tariff, services and movement of natural persons schedules were completed in February 2009.

#### *3.1.5 Ministerial signing and parliamentary scrutiny*

AANZFTA was formally signed on 27 February 2009 in Thailand by Australia's Minister for Trade, Mr Crean, and his counterparts from the ten members of ASEAN and New Zealand. The full text of the AANZFTA package, including the text and schedules of the Agreement, plus the associated documents and letters, was made available on the DFAT website on the day AANZFTA was signed.

The FTA was tabled in Parliament, along with a National Interest Analysis and a Regulation Impact Statement, on 16 March 2009 by Mr Crean. The agreement was examined by the Joint Standing Committee on Treaties (JSCOT), which included public hearings at which DFAT appeared before the Committee.<sup>4</sup> The conclusion of the AANZFTA negotiations also coincided with a Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) inquiry into Australia's relationship with ASEAN, which resulted in DFAT appearing three times before this Committee to explain the outcomes from AANZFTA. Both JSCOT and JSCFADT tabled their reports in Parliament on 24 June 2009.<sup>5</sup> Following the completion of the JSCOT process, Parliament will now consider the legislative amendments necessary to enable the Agreement to enter into force, which is expected to occur in last quarter of 2009 and, in any event, no later than 1 January 2010.

### **3.2 AANZFTA outcomes<sup>6</sup>**

On 27 February 2009 in Thailand, Australia's Minister for Trade, Mr Crean, along with his counterparts from the ten members of ASEAN – Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, The Philippines, Singapore, Thailand, Vietnam – and New Zealand, signed the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA). The AANZFTA package<sup>7</sup> consists of the following:

- (i) the FTA text, containing commitments on goods, services, investment, temporary movement of natural persons, electronic commerce, intellectual property, economic cooperation and competition policy;
- (ii) schedules of tariff commitments, containing tariff reduction and elimination commitments, and the associated rules of origin;
- (iii) schedules of specific services commitments;
- (iv) schedules of temporary movement of natural persons commitments;
- (v) an 'implementing arrangement' containing an agreed work program of economic cooperation projects;
- (vi) a letter from Australia's Minister for Trade to Vietnam's Minister of Industry and Trade, according recognition of Vietnam's Market Economy Status; and
- (vii) a Memorandum of Understanding on Article 1 (Reduction and/or Elimination of Customs Duties) of the Chapter on Trade in Goods.

Separately, Australia and New Zealand exchanged letters outlining how the AANZFTA is to apply between Australia and New Zealand.

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<sup>4</sup> The Hansard of DFAT's JSCOT appearance is available at:  
<http://www.aph.gov.au/hansard/joint/commtee/J12025.pdf>

<sup>5</sup> Final reports available at  
<http://www.aph.gov.au/house/committee/jfadt/asean1/report/Final%20Report.pdf>; and  
<http://www.aph.gov.au/house/committee/jsct/16march2009/report.htm>

<sup>6</sup> For more detail see the DFAT website: <http://www.dfat.gov.au/trade/fta/asean/aanzfta/index.html>

<sup>7</sup> Although the negotiations were conducted between Australia, New Zealand and ASEAN as an entity, AANZFTA contains separate tariff, services and movement of natural persons commitments for Australia, New Zealand and each of the ten ASEAN member countries.

AANZFTA is Australia's first plurilateral or multi-country FTA and is the first time either Australia or New Zealand were involved jointly in negotiating an FTA with other countries.

AANZFTA is the latest, and largest, FTA Australia has concluded and the most comprehensive trade deal that ASEAN has negotiated. The FTA was negotiated over sixteen rounds of meetings and took four years to bring to conclusion. The agreement covers some 20 per cent of Australia's total two-way trade in goods and services, worth \$112 billion in 2008. Australia stands to gain from this agreement across many sectors, including through the opportunities created for increased exports of goods and services, as well as the greater certainty and transparency provided for investors.

The AANZFTA tariff outcome is substantial. AANZFTA delivers over time tariff elimination commitments from the six more developed ASEAN member countries (Brunei, Indonesia, Malaysia, The Philippines, Singapore, Thailand) and Vietnam on between 90 and 100 per cent of tariff lines covering 96 per cent of current Australian exports to the region.<sup>8</sup> Australia will eliminate, over time, all tariffs on imports from AANZFTA parties.<sup>9</sup>

Exclusion of specific tariff lines from ASEAN reduction commitments under the FTA has been kept to a minimum, and generally does not exceed 1% of a country's national tariff lines. In addition, except for the small number of tariff lines excluded from tariff commitments, the agreement immediately binds existing applied tariff rates as at the base date of 1 January 2005. This means that applied tariffs that could otherwise, under WTO provisions, be increased significantly above those rates cannot be raised above the base rate. This is particularly valuable in the case of ASEAN, where much of Australia's current trade takes place under low ASEAN applied tariffs.

The FTA also contains regional Rules of Origin (ROO) which will enhance Australia's ability to tap into global supply chains. The ROO provide the basis for determining which goods will qualify for the tariff commitments negotiated as part of the FTA. The ROO criteria guarantee that materials from outside the AANZFTA region are substantially transformed within the region prior to trade between the FTA partners. In other words, goods which are deemed to "originate" in an AANZFTA party will receive the preferential AANZFTA tariff rate. For example, originating materials from any AANZFTA country used as inputs in its production can be counted towards an Australian good meeting the ROO for export to ASEAN countries or New Zealand. Similarly, exports by ASEAN countries and New Zealand to other AANZFTA parties can count originating materials from Australia towards meeting AANZFTA ROO. These rules of origin are particularly important for the

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<sup>8</sup>The agreement provides for high levels of tariff elimination, with significant levels of tariff-free treatment – generally around 90% - being achieved as early as 2013 for the more developed ASEAN economies. For example, duty free tariffs in Indonesia on 21.2% of lines at the base date of 1 January 2005 will increase to 58% in 2010, to 85% in 2013, and to 93.2% by 2025; for Malaysia, 57.7% of lines at duty free at the base date will rise to 67.7% in 2010, to 90.9% in 2013, and to 96.3% in 2020; for the Philippines 3.9% of lines at duty free at the base date will rise to 60.3% in 2010, to 91% in 2013, and to 94.6% in 2020; for Vietnam 29% of lines at duty free at the base rate, will stay at 29% until 2016 when it will increase to 54.6% and will rise to 90% of lines in 2020.

<sup>9</sup> The number of Australian tariff lines with tariff free treatment will increase from 47.6% at the base date of 1 January 2005 to 96.4% in 2010, 96.5% in 2013 and 100% in 2020.

manufacturing sector and the development of more efficient and competitive industries.

AANZFTA also contains 'WTO-plus' outcomes on services, increasing certainty for Australia's services exporters, including through services commitments across a range of sectors such as professional services, education, financial services and telecommunications. There is also a framework for parties to make commitments on temporary business entry of natural persons that go beyond services suppliers, to include goods sellers and investors.

On investment AANZFTA will create greater transparency and certainty for Australian investors in the region and establishes a regime of investment protections, including an investor-state dispute resolution mechanism.

AANZFTA includes useful commitments in other trade-related areas, such as intellectual property, as well as an economic cooperation component to provide technical assistance and capacity building to developing ASEAN countries to assist in implementation of the FTA.

AANZFTA is a forward-looking FTA with substantial built-in agendas and review mechanisms – in areas such as non-tariff measures, rules of origin, services and investment – which are aimed at having AANZFTA's commitments expand and deepen over time in line with the development of the ASEAN Economic Community. A 2016 date for a general review of the FTA was chosen deliberately because it is linked to ASEAN's goal of establishing an ASEAN Economic Community by 2015.

Importantly, AANZFTA provides a solid platform for Australia's ongoing economic engagement with ASEAN that will help ensure that Australia's competitiveness in the region is not undermined and positions Australia to influence the evolving regional economic architecture.

AANZFTA is consistent with WTO rules which permit FTAs under certain conditions to ensure that they are genuinely liberalising and will not undermine the multilateral trading system. The FTA also preserves the benefits of Australia's existing bilateral FTAs with New Zealand (Australia-New Zealand Closer Economic Relations Trade Agreement), Singapore (Singapore-Australia FTA) and Thailand (Thailand-Australia FTA). Once AANZFTA enters into force, exporters will be able to choose which FTA they would prefer to operate under, on a shipment by shipment basis. This will be determined by commercial considerations.

AANZFTA is expected to enter into force in the last quarter of 2009 and, in any event, no later than 1 January 2010 upon the conclusion of domestic processes by Australia, New Zealand and at least four ASEAN member countries.

## **Conclusion**

The negotiation of AANZFTA basically followed the five phases of the 'typical' FTA negotiating cycle, but the nature of the negotiation, involving 11 other parties, made the AANZFTA negotiation particularly complex, multilayered and multifaceted. Nevertheless, there are a number of general lessons that can be derived from the

negotiation. The first of these lessons relates to resources – negotiation of a large-scale plurilateral free trade agreement requires an intensive domestic and inter-governmental investment, particularly in terms of human resources, including expert negotiators.

Secondly, and linked to the issue of resources, is the critical importance of communication, both domestically and with FTA negotiating partners. In order to provide domestic decision-makers, including the Minister for Trade and Cabinet, with a balanced assessment of Australia's defensive and offensive interests, it is necessary to have clear and regular consultation with domestic stakeholders, business and other interested groups such as unions and other non-government organisations, and effective processes to consult across Commonwealth agencies and with state and territory governments. Effective communication and solid working relationships with FTA negotiating partners is of equal importance, given the various levels at which negotiations take place – expert working groups, senior officials concerned with broader policy issues, and Ministerial level contacts. Good working relationships are particularly important in the case of Ministers who are required to act decisively.

Finally, despite all the preparatory work and feasibility studies, the real importance of some matters becomes clear only during the course of the negotiations. As these matters arise, the importance of internal and external intergovernmental processes is reinforced and reemphasised. Intergovernmental processes play a significant role in achieving robust, consistent and transparent FTA outcomes.



## **Australian FTA Negotiating Process**

The negotiating cycle generally occurs as follows, though the time spent on each of the following five phases may vary considerably depending on the particular FTA:

### **1. Assessment of feasibility**

- feasibility study;
- consultation with stakeholders, (and with state and territory governments)/calls for public submissions.

### **2. Decision to launch negotiations**

- consideration by Ministers – seeking agreement to launch FTA negotiations;
- joint announcement of the launch of FTA negotiations;
- Minister for Trade makes a statement to Parliament;
- call for public submissions;
- creation of a negotiating team.

### **3. Substantive negotiations**

- Ministerial (Cabinet) approval of overall objectives, strategy and commitments to be offered by Australia (i.e. negotiating mandate);
- negotiations commence and continue until final package concluded;
- ongoing consultations with stakeholders, and with state and territory governments, final text cleared through internal legal processes;
- Ministerial (Cabinet) amendments to negotiating mandate (if necessary).

### **4. Conclusion of negotiations and legal verification**

- announcement of conclusion of negotiations (but details of FTA not released until after formal signature);
- Ministerial (Cabinet) approval of final negotiated package;
- process of legal verification of FTA text undertaken.

### **5. Ministerial signing and parliamentary scrutiny**

- first submission to the Executive Council (ExCo) (ExCo authorisation for signature is required);
- preparation of signatory texts;
- signing;
- details of FTA made public;
- tabling of the National Interest Analysis (NIA) in both Houses of Parliament;
- Joint Standing Committee on Treaties (JSCOT) to examine NIA and reports to Parliament;
- preparation of amending legislation to enable the Agreement to enter into force;
- Government responds to the recommendations of the JSCOT report (if necessary);

- entry into force of the Agreement after the Parties have notified each other of completion of all domestic requirements, necessary for entry into force, by third person note consistent with the relevant article included in the final provisions of the agreement;
- recording, archiving and publication in the Australian Treaty Series;
- registration with the UN/notification to WTO.