

Chapter 2

Background

Context

2.1 The People's Republic of China (China) and Australia have been negotiating a free trade agreement for over a decade. China is Australia's largest two-way trading partner, largest export destination and largest source of merchandise imports.¹ Australia and China have an extensive bilateral relationship and a joint interest in the economic challenges and opportunities in the Asia-Pacific, such as removing trade barriers and increasing jobs.

2.2 Australia has recently signed trade agreements with other major trade partners in Asia. Australia signed the Japan-Australia Economic Partnership Agreement (JAEPA) on 7 April 2014 and the Korea-Australia Free Trade Agreement (KAFTA) on 8 April 2014. On 5 October 2015, 12 countries including Australia, concluded the negotiation of the Trans-Pacific Partnership Agreement (TPP). The other TPP countries were Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam.²

2.3 Australia is continuing to negotiate a range of other trade agreements. These include:

- the Australia-India Comprehensive Economic Cooperation Agreement;
- the Indonesia-Australia Comprehensive Economic Partnership Agreement;
- the Pacific Agreement on Closer Economic Relations (PACER) Plus; and
- the Trade in Services Agreement.

Implementation of agreement

2.4 The agreement was signed by the Minister for Trade and Investment, the Hon Andrew Robb AO MP, and the Chinese Commerce Minister, Mr Gao Hucheng, in Canberra on 17 June 2015.

2.5 Australia and China have signalled they intend to complete their domestic treaty processes, including passage of necessary implementing legislation, towards the end of 2015. After these processes are complete both countries will exchange written notifications, through diplomatic channels, certifying they are ready to commence the Agreement. ChAFTA will enter into force 30 days after this exchange of notes.

1 DFAT, *China country brief*, available at <http://dfat.gov.au/geo/china/Pages/china-country-brief.aspx> (accessed 6 October 2015).

2 The Hon Andrew Robb AO MP, Minister for Trade and Investment, 'Trans-Pacific Partnership (TPP) pact to drive jobs, growth and innovation for Australia', *Media Release*, 6 October 2015.

2.6 On 10 August 2015, Minister Robb wrote to the committee:

Please be advised that the Government is working towards entry into force of ChAFTA this year, subject to the completion of domestic processes by Australia and China. In view of this, legislative changes in relation to ChAFTA will need to be introduced immediately after JSCOT tables its report, which will necessarily be before the finalisation of the report by the Senate Foreign Affairs, Defence and Trade References Committee.³

2.7 On 21 October 2015, Minister Robb and the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, announced that support had been secured from the Opposition to ensure the passage of the implementing legislation for ChAFTA.⁴

Key aspects of agreement

2.8 ChAFTA is a free trade agreement comparable to Australia's other agreements, such as with the United States and Korea. The full agreement comprises 17 chapters with associated annexes, schedules and side letters. Other key documents include the National Interest Analysis, the Regulation Impact Statement and the Summary of Chapter Outcomes (extracted below).

2.9 Chapter 1 establishes the ChAFTA free trade area, consistent with World Trade Organization (WTO) rules. It sets out ChAFTA's relationship to other international agreements and provides general definitions to guide interpretation of the Agreement.

2.10 Chapter 2, Trade in Goods, establishes rules for trade in goods between the parties, and includes annexes setting out the agreed tariff elimination schedules and the administration of country-specific agriculture tariff-rate quotas and special agriculture safeguard mechanisms. It affirms a number of WTO provisions that already govern trade in goods among the parties and, in some cases, provides for more specific commitments, including a commitment not to use export subsidies between Australia and China. The chapter establishes a mechanism to address non-tariff measures on a case-by-case basis and the Committee of the Chapter, comprising representatives of each party, will make recommendations on further addressing non-tariff measures.

2.11 Chapter 3, the Rules of Origin, sets out the rules for determining whether products of Australia or China will be eligible for preferential tariff treatment under ChAFTA. It also establishes the procedures to claim preferential tariff treatment. The chapter provides for certificates of origin to be produced by 'authorised bodies'. It also provides for self-certification in certain circumstances.

3 The Hon Andrew Robb AO MP, Minister for Trade and Investment, correspondence, 10 August 2015, p. 1.

4 Minister for Trade and Investment, the Hon Andrew Robb AO MP and the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, 'Government and Opposition reach agreement on support for China-Australia free trade deal', *Joint Media Release*, 21 October 2015.

2.12 Chapter 4, Customs Procedures and Trade Facilitation, establishes rules which provide greater predictability of customs procedures through, *inter alia*, improving transparency. It also ensures the availability of a review mechanism to address disputes. The Chapter obliges both parties to issue advance rulings, giving greater certainty to business. It also reflects several key provisions of the WTO Agreement on Trade Facilitation.

2.13 Chapter 5, Sanitary and Phytosanitary (SPS) Measures, builds on commitments under the WTO Agreement on the Application of SPS Measures. It provides for cooperation and mutual technical assistance and capacity building, and supports work on equivalence, inspection and approval procedures. It establishes a Sub-Committee on SPS Cooperation. This chapter, and its sub-committee, is not designed to supplant the work of the existing Australia-China SPS High Level Dialogue on which the Department of Agriculture has the lead. It provides an extra avenue and trigger point to address SPS issues.

2.14 Chapter 6, Technical Barriers to Trade (TBT), builds on existing commitments under the WTO Agreement on TBT. It includes provisions for enhanced cooperation, information exchange and consultation between the parties and, on Australia's side, non-government standards bodies. The chapter establishes a Sub-Committee on TBT which will provide additional avenues for Australia to address TBT issues with China and will set a framework for potential cooperation projects.

2.15 Chapter 7, Trade Remedies, confirms business will continue to have full access to trade remedies under the WTO, including anti-dumping and countervailing measures. It also establishes a temporary bilateral safeguard measure which may be applied if either an Australian or Chinese domestic industry faces 'serious injury' due to a surge in imports following a reduction in tariffs under ChAFTA.

2.16 Chapter 8, Trade in Services, includes modifications and additions to commitments made in the WTO General Agreement on Trade in Services (GATS) that extend the scope of commitments, subject regulators to enhanced disciplines, and address behind the border barriers to trade in services. Such 'GATS-plus' provisions were a priority for Australia. The chapter is structured to enable both countries to make expansive market access commitments. A side letter on education services builds on China's market access commitment to list institutions on its study abroad website, improving the attractiveness of Australian private higher education institutions to Chinese students.

2.17 Annex 8-B, Financial Services, provides for measures additional to Chapter 8 in relation to financial services. China has undertaken comprehensive treaty-level commitments on financial services, including agreement to provisions on transparency, regulatory decision-making and streamlining of financial services licences applications. A side letter on financial services encourages greater cooperation and information-sharing on regulatory frameworks for over-the-counter derivatives (securities) and payment systems, to better manage risks and improve transparency.

2.18 Chapter 9, Investment, takes a two-stage approach to investment. Stage one is a short form investment chapter that will apply on entry into force. It includes basic market access provisions and establishes a committee on investment and a forward work program. Australia has made its market access commitments, including the higher Financial Investment Review Board screening threshold, in stage one. Stage two, the forward work program, includes a commitment to commence negotiations for a future comprehensive investment chapter within three years of entry into force of the agreement. The short form investment chapter commits both parties to non-discriminatory treatment of the other party's investors and investments (national treatment). Australian and Chinese investors will be able to enforce the national treatment commitments through an Investor-State Dispute Settlement (ISDS) mechanism.

2.19 Chapter 10, Movement of Natural Persons, provides for coverage of temporary entry of services suppliers and investors. China and Australia have committed to expeditiously process applications for immigration formalities, provide timely information on visa application progress, and ensure transparent procedures and requirements relating to the movement of natural persons of the other party. Both sides have made a commitment not to apply labour market testing to the categories where they have made specific commitments.

2.20 Chapter 11, Intellectual Property (IP), is consistent with Australia's current IP setting and includes a commitment to implement effective intellectual property enforcement systems with a view to eliminating trade in goods and services infringing intellectual property rights. This includes the provision of criminal procedures and penalties in appropriate circumstances. The chapter also includes commitments to continue to work to enhance IP examination and registration systems, to provide border measures in relation to counterfeit trademark or pirated copyright goods, and on the protection of undisclosed information.

2.21 Chapter 12, Electronic Commerce, includes a commitment to maintain the practice of not imposing customs duties on electronic transmissions between the two countries (subject to the WTO Work Programme on Electronic Commerce). It also includes a commitment to protect electronic commerce customers in a manner at least equivalent to protections for consumers engaged in other forms of commerce and provisions to promote cooperation in relation to online consumer protection and the regulation of unsolicited commercial electronic messages (spam).

2.22 Chapter 13, Transparency, requires the prompt publication of all laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by ChAFTA. The parties shall notify each other, where possible, of any proposed or actual law, regulation, procedure or administrative ruling of general application that might materially affect the operation of ChAFTA or otherwise substantially affect the other party's interests under ChAFTA.

2.23 Chapter 14, Institution Provisions, establishes a Joint Commission, consisting of representatives of both parties, to be convened annually and otherwise at a party's request. The Joint Commission will oversee implementation and operation of ChAFTA, and supervise and coordinate the work of all subsidiary bodies.

2.24 Chapter 15, Dispute Settlement, includes a binding State-to-State dispute settlement mechanism modelled on previous free trade agreements and the WTO system. Most substantive obligations in ChAFTA will be subject to this mechanism except those in the chapters on Electronic Commerce; Sanitary and Phytosanitary Measures; Technical Barriers to Trade; and the Movement of Natural Persons chapter (save for disputes meeting certain criteria).

2.25 Chapter 16, General Provisions and Exceptions, sets out a number of WTO-style general and security exceptions which apply to several chapters of ChAFTA. The chapter provides that nothing in ChAFTA shall require a party to furnish or allow access to confidential information that would impede law enforcement, be contrary to the public interest or prejudice legitimate commercial interests of public or private enterprises. The chapter also references the importance of cooperation, particularly with respect to competition and consumer welfare, and sets out the means by which such cooperation should occur.

2.26 Under this chapter both parties shall review ChAFTA to further its objectives within three years of entry into force and at least every five years thereafter, unless otherwise agreed.

2.27 Chapter 17, Final Provisions, governs the way in which ChAFTA operates as a treaty. It establishes the processes by which ChAFTA will enter into force, how it may be amended and the conditions under which it may be terminated.

2.28 Four side letters between Australia and China cover the areas of:

- skills assessment processes for temporary skilled labour visas;
- financial services;
- education services; and
- legal services.

Joint Standing Committee on Treaties (JSCOT)

2.29 JSCOT tabled its report into ChAFTA on 19 October 2015. The majority report supported the treaty but noted that ChAFTA has 'proved more controversial than previous agreements, particularly regarding the provisions for labour'.⁵

2.30 The committee made five recommendations:

- that all government departments and agencies responsible for curbing unlawful immigration activity, particularly the Department of Immigration and Border Protection, are adequately resourced to carry out their functions effectively and efficiently;
- that Austrade is sufficiently resourced to support dedicated officers, with the specific expertise required to provide information and assistance to individual sectors to facilitate access to the Chinese market;

5 JSCOT, Treaty tabled 17 June 2015, *Report 154*, October 2015, p. 59.

- that the Department of Agriculture develop a set of performance indicators to measure progress on the removal of non-tariff barriers; and the Department of Agriculture and the relevant sections of the Department of Foreign Affairs and Trade are adequately resourced to enable effective progress to be made in removing non-tariff barriers;
- that the Australian Government prioritise implementation of the recommendations of the Review of the Tax Arrangements Applying to Collective Investment Vehicles report and Australia as a Financial Centre — Building on our Strengths (the Johnson Report) in order to achieve full utilisation of the China Australia Free Trade Agreement for Australian financial services; and
- that binding treaty action be taken.⁶

2.31 A dissenting report was made by the Hon Kelvin Thompson MP, the Hon Melissa Parke MP, Senator Sue Lines and Senator Glenn Sterle, which:

- opposed inclusion of ISDS provisions in ChAFTA;
- noted that the skills assessment processes in the ChAFTA side letters had caused concern regarding their impact on workplace skills and safety standards; and
- called on the government to accept amendments to the *Migration Act 1958* (Migration Act) proposed by Labor as outlined below.

2.32 The dissenting report stated that amendments to the Migration Act would:

1. require employers nominating 457 visa workers under work agreements, including ChAFTA IFAs, to meet *labour market testing* requirements (legislated labour market testing requirements currently apply only to employers under the general 457 visa stream).
2. require the Minister, before entering a work agreement with an employer, to be satisfied that base pay rates for 457 workers will be greater than the *Temporary Skilled Migration Income Threshold*.
3. require the Minister, before entering a work agreement, to have regard to:
 - whether the agreement will support or create Australian jobs (*Australian jobs test*);
 - a *labour market need statement* provided by the employer demonstrating why they need to utilise temporary skilled migration (writing into the Migration Act requirements currently set out in Departmental guidelines for project-based work agreements);
 - a *training plan* adopted by the employer showing how they will improve the skills of local workers (writing into the Migration

6 JSCOT, Treaty tabled 17 June 2015, *Report 154*, October 2015, pp xvi-xvii.

Act requirements currently set out in Departmental guidelines for the former Labor Government's Enterprise Migration Agreements and Meat Industry Labour Agreements);

- whether the 457 workers will be able to *transfer skills* to Australian workers;
 - an *overseas worker support plan* showing how the employer will provide 457 visa workers with support and assistance during their stay in Australia, including information about workplace entitlements and community services (writing into the Migration Act requirements currently set out in Departmental guidelines for Project Agreements).
4. provide the Minister with power to impose *additional safeguards* on work agreements to ensure that they have a positive impact on Australian jobs (such as minimum numbers of Australian workers to be employed or a ceiling on the number of overseas workers).
 5. require the Minister to publish a register of work agreements entered into and to report annually to Parliament on the operation and impact of work agreements.
 6. increase the *Temporary Skilled Migration Income Threshold* (TSMIT) from \$53,900 to \$57,000 (restoring two years of indexation increases not provided by the Coalition Government) and index it to wages growth.
 7. extend the TSMIT from the general (standard business sponsor) 457 visa stream to 457 visas granted under work agreements, including ChAFTA Investment Facilitation Arrangement (IFA) work agreements.
 - The amendments would give the Minister the power to exempt an individual work agreement or class of work agreements from the operation of this provision, in order to retain flexibility in areas with special circumstances (such as Designated Area Migration Agreements or Meat Industry Labour Agreements).
 8. strengthen enforcement of *skills assessment and occupational licencing* requirements by creating new visa criteria and conditions for 457 visa workers in occupations where it is mandatory to hold a licence, registration or membership (such as electrical or plumbing occupations where workers must hold State and Territory occupational licences).
 - A new visa criterion will require visa applicants in these occupations either to hold the relevant licence when they apply for a visa or to demonstrate that they meet the requirements for obtaining a licence. This criterion will need to be met for the Minister to grant a 457 visa.
 - New visa conditions will require 457 visa holders in licenced occupations:
 - not to perform the occupation before obtaining a licence;

- to obtain the licence within 60 days of arriving in Australia;
 - to provide the Department with documentation showing they hold the licence, and showing any conditions or requirements imposed on their licence, before they perform the occupation; to comply with any conditions on the licence;
 - not to engage in any work which is inconsistent with the licence or conditions imposed on the licence;
 - to notify the Department of any changes to their licence or the conditions imposed on the licence.
- These new visa conditions will improve the Department's ability to enforce occupational licencing requirements and ensure 457 visa workers do not operate as unlicensed workers in trades such aselectrical work;
 - Breaching these visa conditions would provide the Department with grounds to cancel the workers' visa and to impose sanctions on the nominating employer.⁷

2.33 The dissenting report recommended that ChAFTA not be ratified until these legislative changes have been made.

2.34 Senator the Hon Joe Ludwig added additional comments to the report, noting the importance of ratifying ChAFTA as soon as possible to allow business and industry to access the full advantage of the agreement, but noting that this should not be achieved at the 'expense of Australian jobs'. Senator Ludwig stated '[t]he government should be prepared to accommodate legislated safeguards that enable ChAFTA to enter into force this year and ensure the full benefits of the agreement can be realised'.⁸

Proposed legislation

2.35 On 16 September 2015 the Government introduced the Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015 (Customs bill) and the Customs Tariff Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015 into the House of Representatives. The Explanatory Memorandum for the Customs bill stated:

The purpose of the Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015 (the Bill) is to amend the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from China to give effect to the China-Australia Free Trade Agreement (the Agreement). The Customs Act amendments will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

Complementary amendments will also be made to the *Customs Tariff Act 1995* (the Customs Tariff Act) by the Customs Tariff Amendment (China-

7 JSCOT, Treaty tabled 17 June 2015, *Report 154*, October 2015, pp 80-82.

8 JSCOT, Treaty tabled 17 June 2015. *Report 154*, October 2015, p. 96.

Australia Free Trade Agreement Implementation) Bill 2015 to give effect to the Agreement.⁹

2.36 On 17 September 2015, the provisions of the bills were referred by the Senate to the Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report on the next working day after the tabling of the report of the Senate Foreign Affairs, Defence and Trade References Committee into the Proposed China-Australia Free Trade Agreement.¹⁰

Agreed amendments

2.37 On 21 October 2015, it was announced that the Opposition would support the passage of ChAFTA's implementing legislation as an agreement had been reached with Government which would implement safeguards into the Migration Regulations, making them legally binding. These safeguards will:

- require labour market testing for all work agreements;
- require 'market salary rate' for standard 457 visas to use enterprise agreement rates, where they exist, as the salary benchmark; and
- implement more stringent visa conditions for 457 visa workers in trade occupations.¹¹

2.38 During debate of the implementation legislation for ChAFTA in the House of Representatives on 21 October 2015, the Opposition Leader, the Hon Bill Shorten MP described these safeguards as follows:

Labor's safeguards include amendments to the migration regulations which will require employers under work agreements to carry out labour market testing. This will require advertising for jobs for local workers before turning to 457 workers. Labor has also secured improvements in the immigration department guidelines which will require employers who enter work agreements to: provide a labour market needs analysis showing there is a genuine need to use overseas workers; implement a training plan to tackle skills shortages by training local workers; and adopt an overseas worker support plan to provide their 457 workers with information about their workplace rights, entitlements and other support services. Our safeguards also give the immigration minister the ability to require a minimum number of local workers to be employed on these projects, or to impose ceilings on the number of overseas workers.

...we have also secured amendments to the migration regulations to improve the market salary rate requirement for 457 visa workers. The market salary rate requirement is designed to ensure that temporary skilled migration does not undermine Australian wages and conditions. Labor's amendment to the regulation will strengthen this requirement by using

9 Explanatory Memorandum, p. 2.

10 *Journals of the Senate*, 17 September 2015, p. 3147

11 The Hon Bill Shorten MP, Opposition Leader, *House of Representatives Hansard*, 21 October 2015, p. 21.

enterprise agreements as the benchmark for assessing whether market salaries being paid...Labor has also secured agreement from the government to review the temporary skilled migration income threshold. This threshold is a safeguard designed to ensure that the temporary migration system is used for genuinely skilled jobs; not for entry-level positions, or relatively less skilled work. The review will consider the level of the threshold, and whether it should be indexed in line with wages growth, or possibly inflation, as another measure...

Labor has secured new visa conditions to ensure that 457 visa holders in trades occupations have the necessary skills and qualifications to perform their work safely and to the appropriate quality standards expected of Australian jurisdictions. Labor's new conditions for the 457 visa holders will require them to not perform the occupation unless: they hold the relevant licence; obtain the licence within 90 days of arriving in Australia; comply with any conditions to which the licence is subject; not engage in any work which is inconsistent with the licence; and notify the immigration department in writing if the licence is refused, revoked, seized or cancelled. These new safeguards for 457 visa holders in trades occupations will ensure that 457 visa workers in licenced trades such as but not limited to electricians and mechanics, obtain the necessary Australian licences and certifications. The safeguards will ensure that federal immigration authorities have extra information for monitoring and compliance of occupational licensing requirements. And also, they will improve coordination between the federal immigration department and the state and territory occupational skills and workplace safety regulators. Non-compliance with these visa conditions would be grounds for a 457 visa to be cancelled. Importantly, it would also provide grounds for imposing sanctions on unscrupulous employers who engage overseas trades workers on an unlicensed basis.¹²

2.39 Correspondence from Minister Robb to Senator Wong containing the details of the agreement to ensure the passage of the legislation to implement ChAFTA is attached at Appendix 2.¹³

12 The Hon Bill Shorten MP, Opposition Leader, *House of Representatives Hansard*, 21 October 2015, pp 21-22.

13 Correspondence from the Minister for Trade and Investment, the Hon Andrew Robb AO MP to the Shadow Minister for Trade and Investment, the Hon Senator Penny Wong, dated 20 October 2015.