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Australia's exporters**



# **Submission to the Joint Standing Committee on Treaties Trans-Pacific Partnership Agreement**

March 2016

**Submission by the Export Council of Australia**

15 March 2016

The Committee Secretary  
 Joint Standing Committee on Treaties  
 PO Box 6021  
 Parliament House  
 Canberra ACT 2600

**Sent by Email to:** [jsct@aph.gov.au](mailto:jsct@aph.gov.au)

**Export Council of Australia  
 Submission to the Joint Standing Committee on Treaties on the Trans-Pacific Partnership Agreement (TPP)**

The Export Council of Australia (ECA) is pleased to make this submission to the Joint Standing Committee on Treaties (JSCOT) on the Inquiry into the TPP. On behalf of our members, and indirectly on of Australia’s international business community, the ECA makes this submission in support of TPP and its early entry into force in Australia.

**1. Previous Engagement**

The ECA previously provided commentary and recommendations on the TPP and the need to support the Agreement in its submission to the Department of Foreign and Trade (DFAT) on 2 July, 2014. Subsequently, the ECA has publically supported both the conclusion and the signing of the TPP and included information on the benefits of the TPP on our website and other marketing channels, as well as in the media and in its education and training.

**2. About the Export Council of Australia**

A not-for-profit, membership based organisation, the ECA is the peak industry body representing Australia’s exporters and importers, particularly SMEs. With a membership base of 1,000 and a reach of 15,000, the ECA represents companies of all sizes and across a wide range of industry sectors, including services exporters. The ECA’s core activities include research, advocacy, skills development and events. Some details on the ECA’s work are provided below.

- 2.1. The ECA works collaboratively with a number of Federal and State Government Departments to advance the interests of its members and the broader business community. These include Efic, DFAT, Austrade, the Department of Immigration and Border Protection (DIBP), the Department of Industry, Innovation and Science, the Office of Transport Security, and the Department of Agriculture and Water Resources (DAWR). The ECA is represented on many of the advisory groups administered by the above listed agencies, including the National Committee on Trade Facilitation (NCTF) and the Department of Agriculture (DAWR), and Water Resources Cargo Consultative Committee.
- 2.2. The ECA regularly provides submissions to government and its agencies on various reviews, as well as to parliamentary inquiries. These have included submissions relating to:
  - the Korea-Australia Free Trade Agreement (KAFTA) and the KAFTA Customs Bills
  - the Japan-Australia Economic Partnership Agreement (JAEPA) and the JAEPA Customs Bills
  - the China-Australia Free Trade Agreement (ChAFTA) and the ChAFTA Customs Bills
  - the EMDG Review
  - the Inquiry into Australia's Treaty Making Process
  - the Inquiry into the Business Experience in Utilising Australia's Free Trade Agreements
  - the Productivity Commission review into barriers to growth in Australian services exports

- The Inquiry into Australia's Future in Research and Innovation
- 2.3. The ECA also releases annual Trade Policy Recommendations (TPR), and the latest document, TPR 2015/16, includes commentary and recommendations regarding the Government's Free Trade Agreement (FTA) agenda and ways in which Government should work with industry to raise the level of understanding of FTAs.
  - 2.4. In 2014 the ECA launched a longitudinal survey, Australia's International Business Survey (AIBS), with Austrade, Efic and the University of Sydney, designed to capture data on the international business activity of Australian companies. The first survey captured data from over 1,600 Australian exporters, making it the most comprehensive investigation into Australia's international business activity in more than 15 years.
  - 2.5. AIBS 2015 (which was released on 30 July 2015) resulted from the collection of fully completed and validated responses from 1,237 companies involved in international business. The findings of this report are distinctive and significant because they provide key insights into the nature, needs, concerns and future plans of the overall Australian international business community from the company perspective.
  - 2.6. The ECA recently also released its Advancing Trade Development report, which examines the trade promotion activities offered by 10 of Australia's key export competitors including the United States, United Kingdom, New Zealand, and Singapore in a bid to encourage government to take a long-term, strategic approach to developing Australia's international trade.
  - 2.7. The ECA has been actively delivering education programs that focus on building the capacity and capability of companies to engage in international business for over 60 years. The organisation develops and delivers educational programs that cater for those companies looking to get into export and import, through to experienced exporters and importers.

### 3. Trade with TPP countries and support for the TPP

The ECA appreciates from the research conducted by DFAT that potential gains to Australian exporters and importers, (including SMEs) from a comprehensive TPP Agreement are significant. The twelve Parties to the TPP cover 11.2 per cent of the world's population, account for around 40 per cent of global GDP, and approximately 70 per cent of Australia's trade flows through the Asia-Pacific region. TPP Parties also include three of the largest economies—the United States, Japan and Canada—and five of Australia's top ten goods export markets: Japan, the US, New Zealand, Singapore and Malaysia. Seven of the twelve countries are listed in the AIBS 2015 top 20 international markets, these include: the United States (1st), New Zealand (3rd), Singapore (5th), Japan (6th), Canada (13th) and Vietnam (15th).

Not only will the TPP build on existing FTAs, it will also deliver new access into markets in Mexico, Canada and Peru with whom we do not have existing FTA. As outlined by Australia's Chief Negotiator for the TPP, Ms Elizabeth Ward, in her opening statement to JSCOT,

*“the TPP represents the largest trade liberalising deal concluded anywhere in the world for over twenty years. Not since the Uruguay Round of multilateral negotiations, has such an ambitious, comprehensive and market opening deal been achieved.”*

Some commentators propose the gains that will flow from the TPP will be small, citing modelling conducted by the World Bank, which suggests Australia will benefit by GDP growth of roughly 0.7 per cent by 2030. The ECA believes these economic benefits are not insignificant and will increase as more countries become party to the agreement. Indeed, the ECA realises that there are other studies which point to real potential benefits from the TPP. For these purposes, the ECA would refer to the work of the Peterson Institute for International Economics, which describes the TPP as

a "notable accomplishment" and "a substantial positive response to slowing world trade growth and rising trade barriers, and a major contribution toward a rules-based global economy."<sup>1</sup> Still further, the ECA is also conscious of the disadvantage to Australian business if they were excluded from the TPP, which included major trading competitors, and the compromise to Australia's wider FTA agenda if it was not to be party to the TPP.

Without detracting from the generality of this support, the ECA wishes to highlight the following specific elements that support the endorsement of TPP.

- 3.1. The ECA's preference is for trade liberalisation to occur on a multilateral basis. However, given that the WTO Doha Round of negotiations has failed, the ECA sees benefit in continuing to promote greater international trade and investment flows through bilateral, regional and plurilateral FTAs. On that basis, the ECA is of the opinion that the TPP represents a reasonable and desirable outcome that will advance Australian trade.
- 3.2. The ECA acknowledges that the agreement reached between the parties to the TPP is not a "perfect" outcome. As with other agreements, the TPP represents a compromise outcome reflecting the respective negotiating strengths of the various parties and their respective political sensitivities. In the case of the TPP (as with bilateral FTAs such as ChAFTA, KAFTA and JAPEA), cultural sensitivities on trade in some goods create their own limitations in certain areas and sectoral interests have created their own challenges as in the separate Chapter 4 on Textiles and Apparel.
- 3.3. While not all industries nor individuals are satisfied with all the outcomes, the ECA believes that the TPP delivers significant commercial outcomes across a wide range of agricultural products, resource and energy products, manufactured products, and services, which should not be downplayed. At the same time the ECA also believes that there would be significant disadvantage in Australia not being a party to the TPP.
- 3.4. The ECA is also of the view that the TPP is consistent with and does not detract from the parties' obligations to each other within the APEC trading community.
- 3.5. The ECA does not believe that the TPP is in any way inconsistent with any other negotiations to which Australia is a party, such as: the WTO Trade in Services Agreement, the WTO Environmental Goods Agreement, the India-Australia Comprehensive Economic Cooperation Agreement, the WTO Government Procurement Agreement, the WTO Trade Facilitation Agreement (TFA), the WTO Information Technology Agreement, the Regional Comprehensive Economic Partnership, and Indonesia-Australia Comprehensive Economic Partnership Agreement. Indeed, those other agreements may well be advanced by the TPP.
- 3.6. The ECA considers it essential that FTAs are truly liberalising and comprehensive in their coverage beyond merely the reductions in tariffs on goods or reductions in quota restrictions. In this regard, the inclusion in the TPP of Chapters on services, e-commerce, IP, labour, environment, SMEs, state-owned enterprises and designated monopolies, investment, business facilitation, and technical barriers to trade are important and the ECA welcomes the outcomes in the TPP.
- 3.7. Given its traditional constituency, the ECA has already developed significant expertise in the interests and needs of SMEs, which is recognised by the inclusion of the ECA on many consultative and advisory committees established and conducted by government agencies. The importance of SMEs and the need to address their specific requirements is also recognised in the recommendations contained in the Trade Policy Recommendations issued by the ECA, as well as in the extensive submissions made by the ECA to DFAT and to Parliamentary Inquiries into Australia's prospective and actual FTAs, as well as other trade issues. The ECA is therefore particularly pleased that the TPP includes specific provisions aimed at benefiting SMEs, including an emphasis on moving to

<sup>1</sup> The Peterson Institute for International Economics, *The Economic Effects of the Trans – Pacific Partnership: New estimates*, January 2016, <http://www.piie.com/publications/interstitial.cfm?ResearchID=2906>.

paperless trading, making customs and export delivery more effective and efficient, and user-friendly websites targeted at SMEs to provide easily accessible information about the TPP.

- 3.8. The ECA is equally pleased that the TPP includes state of the art e-commerce provisions driving the information economy and facilitating trade among the TPP Parties. For example, TPP Parties have committed to allow the movement and storage of data across borders, providing a platform for growth in Australian ICT exports. The ECA is confident the TPP will ensure appropriate consumer protections and the right of governments to regulate in the public interest and notes that Australia's regulatory framework, including the Privacy Act, will not be affected.
- 3.9. The ECA is strong advocate for initiatives that improve trade facilitation and has been an active supporter of Australia's efforts in this area including the WTO TFA. The ECA is also a member of the NCTF, which was established by the Australian government to advance the aims of the TFA. In the ECA submission to DFAT on the TPP in 2014, the ECA expressed its desire for there to be Chapters on environment, labour, trade facilitation and customs procedures, so it is pleasing to see that these are present in the final agreement. The TPP also includes additional commitments that will lower the costs of trade. This includes more transparent and efficient customs procedures making it easier for Australian companies to export and do business in the region. For example:
- TPP Parties will be required to provide an advance ruling on the tariff classification of a good, how it should be valued, whether a good is originating and how to claim preference.
  - Regional rules of origin and a single set of documentary procedures for products traded under the TPP.
  - Duty-free temporary admission of pallets and containers.
  - Mechanisms to address non-tariff barriers (NTBs) impeding trade.
  - Simplified rules and technical requirements for several products, including wine and spirits.
- 3.10. In the ECA's earlier submission to DFAT on the TPP, it was acknowledged that some form of limited Investor-State Dispute Settlement (ISDS) provision would need to be included in the TPP to reflect the interests of all parties to the TPP as a means to secure consent to the TPP. At the same time, the ECA was of the view that a properly drafted ISDS (which excluded Australia's legitimate national interests) would actually advance the interests of the parties to the TPP and would be in Australia's interest. The Investment Chapter in the TPP does contain ISDS provisions and the ECA is of the view that the ISDS provisions represent a desirable outcome that provides both for Australia's national interests and a sound basis for resolving disputes which may arise out of the TPP.
- 3.11. The ECA is aware of concerns on the inclusion of ISDS provisions in FTAs. However, the ECA does not believe that such concerns are warranted in all cases. The ECA is of the view that the merit (or otherwise) in an ISDS will depend on the specific terms of each ISDS provision when read together with any general dispute resolution provision that appears in that FTA. Further, when considering the provisions of an ISDS in an FTA, it should be remembered that it will also be available to Australian investors and exporters.

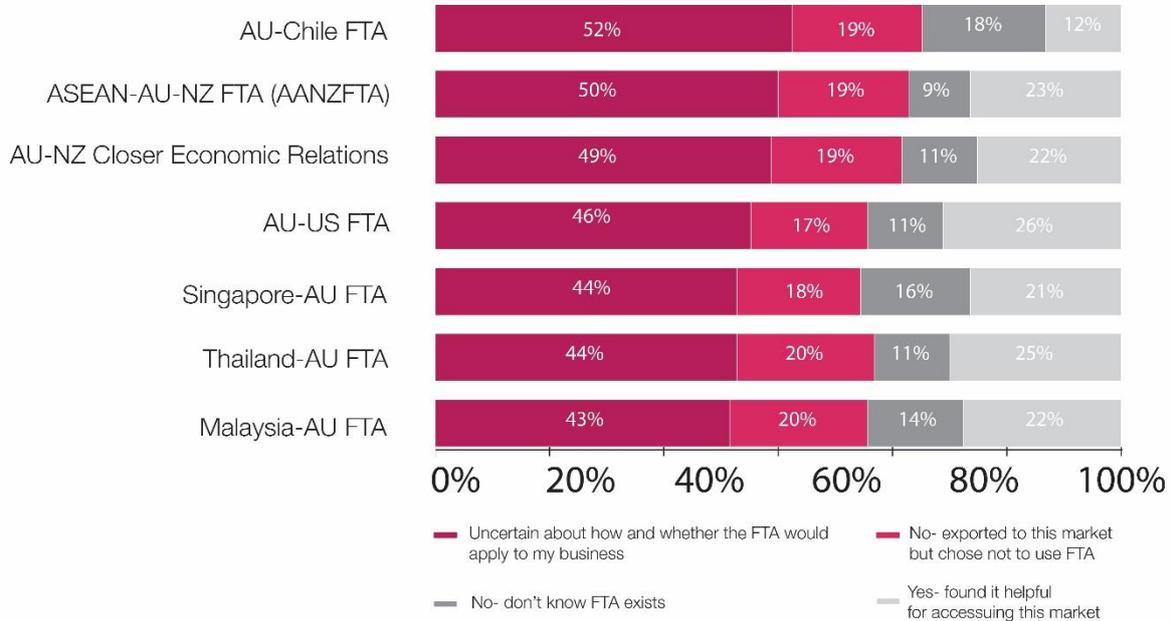
#### **4. Utilisation of the TPP**

- 4.1. While the ECA applauds the government's work in successfully negotiating landmark trade agreements, including the TPP, there is a need to ensure that the agreements are well understood by the business community, particularly with regard to SMEs.

4.2. AIBS 2015 reveals that there are significant knowledge gaps in the international business community that need to be addressed if the agreements are going to be fully leveraged (see Figure 1).

**Figure 1: Use of FTA by individual FTA**

Survey question: Please specify your use of FTAs in the markets exported to?



No. of respondents: ASEAN-AU-NZ FTA = 555, AU-Chile FTA = 172, AU-US FTA = 465, AU-NZ Economic Relations = 468, Thailand-AU FTA = 352, Malaysia-AU FTA = 389, Singapore-AU FTA = 439

© AIBS 2015

Source: AIBS 2015

- 4.3. The JSCOT report on ChAFTA states that to take full advantage of ChAFTA, and other FTAs, Australian business and industry must be provided with the education and support required to understand, navigate and comply with the FTAs' complexities. Moreover, following the inquiry into business utilisation of Australia's FTAs, the Joint Select Committee on Trade and Investment Growth's report notes that while the business community supports the government's pursuit of FTAs, potential reforms to improve awareness of their advantages could help improve businesses' ability to benefit from the Agreements.
- 4.4. The ECA appreciates that businesses need simple and practical information about FTAs that they can utilise quickly and easily. As a result, in 2015 the ECA developed an FTA Tool with ANZ Bank, and content partner Hunt and Hunt Lawyers, which it believes is an excellent starting point for businesses wishing to understand the basics about FTAs. The "FTA Dashboard" which has now been launched and is being further developed by DFAT will complement the ECA's work in this space and offer businesses a deeper level of detail.
- 4.5. These online tools are helping businesses to understand and navigate FTAs but there is room for greater collaboration between government and industry in terms of offering ongoing support and information.
- 4.6. The ECA is aware that there have been significant issues experienced by importers, exporters and their service providers with the customs aspects of implementation of the ChAFTA. Accordingly, the ECA believes that it is imperative for government to develop a more comprehensive strategy for education on the implementation of the TPP, to be undertaken a significant time before the TPP commences and in full co – operation with relevant industry associations.

**5. Reducing the adverse effects of non-tariff barriers**

- 5.1. Many international barriers to exports are barriers inherent in domestic regulations within the destination country. As highlighted in the ECA's 2015/16 Trade Policy Recommendations, NTBs are an increasing impediment to international trade flows. The ECA believes it is crucial to acknowledge the NTBs that Australian companies face and, where possible, take the necessary steps to ensure these are addressed.
- 5.2. The ECA does recognise that while NTBs can sometimes be addressed in FTAs, they are often complex obstacles to break down. The TPP should establish a framework to identify and address NTBs barriers after entry into force of the agreement, with the long term objective of facilitating increased trade.
- 5.3. As noted in the Productivity Commission's Report on Barriers to Growth in Services Exports,
- “Realising benefits from trade depends on governments committing to further reducing barriers at and behind the border. No one mechanism will be sufficient to address international barriers to services trade.*
- Trade agreements can be a precursor to market access, including establishing a commercial presence abroad, but realised benefits may be limited without supplementary measures, such as mutual recognition. The Australian Government can help by putting in place a framework in trade agreements for developing mutual recognition agreements.”<sup>2</sup>*
- 5.4. The 2015 B20 Trade Taskforce Policy Paper also called for G20 countries to reaffirm the standstill commitment and roll back existing protectionist measures, especially NTBs. As noted in the 2014 B20 Australia Trade Taskforce, NTBs can have a much greater negative impact on GDP growth than tariff barriers.<sup>3</sup>
- 5.5. In the agrifood sector, for example, the Australian Food and Grocery Council's (AFGC's) International Trade Report on NTBs facing Australia's agri-food exports identifies that NTBs have been increasing over the past decade.
- 5.6. The ECA believes there should be a focus on addressing NTBs to trade, is supportive of initiatives that aim to harmonise standards across countries and agrees that the government should build stronger frameworks for developing mutual recognition agreements. To enable effective progress to be made on removing these barriers, however, the government needs to invest in adequately resourcing the DFAT and the DAWR. Prioritising this will help break down NTBs and ensure the desired benefits of trade are delivered. At the same time, the ECA recognises that some NTBs cannot be resolved by trade agreements alone. In its 2015/2016 Trade Policy Recommendations the ECA stresses the merit of Australia having recourse to the mechanisms to resolve trade disputes—including those relating to NTBs—between nations, whether they be pursuant to the WTO Dispute Settlement Understanding or pursuant to the dispute resolution provisions in various FTAs of other agreements. The ECA understands that for many years, Australia has chosen not to initiate such proceedings and has confined itself to being a third party to WTO disputes brought by other nations. However, some ECA members have recently expressed their hopes that Australia should be prepared to initiate the proceedings directly both to protect the interests of Australian exporters and importers and also to ensure that those Australian interests are not disadvantaged compared to their competitors (such as the US, NZ and Brazil) whose governments are prepared to initiate proceedings directly. The ECA also believes that national relationships between countries are not adversely affected by being directly engaged in such disputes and that, in fact, the

<sup>2</sup> Productivity Commission, Barriers to Growth in Service Exports - Research report, 7 December 2015, page 2, <http://www.pc.gov.au/inquiries/completed/service-exports/report/service-exports.pdf>

<sup>3</sup> B20 Turkey, B20 Trade Taskforce Policy Paper 2015, September 2015, [http://b20turkey.org/policy-papers/b20turkey\\_trade.pdf](http://b20turkey.org/policy-papers/b20turkey_trade.pdf)

ability to conduct such disputes in a sensible manner according to agreed procedures represents evidence of a sound trading relationship.

## **6. Likely issues associated with the Bills to implement the TPP**

- 6.1. The ECA has been involved with the review of Bills introduced to implement other FTAs including ChATFA, KAFTA and JAEPA, which predominantly relate to relevant Customs legislation. On the basis that the Bills to implement the TPP will work in a similar way, the ECA wishes to make the following comments regarding those Bills so that the comments may be taken into account before those Bills are developed.
- 6.2. As set out in other submissions and in this submission, the ECA generally welcomes the TPP and its associated initiatives.
- 6.3. On the assumption that all necessary Parliamentary approvals are secured to allow the enactment and commencement of the TPP it is vital that the TPP is adopted as early as possible.
- 6.4. The ECA is of the view that not only is it important that the TPP is implemented at the earliest opportunity but is equally important that,
  - a) it is done in a manner consistent with the terms of the TPP;
  - b) the terms of the TPP and the legislation enabling the TPP (including, without limitation, the Bills) are communicated thoroughly to the trading community which will use the TPP whether they are importers, exporters, freight forwarders, licensed customs brokers or the providers of air and sea cargo transportation in a way which makes TPP readily accessible and comprehensible to those parties; and
  - c) the administration of the TPP and its provisions is undertaken in a manner which is sympathetic to its complexities especially in relation to the compliance with the complex rules of origin. Again, the ECA would refer to a number of submissions made to the previous Senate Inquiries regarding other FTAs, which have identified that rules of origin continue to provide difficulties in the adoption of other FTAs and can also create an impediment to parties actually using other FTAs.
- 6.5. For these purposes the ECA recommends that the Committee seek detailed guidance on engagement on TPP contemplated by paragraph 6.4.
- 6.6. By way of further support to the commentary in paragraphs 6.1 to 6.4 above, the ECA would refer the Committee to the recommendations of the B20 Committee as to impediments to the proper adoption and implementation of FTAs, as to the findings of the survey by the Intelligence Unit of The Economist as commissioned by HSBC, and the results of AIBS 2015, which identify that complexities, as well as a lack of awareness and understanding of FTAs, pose some of the most significant impediments to adoption and usage of those FTAs. Accordingly, the ECA has made and continues to make submissions to a number of parties (including the Minister for Trade and Investment) that Government agencies should be making steps to change and improve their levels of engagement with the trading community on FTAs.
- 6.7. The ECA notes that many of the operative provisions of the legislation intended to implement other FTAs have been contained in Regulations, which then are not subject to Parliamentary scrutiny in Inquiries which consider the Bills. The ECA would recommend that the DIBP and other Government agencies, that have been tasked to introduce and adopt legislation to implement the TPP, should also be obliged to introduce the associated Regulations at an early stage and for those Regulations (and any related procedures) to be subject to review prior to introduction, including review by the Committees which review the Bills. The ECA is aware that the "last minute" nature of provision of Regulations and procedural details regarding the ChAFTA had created some significant uncertainties and difficulties in implementing the ChAFTA, which issues have yet to be resolved.

- 6.8. The ECA is further concerned that the Bills may not specifically address many of the actual provisions of TPP. These need to be considered in the context that a number of potential offences are imposed on a strict liability basis. By way of example:
- a) the "voluntary disclosure" provisions of the Customs Act 1901 (Act) provide for an exception to strict liability under sections 243T and 243U of the Act in circumstances where a party identifies an error before the DIBP gives a notice of intent to audit that party or institute proceedings in relation to a potential breach of the Act. The ECA would recommend that in the case of the TPP that a party should be entitled to identify an error and avoid such liability at any stage before proceedings or other action is taken by the DIBP without needing to strictly meet the requirements of sections 243T or 243U of the Act. This would be consistent to the provisions of article 5.8.6 of the TPP;
  - b) the ECA observes that the provisions of Section B of Chapter 3 and Annex B to Chapter 3 are less specific than in other FTAs where the use of certificates of origin or declarations of origin and processes for claims of preference are the subject of prescriptive provisions. While the ECA welcomes, in theory, such more flexible provisions, the ECA is concerned that the DIBP adopts an approach to compliance and enforcement which equally allows for such flexibility. Accordingly, in these circumstances, the ECA recommends to the Committee that it request the DIBP to provide details of what will be its requirements for claims of preference at an early stage and how it will engage with industry on those requirements at an early stage;
  - c) Article 3.22 of the TPP provides that certain minor errors and discrepancies in certifications of origin shall not disqualify claims of origin or preference. If those discrepancies and variations do not invalidate the claim for origin then, at the same time, such discrepancies and variations should not lead to penalty or prosecution of a party using that certification of origin. The ECA recommends that this should appear in the Bills and the Guide associated with the issue of Infringement Notices by the DIBP;
  - d) Article 3.29 of the TPP provides for limited ability to seek post-importation claims for preferential tariff treatment. This would allow for the claim of preference and the claim for a refund. The ability to seek a refund in these circumstances would be contained in the Customs (International Obligations) Regulation 2015 (Regulation) and the ECA recommends that the Committee should seek assurance that such a specific provision will be included in the Regulation. For these purposes the ECA also recommends that the Committee seek clarification on the specific process to be adopted by the DIBP to allow for such post – importation claims as the terms of article 3.29 are quite general and much will depend on the procedural process to be adopted by the DIBP;
  - e) the ECA is concerned as to the circumstances in which Annex A to Chapter 3 may be invoked as the need to change procedural requirements such as set out there will create all manner of issues for importers, exporters and their service providers who then need to adopt entirely new procedures. The ECA recommends that the Committee request DFAT and DIBP to provide more details of the circumstances in which Annex A may be invoked and the specific measures it will adopt to assist parties to meet those requirements,
  - f) Article 3.27 of the TPP provides for parties will be provided with specific time periods to respond to request for information for verification of origin. The ECA recommends that this should be included in the Bills;
  - g) Article 3.27 of the TPP also refers to the right to undertake a verification visit by consent. The ECA recommends that the Bills and the Act should reflect that access to verify TPP compliance is only by consent in which the other terms of Article 3.27 must also be observed; and
  - h) Article 3.28.2 of the TPP provides for a denial of preferential treatment under the TPP. The ECA recommends that offence provisions in the Act should not apply to TPP issues as the denial of preferential status should be the extent of liability except to the extent that there is deliberate or reckless breach.

- 6.9. The ECA recommends that the Committee request the DIBP to provide a table which refers to each of the specific provisions of Chapters 3 and 4 of the TPP and which also identifies where those provisions have been adopted or are proposed to be adopted whether by the Bills, otherwise in the Act or the Regulations or by procedure to ensure that the Committee is satisfied that the provisions of the TPP have been properly accommodated in Australian law and practice. This should explain any inconsistencies between the TPP and the Bills as set out above.
- 6.10. The ECA recommends that the Committee should also request the DIBP to ensure that the correspondent Customs Service in other TPP parties provide a similar table in which they specify which provisions in its laws and practice accommodate the specific obligations in the TPP. This would assist the Committee and would also assist traders in ensuring that their rights under the terms of the TPP are being protected under corresponding TPP parties' laws.
- 6.11. Without limiting the generality of the above mentioned provisions, the ECA recommends that where a party (whether importer or exporter or service provider) has relied on a certification of origin which complies with the terms of the TPP but which proves to have been incorrectly issued (through no fault of the importer or exporter or service provider) then the party relying on that certification of origin should not be subject to prosecution, penalty or other compliance action or adverse finding by Customs either here or in the TPP Party country.
- 6.12. Further to the comments in the preceding paragraphs, the ECA recommends to the Committee that the DIBP shall also be asked to advise on the following:
- a) the adequacy of resources available to provide rulings and advice and the mechanisms to resolve disputes regarding claims on preferential access under the TPP;
  - b) the details of mechanisms and timeframes for parties to be able to secure advance rulings as contemplated by Article 5.3 of the TPP and to seek appeals regarding the implementation of the TPP;
  - c) the proposed work programs and timings to effect the "facilitation" and "co-operation" provisions as set out in Chapter 5 the TPP;
  - d) the availability of "helpdesk" facilities to those wishing to trade using the benefit of the TPP to satisfy inquiries; and
  - e) the protocols or any Memoranda of Understanding as between the DIBP and the correspondent Customs Services which would allow each country's officers to travel to the other party and undertake investigations regarding compliance with the terms of the TPP as provided for in Article 3.27 of the TPP and as otherwise which are likely to be provided for in the Bills.
- 6.13. Given that the provisions of the TPP and especially its rules of origin and the certification of origin regime may be complicated, the ECA is concerned that the DIBP does not adopt an unnecessarily strict approach to compliance by penalising inadvertent errors using the strict liability provisions of the Act or its associated Infringement Notice Scheme. While recognising the obligations of the DIBP to protect the revenue, the ECA believes that it is especially important that the DIBP (and its correspondent colleagues in the TPP countries) do not unnecessarily impose administrative penalties or institute prosecutions against parties for minor or inadvertent errors in claims of preference or in strict compliance with the terms of the legislation associated with the TPP. This is more important than ever given that the DIBP (and its predecessor in the Australian Customs and Border Protection Service) has made a number of public statements as to its increased compliance activities and the imposition of penalties and the issue of Infringement Notices. It is also important in the context that the terms of the Infringement Notice Scheme were recently amended to increase and facilitate the ability of the DIBP to issue Infringement Notices and limits the availability of review or the withdrawal of those Infringement Notices.

- 6.14. Accordingly, the ECA recommends that the DIBP amends the Guide associated with the Infringement Notice Scheme so that:
- a) there should be a general moratorium against prosecution activity, the issue of Infringement Notices or compliance activity for inadvertent breaches associated with TPP provisions of the Act for a six (6) month period from the commencement of the TPP Bills;
  - b) when considering whether to issue an Infringement Notice in respect of claim of preference or trade pursuant to the TPP, the relevant decision maker should be required to specifically take into account the wordings of the TPP in addition to the Act;
  - c) if a party has relied on a certification of origin which has been issued then the party should not be subject to an Infringement Notice if that certification is incorrect for reason other than error by the party relying on the Certificate of Origin;
  - d) the provisions regarding voluntary disclosure should be re-stated in the context of TPP so that if a party has made a corrected customs import declaration then that party should be deemed as having undertaken voluntary compliance in the context of sections 243T and 243U of the Act and should not be subject to Infringement Notice or other compliance action (including prosecution) even if the terms of these sections have not all been observed;
  - e) no compliance action, Infringement Notice or prosecution should follow if a party has made an inadvertent error associated with the issue or reliance on a Certificate of Origin as opposed to one which is deliberately false; and
  - f) when considering the compliance history of a party as part of a decision whether to issue an Infringement Notice, a decision maker should take into account that the TPP is of very recent introduction and therefore there may not be an extensive compliance history in respect of claims of preference under the TPP and that the absence of such a history should not mitigate against the interests of the party subject to the investigation.
- 6.15. The ECA points out that this practice as set out in the preceding paragraph would generally be consistent to the practice which was adopted at the time of the introduction of the FTA between Australia and the US (AUSFTA). At that stage Customs specifically adopted amendments to the (then) guidelines associated to the Infringement Notice Scheme which made particular provision regarding the terms of the AUSFTA and ensured that parties were treated in a manner consistent with the specific terms of the AUSFTA even if particular amendments were not made to the relevant legislation.
- 6.16. For those purposes, the ECA recommends that the Committee seek other assurances from Customs that the considerations of associated with the issue of an Infringement Notice and the terms of the TPP should also extend into decisions as to prosecution (or otherwise) for parties trading under the TPP.
- 6.17. The ECA notes that Article 3.32 of the TPP provides for a Committee on Rules of Origin and Origin Procedures. The ECA recommends that such a Committee should include the affected Australian trading community and that the Committee should seek assurances from DFAT, DIBP and other government agencies that the relevant Committee under Article 3.32 should be conducted in that manner. Similarly, the ECA recommends that the Australian trading community should be engaged in customs cooperation conducted under article 5.2.
- 6.18. The ECA would further recommend that the Committee seek confirmation from the Anti – Dumping Commission that Australian practice and procedure in anti – dumping and countervailing duty proceedings complies with Annex 6 – A to the TPP including citing specific provisions in the Act which provides for such compliance.

The ECA would be pleased to make further submissions or provide further information as requested by the Committee.

The ECA looks forward to providing further input and assistance where required.

Sincerely

A handwritten signature in blue ink, consisting of a series of fluid, connected strokes that form a stylized representation of the name 'Andrew Hudson'.

Andrew Hudson  
Director and Chair of the Trade Policy Committee  
Export Council of Australia