Export Council of Australia
The Voice for Australia's Exporters

3 September, 2015

The Committee Secretariat
Foreign Affairs, Defence and Trade Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by Email to: fadt.sen@aph.gov.au

Export Council of Australia
Submission to the Foreign Affairs, Defence and Trade Committee on the China-Australia Free Trade Agreement (ChAFTA)

At the outset, the Export Council of Australia (ECA) would like to commend the Australian Government for negotiating such a trade liberalising agreement with Australia's largest trade partner. On behalf of its members, and indirectly on behalf of Australia's international trade community, the ECA makes this submission in support of ChAFTA and its early entry into force in Australia.

1. Background on the ECA

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 below.

1.1. 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, the Department of Foreign Affairs and Trade (DFAT), Austrade, the Department of Immigration and Border Protection (DIBP), the Department of Industry and Science, and the Department of Agriculture.

1.2. 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 JAPEA Customs Bills, the Trade in Services Agreement (TiSA), and more recently

the EMDG Review, the Inquiry into Australia's Treaty Making Process and the Inquiry into the Business Experience in Utilising Australia's Free Trade Agreements.

1.3. The ECA also releases annual Trade Policy Recommendations (TPR), and the latest document, TPR 2014/15, 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.

1.4. 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.

1.5. 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.

1.6. 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. Previous engagement on ChAFTA

The ECA has already engaged extensively in consultations regarding the negotiation and completion of the ChAFTA. This has included making this submission into the ChAFTA and preparing two (2) submissions to the Inquiry by the Joint Standing Committee on Treaties into the ChAFTA (JSCOT Inquiry) and appearing before that Committee.

In addition, the ECA has also engaged extensively with submissions on other FTAs and worked with relevant Government agencies on implementation of the FTA.

3. Comments on the ChAFTA

As stated above the ECA has already made two (2) submissions (JSCOT submissions) to the JSCOT Inquiry. Copies are attached at the end of this submission. The JSCOT submissions address issues such as:

3.1. Trade with China and support for the ChAFTA

3.2. Likely issues associated with the Bills to implement the ChAFTA

3.3. Prospects for work on trade with China outside of the ChAFTA

3.4. Recommendations

The JSCOT Submissions address many of the Terms of Reference of this Inquiry and as a result, the ECA would also request that the Committee treat the JSCOT Submissions as also being part of its submission to this Inquiry.

The ECA also wishes to make additional comments as set out in paragraph 4 below.

4. Additional comments to the FADT Inquiry

The ECA believes that the comments and recommendations in the ECA's JSCOT submissions address the majority of the Term of Reference to this Inquiry.

4.1. Comments and recommendations specific to the FADT Terms of Reference

However, the ECA appreciates that the JSCOT Submissions do not address one of the Terms of Reference of this Inquiry, namely;

> *"domestic labour market tertiary obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders"*

In reviewing their provisions, the ECA has also had the benefit of comments made by the Minister for Trade and Investment and the opening statement made by Jan Adams, Deputy Secretary of DFAT, to the JSCOT Inquiry on 17 August 2015. On the basis of its review and their statements the ECA believes that while there has been some liberalisation effected by the ChAFTA (consistent with that in other FTA) that has not been at the expense of necessary regulations and protections. The relevant provisions reflect that important regulatory conditions must be complied with before overseas workers can be employed in Australia including any mandatory licencing or registration requirements. Further, the provisions regarding Investment Facilitation Agreements (IFAs) (as set out in the Memorandum of Understanding in the ChAFTA, and the requirements set out by the DIBP) preserve the need for compliance with Australian laws and regulation, as well as observing necessary labour market testing.

However, these provisions are complex and seem to have caused some concerns. Accordingly, the ECA recommends that the following provided steps could be considered.

a) Additional explanatory materials circulated directly in the public domain by DFAT and DIBP with additional explanatory materials on their websites.

b) A public register of applications for IFAs and associated Labour Agreements that would not require recourse to Freedom of Information provisions.

c) Regular reporting by the DIBP on grants of, and compliance with, Labour Agreements.

d) Seeking advice from the DIBP as to whether it has adequate resources and legislation to enforce the IFA and Labour Agreement requirements.

e) Requiring an audit of IFAs and associated Labour Agreements (together with grants of visas to skilled workers) by the Australian National Audit Office (ANAO). That audit should consider grant of visas and entry into Labour Agreements, as well as steps taken to comply with their terms and any compliance action by the DIBP. That audit should become part of the process to review the ChAFTA as contained in the ChAFTA. Recommendations and findings of the ANAO should then be implemented by procedural change and agreement with China (if necessary).

4.2. **Additional comments and recommendations on Chapter 3 of ChAFTA**

Many of the comments and recommendations in the JSCOT submissions addressed issues associated with Certificates and Declaration of Origin:

In addition the ECA wishes to address an issue as to the proposed form of these documents, which require details of exporters and producers as well as the importers. However, there could be circumstances where the importer on these documents is different to the importer on the Import Declaration (for example if the importer on the Certificate of Declaration of Origin is a trader of the goods or a supplier on wholesale who sells to the ultimate importer). In that case, preferential treatment could be denied unnecessarily. This could adversely affect Australian importers or exporters. Accordingly, the ECA **recommends** that the DIBP and China Customs adopt an approach to Certificates or Declarations of Origin which only requires details of the producer and exporter and not the importer **or** adopt an approach which allows another importer other than that named importer to use the Certificate or Declaration of Origin so long as the importer on the Import Declaration can establish that there has been no act in relation to the goods that affects the originating status of the goods.

5. Recommendations

The ECA would make the recommendations as set out in the JSCOT Submissions and as set out in paragraph 4 of this submission.

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

Yours Sincerely

Andrew Hudson

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

Attachment 1 - JSCOT Submission

28 July, 2015

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

Sent by Email to: jsct@aph.gov.au

Export Council of Australia
Submission to the Joint Standing Committee on Treaties on the China-Australia Free Trade Agreement (ChAFTA)

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6.1. 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, the Department of Foreign Affairs and Trade (DFAT), Austrade, the Department of Immigration and Border Protection (DIBP), the Department of Industry and Science, and the Department of Agriculture.

6.2. 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 JAPEA Customs Bills, the Trade in Services Agreement (TiSA), and more recently

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6.5. AIBS 2015 (which is to be released on 30 July 2015) resulted in 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. Results from AIBS 2015 are used in this submission to support our recommendations.

6.6. 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.

7. Trade with China and support for the ChAFTA

China was identified by AIBS 2015 participants as the second top export market, behind the United States. It was identified as the most important market for companies in agriculture, forestry and fishing, education and training, and agricultural equipment, technology and services. Respondents also selected China as the top market with which an FTA was most desired and ranked it the second most popular target market for new business. These statistics reinforce the significance of China as a trading partner, providing further justification for the early entry into force of ChAFTA.

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

7.1. The ECA's preference is for trade liberalisation to occur on a multilateral basis. However, given that the WTO Doha Round of negotiations has stalled with no conclusion in sight, 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 ChAFTA represents a reasonable

and desirable outcome that will advance Australian trade, especially given the significant achievement of China affording MFN status to Australia.

7.2. The ECA notes that China is Australia's largest two-way trading partner in goods and services, valued at $160 billion in 2013-14. China is also our largest export destination ($100 billion in 2013-14) and our largest source of merchandise imports, valued at $50 billion in 2013-14. DFAT reports that Australia's top exports to China (by value) are iron ore and concentrates, coal, gold and copper. China is also Australia's top overseas market for agriculture and services exports. The ECA is pleased that 85 per cent of Australia's goods exports to China will enter duty free when ChAFTA enters into force, increasing to 93 per cent after four years and 95 per cent when the agreement is fully implemented.

7.3. The ECA acknowledges that the agreement reached between the two countries is not a "perfect" outcome. As with other agreements, ChAFTA represents a compromise outcome reflecting the respective negotiating strengths of the parties and their respective political sensitivities. In the case of ChAFTA (as with KAFTA and JAEPA), cultural sensitivities on trade in some goods did create their own limitations in areas such as the export of rice and sugar. The ECA also recognises that other interests have led to the "carve out" for some goods from the terms of the ChAFTA, the retention of quotas and safeguards in other areas for certain trade and the novel terms of Article 16.6 allowing the parties to adopt more restrictive trade measures in the case of balance of payments, external financial difficulties or other threats. The ECA is not entirely surprised by these compromises given the sheer scale of the Chinese economy and the significant nature of the trading relationship. As a result, while not all parties are satisfied with all the outcomes, the ECA believes that the ChAFTA delivers significant commercial outcomes across a wide range of product sectors including barley, sorghum, seafood, sheepmeat, pork, dairy, beef, wine and wool, as well as resources, which should not be downplayed. In addition, the ECA welcomes the significant advances under the ChAFTA for Australian service providers and exporters, which are well beyond those secured under other FTA.

7.4. The ECA is also of the view that ChAFTA needs to be considered in the context of the wider and deeper relationship between Australia and China, which applies not only to trade but to political, cultural and defence relationships as well.

7.5. Australia faces increasing competition in China from the likes of the United States, Canada and the European Union, hence ChAFTA offers a significant competitive advantage particularly in the agricultural sector. ChAFTA also counters the advantages currently enjoyed by Chile and New Zealand through their existing FTAs with China. It is therefore imperative that ChAFTA enters into force as soon as

practicable so that Australian exporters can remain competitive and retain their market share.

7.6. The ECA is also of the view that ChAFTA is consistent with and does not detract from the parties' obligations to each other within the APEC trading community.

7.7. The ECA does not believe that ChAFTA is in any way inconsistent with any other negotiations to which Australia is a party, such as WTO negotiations as part of the Doha Round, the proposed Trade in Services Agreement the Environmental Goods Agreement, and Government Procurement Agreement. ChAFTA will also be consistent to the provisions of the WTO Trade Facilitation Agreement **("TFA")**. Indeed, those other agreements may well be advanced by ChAFTA. For example, the provisions in the ChAFTA aimed at facilitating trade, such as in the Chapters on Customs Procedures and Trade Facilitation and Electronic Commerce will form the basis for bilateral improvements which are now required pursuant to the TFA. In addition, the Chapter on Customs Procedures and Trade Facilitation will also create another basis on which the parties can work towards mutual recognition of their Trusted Trader/AEO programs now that the Australian Trusted Trader Programme has commenced.

7.8. The ECA is concerned that delay in, or failure to adopt ChAFTA will compromise the ability of any future Australian Government to pursue negotiations with its current FTA or related agreements. It would be inconsistent with Australia's expressed public position to advance and liberalise international trade if it was then to delay the implementation of an agreement, such as ChAFTA, which has been comprehensively negotiated and affords significant improvements in trade liberalisation with one of our major trading partners.

7.9. 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, commitments on services and investment are important and the ECA welcomes the outcomes in ChAFTA.

7.10. The ECA is aware of concerns on the inclusion of Investor State Dispute Settlement **(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. In the case of the ChAFTA, the ECA believes that a balanced position has been achieved with a number of "sensitive" areas having been excluded from the general dispute resolution provision in Chapter 15 and the comprehensive terms of the ISDS mechanism for investment in Section B of Chapter 9 read together with the side letter on Transparency generally set a sound approach to ISDS. The ECA believes that the ISDS in section B of Chapter 9 represents a reasonable and sensible basis to resolve disputes. For these purposes the ECA would also refer the Committee to the DFAT publication "ChAFTA – myths versus realities" dated 20 July 2015, which addresses

some ISDS concerns in the context of ChAFTA. 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.

7.11. The ECA recognises that ChAFTA includes some flexibility in terms of requirements for importers and exporters to hold documents evidencing that goods are entitled to preferential treatment. ChAFTA allows for exporters to elect to either secure Certificates of Origin issued by an authorised party (Article 3.14) or to provide their own Declaration of Origin (Article 3.15). The ECA welcomes such flexibility although it does seek confirmation that adequate resources will be made available for parties to secure "Advance Rulings" on origin pursuant to Article 4.9 as required before a Declaration of Origin can be used (Article 3.15.1). It has been the experience of many practitioners that there can be delays in securing such Advance Rulings and the ECA **recommends** that JSCOT seek confirmation on the process, resources and timing associated with such Advance Rulings.

7.12. The ECA notes the provisions of Article 16.6, which are unique to ChAFTA, and provide for circumstances in which a party can adopt restrictive measures that are not consistent to the terms of the ChAFTA. While the ECA understands the general intent of the provisions, the ECA also **recommends** that the Committee seek additional details on how the provisions will work as they will impact on business decisions and risks to business in using ChAFTA.

8. Previous engagement on ChAFTA

The ECA has already engaged extensively in consultations regarding the negotiation and completion of the ChAFTA. This has included making this submission into the ChAFTA and preparing a submission to the Inquiry by the Senate Standing Committee on Foreign Affairs, Defence and Trade into the ChAFTA.

In addition, the ECA has also engaged extensively with submissions on other FTAs and worked with relevant Government agencies.

9. Likely issues associated with the Bills to implement the ChAFTA

The ECA has been involved with the review of Bills introduced to implement other FTAs including KAFTA and JAEPA, which predominantly relate to relevant Customs legislation. On the basis that the Bills to implement the ChAFTA 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.

9.1. As set out in other submissions and in this submission, the ECA generally welcomes the ChAFTA and its associated initiatives.

9.2. On the assumption that all necessary Parliamentary approvals are secured to allow the enactment and commencement of the ChAFTA it is vital that the ChAFTA is adopted as early as possible and preferably before the end of 2015. This would

enable Australian traders to secure the benefits of the first reduction in tariffs and protection scheduled to take place in "year 1" which could be 2015 as well as the reductions scheduled to be effected in "year 2" (2016). The ECA **recommends** that the Committee seek confirmation of the likely date for commencement of ChAFTA.

9.3. The ECA is of the view that not only is it important that ChAFTA is implemented at the earliest opportunity but is equally important that,

a) it is done in a manner consistent with the terms of the ChAFTA;

b) the terms of the ChAFTA and the legislation enabling the ChAFTA (including, without limitation, the Bills) is communicated thoroughly to the trading community which will use ChAFTA whether they are importers, exporters, freight forwarders, licensed customs brokers or the providers of air and sea cargo transportation in a way which makes ChAFTA readily accessible and comprehensible to those parties; and

c) the administration of the ChAFTA 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 FTA which have identified that rules of origin continue to provide difficulties in the adoption of other FTA and can also create an impediment to parties actually using other FTA.

For these purposes the ECA **recommends** that the Committee seek detailed guidance on engagement on ChAFTA contemplated by paragraph 9.3 (b) .

9.4. By way of further support to the commentary in paragraphs 9.2 and 9.3 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. The ECA notes with approval the additional funding allocated to FTA engagement in the last Federal Budget, including funding for the "FTA Dashboard" being developed by DFAT and funding for additional outreach on FTAs. The ECA has, itself, developed an "FTA Tool" to assist the trading community understand the basics of FTAs. The ECA refers the Committee to the our recent submission to the Joint Select Committee on Trade and Investment Growth Inquiry into the Business Experience in Utilising

Australia's FTAs for more specific recommendations on improving the business community's understanding an utilisation of FTAs.

9.5. 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 ChAFTA, 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.

9.6. The ECA is further concerned that the Bills may not specifically address many of the actual provisions of ChAFTA. 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 ChAFTA 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;

b) Article 3.17 of the ChAFTA provides that certain discrepancies and variations in Certificates of Origin or in the format of Certificates of Origin will 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 Certificate 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. Further, the ECA also recommends that similar treatment should apply to discrepancies and variations in Declarations of Origin;

c) Article 3.14 refers to Certificates of Origin being issued by authorised bodies and Article 3.14.2 provides a process for verification of such bodies. The ECA **recommends** that details of those bodies and other information as contemplated by Article 3.14.2 should appear in the Bills or the Regulations implementing the ChAFTA and otherwise be subject to early disclosure to those seeking to use the ChAFTA;

d) Article 3.14.5 of the ChAFTA 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 intent of the terms "other valid reasons" and "force majeure" in Article 3.14.5 which would allow for such post – importation claims;

e) Article 3.21.4 of the ChAFTA provides that a party will be provided with no less than a three month period to respond to request for information pursuant to Article 3.21.1 of the ChAFTA. The ECA **recommends** that this should be included in the Bills;

f) Article 3.21.5 of the ChAFTA 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 ChAFTA compliance is only by consent in which the terms of Article 3.21.5 must also be observed; and

g) Article 3.22 of ChAFTA provides for a denial of preferential treatment under ChAFTA. The ECA **recommends** that offence provisions in the Act should not apply to ChAFTA issues as the denial of preferential status should be the extent of liability except to the extent that there is deliberate or reckless breach.

9.7. Arising from paragraph 9.6, 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 ChAFTA 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 ChAFTA have been properly accommodated in Australian law and practice. This should explain any inconsistencies between the ChAFTA and the Bills as set out above.

9.8. The ECA **recommends** that the Committee should also request the DIBP to ensure that its correspondent China Customs Service provides a similar table in which it specifies which provisions in its laws and practice accommodate the specific obligations in the ChAFTA. This would assist the Committee and would also assist traders in ensuring that their rights under the terms of the ChAFTA are being protected under corresponding Chinese laws.

9.9. Without limiting the generality of the abovementioned provisions, the ECA **recommends** that where a party (whether importer or exporter) has relied on a Certificate of Origin properly issued by an authorised party under the terms of the

ChAFTA which Certificate of Origin proves to have been incorrectly issued (through no fault of the importer or exporter) then the party relying on that Certificate of Origin should not be subject to prosecution, penalty or other compliance action or adverse finding by Customs either here or in China.

9.10. 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 ChAFTA;

b) the details of mechanisms and timeframes for parties to be able to secure advance rulings as contemplated by Article 4.9 of the ChAFTA and to seek appeals regarding the implementation of the ChAFTA ;

c) the proposed work programs and timings to effect the "facilitation" and "co-operation" provisions as set out in Articles 4.3 and 4.4 of the ChAFTA;

d) the availability of "helpdesk" facilities to those wishing to trade using the benefit of the ChAFTA to satisfy inquiries; and

e) the protocols or any Memoranda of Understanding as between the DIBP and its correspondent Chinese Customs Service which would allow each country's officers to travel to the other party and undertake investigations regarding compliance with the terms of the ChAFTA as provided for in Article 3.21 of the ChAFTA and as otherwise which are likely to be provided for in the Bills.

9.11. Given that the provisions of the ChAFTA and especially its rules of origin and the Certificate or Declaration of Origin regime may be complicated, the ECA is concerned that the DIBP does not adapt 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 Chinese Customs Service) 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 ChAFTA. 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 was 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.

9.12. 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 ChAFTA provisions of the Act for a six (6) month period from the commencement of the ChAFTA Bills;

b) when considering whether to issue an Infringement Notice in respect of claim of preference or trade pursuant to the ChAFTA, the relevant decision maker should be required to specifically take into account the wordings of the ChAFTA in addition to the Act;

c) if a party has relied on a Certificate of Origin which has been issued by an authorised body then the party should not be subject to an Infringement Notice if that Certificate of Origin 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 ChAFTA 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 ChAFTA is of very recent introduction and therefore there may not be an extensive compliance history in respect of claims of preference under the ChAFTA and that the absence of such a history should not mitigate against the interests of the party subject to the investigation.

9.13. The ECA points out that this practice as set out in paragraph 9.12 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.

9.14. 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 ChAFTA should also extend into decisions as to prosecution (or otherwise) for parties trading under the ChAFTA.

9.15. The ECA notes that Article 3.24 of the ChAFTA provides for a joint review of the origin documentary requirements including development of an electronic origin data exchange and increased use of Declarations of Origin. The ECA **recommends** that such a joint review should include the affected Australian trading community and that the Committee should seek assurances from DFAT, DIBP and other government agencies that the review should be conducted in that manner. The ECA also **recommends** that the industry should be included on the FTA Joint Commission (Chapter 14) and on the review of ChAFTA (pursuant to Article 16.5)

10. Work beyond the current terms of ChAFTA

10.1. Notwithstanding the merits of ChAFTA, the ECA would encourage the Australian Government to continue to work to improve the terms of the trading relationship between Australia and China and to improve certain aspects which may not have been able to be addressed in the current terms of ChAFTA.

10.2. China has a relatively complex and multi-layered regulatory framework. The ECA is of the hope that Australian Government officials both on the ground in China and in Australia will continue to offer support to companies, particularly those new to doing business in the market, to assist them in overcoming non-tariff barriers not addressed through ChAFTA. AIBS 2015 participants identified China as the most difficult market to do business in, with the most significant barriers including information about local language, culture &/or business practices (37 per cent), understanding local regulations (10 per cent), payment issues (9 per cent), and regulations that favour local firms (9 per cent). The importance of government and industry working together to assist businesses overcome these hurdles to doing business in what remains a complex market cannot be understated.

10.3. The ECA would **recommend** the adoption of a program to fully promote the benefits of ChAFTA to all those in trade including importers, exporters and service providers. It seems to be widely accepted that there is a significant lack of awareness and understanding of FTAs across the board. The ECA commends the work currently being undertaken by DFAT and Austrade to promote the benefits of the North Asian FTAs. However, the ECA believes sector specific engagement and expanding the scope to include the promotion of information about all of Australia’s FTAs is necessary. The ECA again refers the Committee to its submission to the Inquiry into the Business Experience in Utilising Australia's Free Trade Agreements for further recommendations on this issue. The ECA is working on developing workshops to

complement the government's FTA roadshow, which will provide practical information on exporting and utilising FTAs. Furthermore, profiling the positive stories to come out of the entry into force of ChAFTA, as well as existing FTAs, will be important in ensuring that the outcomes are not overshadowed by negative press.

10.4. While the ECA appreciates that the absence of Chapters on Labour, the Environment and Government Procurement may reflect the view that both countries are mature nations who recognise the importance of these issues through other agreements, the ECA believes that such Chapters have their place in an FTA (as with other Australian FTAs) and encourages the Government to continue to work with ChAFTA on these important issues. In particular, the ECA **recommends** early movement on Government Procurement pursuant to Article 16.8 and that industry is actively engaged on developing the Chapter. The ECA also recommends the government explores the idea of holding information sessions to assist Chinese Government agencies in acquiring goods and services from Australian entities and to assist Australian entities in sales of goods and services to Chinese Government Agencies. This aspect could be actioned now without necessarily waiting for the completion of negotiations on a new Chapter on Government Procurement.

11. Recommendations

Based on the commentary above, the ECA would make the recommendations to the Committee as set out in paragraphs 2.12, 2.13, 9.2, 9.3, 9.5, 9.6, 9.7, 9.8, 9.10, 9.12 , 9.14, 9.15, 10.3 and 10.4 of this submission.

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.

Yours Sincerely

Andrew Hudson

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

Attachment 2 - Supplementary JSCOT Submission

31 July, 2015

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

Sent by Email to: jsct@aph.gov.au

Export Council of Australia
Supplementary Submission to the Joint Standing Committee on Treaties on the China-Australia Free Trade Agreement (ChAFTA)

The Export Council of Australia **(ECA)** refers to its submission to the Committee dated 28 July 2015.

The ECA now wishes to make a supplementary submission to the Committee addressing some of the issues raised in its submission. In doing so, the ECA adopts the same defined terms as used in its submission of 28 July 2015.

As the Committee would be aware, in paragraphs 4.6 - 4.14 of its submission, the ECA made a number of comments regarding the need for the provisions of the Bills implementing the ChAFTA to be consistent to the terms of the ChAFTA and recommending that the Committee seek clarification from the Government (including, without limitation, the DIBP) that the DIBP will exercise a degree of proportionality and leniency when undertaking compliance activities and seeking to impose penalties or Infringement Notices in respect to alleged breaches of the provision of the Bills regarding the ChAFTA.

For these purposes, the ECA would also draw the attention of the Committee to the provisions of paragraph 2.10.2 of the ChAFTA which specifically identifies the approach to be taken regarding compliance and the issues of penalties (if any) regarding non-compliance with the ChAFTA.

The paragraph provides;

"In accordance with Article VIII of GATT 1994, neither Party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation, which is easily rectified and obviously made without fraudulent intent or gross negligence, shall be greater than necessary to serve merely as a warning".

In these circumstances, the ECA further **recommends** that the Committee seek clarification and confirmation from the DIBP that in undertaking compliance activities and seeking to impose penalties or issue Infringement Notices or seek prosecutions it will specifically take into account the provision of paragraph 2.10.2 of the ChAFTA and that the Guide relating to the Infringement Notice Scheme will be specifically amended to accommodate those particular directions.

Yours Sincerely

Andrew Hudson

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