

The Senate

Foreign Affairs, Defence and Trade
References Committee

China-Australia Free Trade Agreement

November 2015

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFPA	Australian Forest Products Association
AMWU	Australian Manufacturing Workers' Union
CFMEU	Construction, Forestry, Mining and Energy Union
ChAFTA	China-Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
DIBP	Department of Immigration and Border Protection
ECA	Export Council of Australia
FSC	Financial Services Council
ISDS	investor-state dispute settlement
IFA	Investment Facilitation Arrangement
JSCOT	Joint Standing Committee on Treaties
TSMIT	Temporary Skilled Migration Income Threshold

Chapter 1

Introduction

Referral

1.1 On 24 March 2015, the Senate referred the following matter to the Foreign Affairs, Defence and Trade References Committee for inquiry and report:

The proposed China-Australia Free Trade Agreement, with particular reference to the impact of the agreement on Australia's:

- a. economy and trade;
- b. domestic labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders;
- c. investment; and
- d. social, cultural and environmental policies.

That, in conducting the inquiry, the committee shall review the agreement to ensure it is in Australia's national interest, and have regard to the report of the Joint Standing Committee on Treaties on the proposed agreement.

That the committee report within one month of the tabling of the report of the Joint Standing Committee on Treaties on the proposed agreement.¹

1.2 The agreement was tabled in the Parliament on 17 June 2015 and was referred to the Joint Standing Committee on Treaties (JSCOT) for inquiry and report.² On 19 October 2015, JSCOT tabled its report into the ChAFTA. The majority report made five recommendations, including that binding treaty action be taken in relation to ChAFTA.³

Conduct of inquiry

1.3 The committee advertised the inquiry on its website and in *The Australian* newspaper. The committee also wrote to individuals and organisations likely to have an interest in the agreement, drawing their attention to the inquiry and inviting them to make written submissions.

1.4 The committee received 69 submissions to the inquiry. These submissions are listed at Appendix 1, and are available on the committee's website: www.aph.gov.au/senate_fadt. The committee also received 57 form letters from individuals expressing opposition to the agreement.

1 *Journals of the Senate*, 24 March 2015, p. 2371.

2 House of Representatives, *Votes and Proceedings*, 17 June 2015, p. 1397.

3 Joint Standing Committee on Treaties, Treaty tabled on 17 June 2015, *Report 154*, October 2015, p. 66.

Structure of the report

1.5 Chapter 2 provides background to the agreement. Chapter 3 considers some of the key trade outcomes. Chapter 4 discusses the key issues raised during the inquiry. Chapter 5 contains the committee's conclusion and recommendations.

Acknowledgements

1.6 The committee thanks all those who assisted the inquiry by providing submissions and other material.

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.

Chapter 3

Trade outcomes

Introduction

3.1 This chapter considers the trade outcomes achieved by ChAFTA, the timing of entry into force, technical barriers to trade, and Australia's trade relationships.

Value of trade outcomes

3.2 Tariff reductions for Australian products (particularly agricultural) exported to China were highlighted as key outcomes of ChAFTA. On entry into force, 85 per cent of Australia's exports (by value in 2013) to China will enter duty free, rising to 93 per cent on full implementation. The Department of Foreign Affairs and Trade (DFAT) *Outcomes at a Glance* document states:

For agriculture, the Australian Government has secured elimination of tariffs on entry into force for barley and sorghum, and rapid tariff reduction on other agriculture exports, including seafood, sheepmeat, pork and a variety of horticulture. Other key agriculture outcomes include:

- dairy: tariffs up to 20 per cent eliminated within 4 to 11 years.
- beef: tariffs of 12 to 25 per cent eliminated over 9 years.
- wine: tariffs of 14 to 20 per cent eliminated over 4 years.
- wool: a new Australia-only duty free quota, in addition to continued access to China's WTO quota.

3.3 Further, on entry into force, 92.9 per cent of Australia's resources, energy and manufactured products exports will enter China duty free, with most remaining tariffs removed within four years.¹

3.4 For the Australian services suppliers in ChAFTA, China has offered a number of services sector commitments.² Key outcomes include:

- legal services: Guaranteed market access for Australian law firms to establish commercial associations with Chinese law firms in the Shanghai Free Trade Zone (SFTZ);
- education services: Within one year of entry into force, China will list on a key Ministry of Education website 77 Australian private higher education institutions registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS);

1 Department of Foreign Affairs and Trade, *Outcomes at a Glance*, available at: <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx> (accessed 8 October 2015).

2 Department of Foreign Affairs and Trade, *Outcomes at a Glance*, available at: <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx> (accessed 8 October 2015).

- telecommunications services: Guaranteed market access for Australian companies investing in specified value-added telecommunications services in the Shanghai Free Trade Zone (SFTZ), providing greater certainty for Australian telecommunications investments in the SFTZ.
- financial services: China has committed to deliver new or improved market access to Australian financial services providers in the banking, insurance, funds management, securities, securitisation and futures sectors.
- Tourism and travel-related services: China has guaranteed that Australian services suppliers will be able to construct, renovate and operate wholly Australian-owned hotels and restaurants in China.
- Health and aged care services: China will permit Australian service suppliers to establish profit-making aged care institutions throughout China, and wholly Australian-owned hospitals in certain provinces. This will greatly expand the Australian private health sector's offering of medical services through East Asia.³

3.5 Remaining Australian tariffs on Chinese imports will be eliminated progressively. The DFAT *Outcomes at a Glance* document states this will allow consumers and businesses to 'benefit from lower prices and greater availability of Chinese products'.⁴

3.6 A number of submissions were received from businesses and commercial organisations which would be impacted by the trade outcomes of ChAFTA. This included a large number of agribusiness organisations representing those involved in wine, beef, pork, dairy, wool and others. For example the National Farmers' Federation strongly supported the agreement and said it will 'provide millions of dollars in export value to Australian farmers'.⁵ The Seafood Trade Advisory Group stated that 'direct access to our largest market in China will result in increased competitiveness for Australian product directly traded into mainland China enabling investment in supply chains and infrastructure'.⁶

3.7 GrainGrowers also supported ChAFTA, although it offers no preferential access to its largest export, wheat. GrainGrowers noted:

However, the deal is extremely important to our industry because of the preferential tariff access achieved for other important Australian grain exports. The deal is also a critical step in underpinning the very important

3 Department of Foreign Affairs and Trade, *Outcomes at a Glance*, available at: <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx> (accessed 8 October 2015).

4 Department of Foreign Affairs and Trade, *Outcomes at a Glance*, available at: <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/key-outcomes.aspx> (accessed 8 October 2015).

5 *Submission 22*, p. 5.

6 *Submission 12*, p. 1.

and mutually beneficial Australia-China trade relationship and because it provides the basis on which to enhance trade in the future.⁷

3.8 The Minerals Council of Australia was also supportive of ChAFTA:

On minerals and energy, ChAFTA strengthens trade and investment opportunities through tariff reductions and elimination, liberalising arrangements on mining related services and investment, machinery to review and address non-tariff measures, and provisions on labour movement.⁸

3.9 The Australian Bankers' Association characterised ChAFTA as ground breaking for the banking industry and supported the efforts to reduce and remove impediments to trade in financial services. It stated the agreement will 'facilitate deeper participation by Australian financial institutions in China and strengthen financial services trade and investment in both directions'.⁹ Similarly, the Financial Services Council (FSC) urged swift implementation. It noted:

Financial services cannot be exported easily unlike commodities for example. They rely on the construction of regulatory architecture. This agreement between Australian and Chinese governments delivers this architecture. Because of this architecture, trade with China and therefore economic growth will increase. In a tangible sense, ChAFTA will have a positive impact on employment and investment. This agreement will lead to significant growth in exports of funds and management services.¹⁰

3.10 However, others businesses and industry groups considered ChAFTA would have detrimental outcomes. For example, representatives of the paper industry saw the tariff arrangements for paper products as inequitable and stated that removing the import tariff while maintaining the export tariff would 'adversely impact the competitiveness of the sector'.¹¹ Armstrong World Industries, a manufacturer of vinyl floor and wall products, was also concerned that inequitable tariff arrangements would affect the viability of its business, and requested that the import tariff reduce over a five-year period as the export tariff does.

3.11 The Australian Industry Group, while it supported the ratification of ChAFTA, also pointed out the inequitable tariff arrangements which will affect industries such as the Australian Fibre Packaging Industry, which has no scheduled tariff rate reduction for its exports while Chinese imports will have zero tariffs from day one of entry into force. It recommended:

- That DFAT strives to address the concerns of the paper packaging industry when negotiating with China in RCEP negotiations.

7 *Submission 39*, p. 2.

8 *Submission 53*, p. 25.

9 *Submission 36*, p. 6.

10 *Submission 47*, p. 3.

11 *Submission 48*, p. 2.

- That DFAT is directed to never accept an FTA deal where Australia offers any tariff advantage that is not reciprocated by the FTA partner.¹²

3.12 The Australian Fair Trade & Investment Network (AFTINET) did not consider tariff arrangements under ChAFTA to be in Australia's national interest, stating that the National Interest Analysis (NIA) does not weigh the estimated 'very small increases in GDP of 0.05%-0.11% after 20 years' against the risks and losses resulting from the agreement, including:

- loss of employment in manufacturing industry from increased imports resulting from zero tariffs;
- loss of potential local employment and lower labour standards in Australia from expansion of temporary labour employed at minimum rates not market rates;
- losses to government revenue from reductions in tariffs;
- competition from imported goods produced without enforceable labour rights for workers and without enforceable environmental standards;
- health and safety impacts of imported goods which may not conform to Australian safety standards; and
- losses resulting from possible regulatory risks and costs to government arising from ISDS.¹³

3.13 Civil Liberties Australia expressed concern that economic modelling for ChAFTA was optimistic and noted that previous agreements had not lived up to the promises of government.¹⁴ The submission stated that:

The assessment done by the Centre for International Economics (CIE), using fairly optimistic assumptions, predicts negligible benefits after 20 years from the combined effects of ChAFTA and the free trade agreements with Korea and Japan—in the order of 0.11% after 20 years of operation.¹⁵

Entry into force

3.14 The importance of prompt entry into force was repeatedly emphasised. For example, the Business Council of Australia noted that Australian exporters would receive a tariff cut at ratification and receive another tariff cut on 1 January every year after that. This meant that failure to ratify the ChAFTA by 31 December 2015 would mean Australia would miss out on an immediate double tariff cut next year.¹⁶

12 *Submission 62*, p. 2.

13 *Submission 14*, p. 5.

14 *Submission 30*, p. 4.

15 *Submission 30*, p. 4.

16 *Submission 68*, p. 2.

Technical barriers to trade

3.15 Several submissions focused on other barriers to trade. The National Farmers' Federation, while it welcomed the agreement, observed that trade with China for many commodities will be inhibited by the non-tariff barriers. It gave the Australian pork industry as an example:

While the China agreement reduces tariffs for Australian pork, further work is required to negotiate the import protocols and export processor accreditation before Australian producers can start to take advantage of the opportunities provided under the agreement.¹⁷

3.16 The Construction, Forestry, Mining and Energy Union (CFMEU) stated that China has established non-tariff, or technical, barriers to trade which would inhibit Australian exporters from realising the benefits of the tariff reductions. It used the coal industry as an example and stated that China has ramped up:

...unfair protection of their domestic coal mining industry through the erection of non-tariff barriers on imported coal including from Australia. The reality is that Australian exports are not just dropping because of the recent imposition of tariffs and falling demand but that China is engaging in protectionist measures to help its domestic coal industry and ChAFTA would appear to be helpless to change that.¹⁸

3.17 In comparison, the Australian Industry Group, which had expressed concern about non-tariff barriers to trade in a submission during the negotiation period of ChAFTA, congratulated 'DFAT in securing a formal mechanism to address ongoing issues with non-tariff barriers faced by Australian exporters'.¹⁹ Similarly, Citrus Australia was satisfied that technical barriers had been dealt with within the agreement, stating:

Advantages gained through reductions in tariffs, quotas and agricultural safeguards are obvious to everyone. However, ChAFTA also includes text on access to adequate port infrastructure, streamlined customs and inspection services (particularly for perishable goods), and a commitment to ongoing dialogue on sanitary and phytosanitary issues, along with other technical barriers.²⁰

Australia's trade relationships

3.18 ChAFTA was frequently assessed by submitters in the broader context of Australia's other trade relationships and trade agreements, and those of Australia's competitors. For example, the Australian Chamber of Commerce and Industry stated that 'ChAFTA will ensure Australian goods exporters overcome the competitive disadvantage compared with countries that already have free trade agreements with

17 *Submission 22*, p. 6.

18 *Submission 66*, p. 39.

19 *Submission 62*, p. 1.

20 *Submission 63*, p. 6.

China, and will create opportunities to build competitive advantage in goods and services'.²¹

3.19 The Export Council of Australia considered ChAFTA would provide a 'significant competitive advantage' and believed it counters advantages held by Chile and New Zealand through their trade agreements with China.²² It also noted that the agreement was not inconsistent with other negotiations Australia is party to and stated:

Indeed, those other agreements may well be advanced by ChAFTA. For example, the provisions in 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 [WTO Trade Facilitation Agreement].²³

3.20 In contrast, other submissions were critical of Australia's approach to trade agreements and policy. For example, the Australian Manufacturing Workers' Union (AMWU) described Australia's trade policy as 'driven by an unflinching adherence to the doctrine of free trade'. It argued that:

...trade policy in Australia continues to be based on a doctrine that fails to consider how trade actually operates in the real world, fails to reflect the real economic costs and benefits of trade agreements and other policies and as a result policies fail to generate the benefits that they promise'.²⁴

3.21 The AMWU highlighted that in 2010, the Productivity Commission had found 'little evidence from business to indicate that bilateral agreements to date have provided substantial commercial benefits' and that the 'increase in national income from preferential agreements is likely to be modest'.²⁵

21 *Submission 35*, p. 3.

22 *Submission 60*, p. 8.

23 *Submission 60*, p. 9.

24 *Submission 63*, p. 2.

25 *Submission 63*, p. 6.

Chapter 4

Key issues

Introduction

4.1 This chapter considers some of the key issues raised in submissions to the inquiry. These included:

- investor-state dispute settlement;
- labour market testing;
- skills assessment processes;
- investment facilitation arrangements; and
- environmental standards.

Investor-state dispute settlement

4.2 Investor-state dispute settlement (ISDS) provides foreign investors with the right to access an international arbitration tribunal if they believe actions taken by a host government are in breach of its investment obligations.¹ Chapter 9 of ChAFTA, Investment, commits Australia and China to non-discriminatory treatment of the other party's investors and investments. It also commits both parties to Most Favoured Nation (MFN) treatment, meaning neither party can offer more favourable treatment to foreign investors in any future agreements.² Chapter 9, Section B, outlines the agreed ISDS arbitration tribunal processes.

4.3 Currently, Australia has agreed ISDS provisions in free trade agreements with Chile, Singapore, Thailand and Korea. It has also agreed to ISDS provisions in 21 bilateral investment treaties, including with China.³

4.4 A large number of submissions to the inquiry from individuals opposed the inclusion of ISDS processes within ChAFTA and other Australian trade agreements. These submissions pointed to cases in which foreign investors took legal action against governments under ISDS provisions for enacting health, environmental or other public interest legislation.

4.5 Some of those opposed to ISDS processes argued that the cost of litigation and compensation awarded to foreign investors can also act to discourage governments from proceeding with legitimate domestic legislation in the national interest. For example, the Public Health Association of Australia stated:

1 Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement', <http://dfat.gov.au/trade/topics/Pages/isds.aspx> (accessed 9 October 2015).

2 Department of Foreign Affairs and Trade, 'ChAFTA Summary of Chapters and Annexes', <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/chafta-summary-of-chapters-and-annexes.aspx#chapter-9> (accessed 9 October 2015).

3 Department of Foreign Affairs and Trade, 'Investor –State Dispute Settlement', <http://dfat.gov.au/trade/topics/Pages/isds.aspx> (accessed 9 October 2015).

From a public health point of view, one of the biggest concerns is the chilling or deterrent effect that ISDS can have on public health policy. An example is the stalling of plans to introduce tobacco plain packaging in New Zealand, while the ISDS case against Australia by Philip Morris Asia is decided.⁴

4.6 The potential for the ChAFTA ISDS mechanism to influence the scope of future Australian regulation was a key issue raised. This was illustrated by CHOICE which outlined the potential for ChAFTA ISDS processes to prevent future reform of Australia's food labelling laws.⁵

4.7 Philip Morris Asia is currently challenging Australia's legislation, enacted in 2011, regulating for the plain packaging of tobacco products under the ISDS processes of Australia's investment agreement with Hong Kong. This arbitration is still ongoing.⁶ While this arbitration is the first major ISDS case to be brought against Australia, several submissions pointed to an increased use of ISDS cases against other national governments. In particular, Dr Kyla Tienhaara noted:

Over the last decade there has been an explosive increase of cases of investor-state dispute settlement (ISDS). Until the mid-nineties, only a handful of cases had emerged. Then, following a few high-profile cases, everything changed. Between 2003 and 2013, one arbitral body registered more than thirty new cases every year and more than fifty cases in each of the last three years of that decade. As of the end of 2014, the total number of known cases was 608. By then, one hundred and one governments had responded to one or more ISDS claims.⁷

4.8 Many opposed to ISDS provisions noted that the Investment Chapter within ChAFTA is unfinished, with negotiation of some provisions to occur during a review process within three years of the date of entry into force of the agreement. For example, AFTINET stated:

...the section is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by review process in three years' time. These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment of foreign investors. These are provisions often used to sue governments under other agreements. The Australian Parliament is being asked to vote for the implementing legislation for this agreement without having the details of what these future provisions may be.⁸

4.9 Other submissions spoke of the lack of transparency in ISDS cases and disagreed with the legal processes used in ISDS cases. The Electrical Trades Union of

4 *Submission 34*, p. 3.

5 *Submission 49*, p. 1.

6 Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, 2012-12, available at <http://www.pcacases.com/web/view/5> (accessed 4 November 2015).

7 *Submission 8*, p. 2.

8 *Submission 14*, p. 11.

Australia (ETU) characterised ISDS as 'an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors'.⁹

4.10 However, some submissions indicated support for the inclusion of an ISDS mechanism in ChAFTA. Both GrainGrowers and the Australian Chamber of Commerce and Industry (ACCI) considered the ISDS provisions in ChAFTA would provide protection for Australian investors. The ACCI highlighted that 'ISDS clauses ensure that Australian investments abroad receive the same non-discriminatory and fair access to markets accorded to foreign investments in Australia'.¹⁰

4.11 Others emphasised the limited scope of the ChAFTA ISDS provisions. For example, Dr Luke Nottage described the scope of ISDS-backed protections for investors as 'narrow'.¹¹ Lexbridge Lawyers observed that there is always a degree of risk associated with ISDS in regard to a potential challenge to government action or regulation:

However, in recognising this risk it is also necessary to recognise that the exposure varies between agreements and depends on the specific provisions in each agreement. A proper assessment of the risk of ISDS therefore requires a detailed examination of the relevant agreement, including the scope of ISDS and any applicable safeguards...In our view, an examination of these factors leads to the conclusion that the exposure under ChAFTA – in terms of a challenge to government regulation – is significantly less than the vast majority of Australia's agreements containing ISDS.¹²

4.12 In particular, Lexbridge Lawyers highlighted the safeguards in ChAFTA:

ChAFTA contains a set of safeguards which are similar to those found in other recent agreements including the Korea-Australia FTA. In addition ChAFTA contains additional procedural safeguards which have not been included in any existing Australian agreement. Most notably, these include an innovative safeguard to block – and potentially prevent claims against non-discriminatory public welfare regulation.¹³

Labour market testing

4.13 Conflicting views were expressed on the ChAFTA impact on labour market testing. Article 10:4 states:

3. In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:

...

9 *Submission 38*, pp 25-26.

10 *Submission 35*, p. 9.

11 *Submission 7*, p. 1.

12 *Submission 23*, p. 1.

13 *Submission 23*, p. 6.

(b) require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.¹⁴

4.14 Many submitters were concerned that the removal of the requirement for labour market testing would mean that Australian workers could lose employment opportunities to temporary migrants. For example, the Australian Nursing and Midwifery Federation commented:

We note that temporary visa holders working in health and aged care under the visa class 457, 442 and 485 along with international students and working holiday makers now constitute a significant and growing temporary migrant workforce at a time when local nurses and midwives are struggling to gain employment.¹⁵

4.15 Likewise, the ETU commented that the removal of the labour market testing provision for issuing 457 visas to Chinese workers 'sets the stage for Australian workers to be robbed of opportunities, and undercut by a new class of immigrant working poor'.¹⁶ Several submitters also argued there were existing problems with the 'lack of enforcement' of standards for 457 visa workers and gave examples of temporary migrant workers being employed in unfair and unsafe conditions.¹⁷

4.16 Conversely, the Master Builders Association (MBA), while it is 'first and foremost committed to the local building and construction industry and...the training and upskilling of Australians' thought that labour market testing should be removed as it is unreliable and ineffective. The MBA also stated that temporary migration would be important to the building and construction industry given that:

The industry's challenge is to meet the rising demand for a skilled workforce against a background of decreasing apprentices in training, from 56,000 to 43,100 since 2010. In addition, the apprenticeship commencement rate has decreased by 18.8 per cent since 2010, from 22,100 to 18,000 commencements in the past five years...¹⁸

4.17 Migration Council Australia considered that existing 457 visa provisions would ensure that Australian workers would be given preference. It stated:

...Chinese citizens on 457 visas under ChAFTA will still require English proficiency and sponsorship under standard terms and conditions of the 457 visa program, including market salary rates and a wage threshold. In effect, those elements of the 457 regulatory framework that have been shown to be most effective in preventing employers from preferencing overseas workers will still apply.¹⁹

14 Department of Foreign Affairs and Trade, *Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China*, p. 113.

15 *Submission 1*, p. 1.

16 *Submission 38*, p. 4.

17 For example, *Submission 14*, p. 6.

18 *Submission 27*, pp 5-7.

19 *Submission 5*, p. 3.

Skills assessment processes

4.18 Submissions from individuals and organisations also voiced their concerns regarding a side letter to ChAFTA which removes the requirement for mandatory skills assessment for temporary skilled visas for a number of trades, with the remaining trades to be reviewed within two years. In all cases there was concern that Chinese workers may not have skills and health and safety training of an Australian standard which could lead to harm to themselves and others.

4.19 The ETU stated:

Electrical work is inherently dangerous...removing the requirement for overseas trade workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public.

China does not have the level of trades training and safety standards in comparison to Australia. The ChAFTA arrangements will only serve to erode electrical safety in our country and lead to accidents, injuries and death to workers and members of the public.²⁰

4.20 The CFMEU expressed concern with the quality of trade training in China and quoted an assessment made by the World Bank in 2013 of the Chinese VET system:

At technical/vocational schools in China, curriculums and training methods are outdated and can barely keep pace with the evolving market's needs...teachers often lack practical skills themselves; students don't get enough hands-on training and workplace experience as they hope.²¹

4.21 In contrast, Migration Council Australia said removing mandatory testing:

...signals Chinese qualifications will be treated in the same manner as other countries, such as the United Kingdom, recognising the continuous improvement in the Chinese formal education sector and the growth in the maturity of the Chinese labour market.²²

4.22 The CFMEU expressed concern that the trades of cabinetmaker, carpenter, carpenter and joiner, and joiner do not have licensing requirements to work in the trade. The submission stated:

Removing mandatory skills assessments for Chinese 457 visa applicants in these trades is therefore removing the last and only regulatory safeguard designed to prevent employers nominating for 457 visas Chinese workers who do not possess Australian-standard skills in these trades.²³

4.23 The CFMEU also cited the removal of mandatory skills assessment as a potential cause of exploitation of temporary migrant workers, with employers nominating them for skilled 457 visas but putting them to work in lower-skilled jobs.

20 *Submission 38*, p. 4.

21 *Submission 66*, p. 24.

22 *Submission 5*, p. 4.

23 *Submission 66*, p. 22.

The CFMEU noted that this was commonplace prior to the introduction of mandatory skills assessments for China.²⁴

4.24 The Business Council of Australia did not see the removal of mandatory skills testing as problematic because workers on 457 visas are still required to obtain the necessary licences to work in Australia.²⁵ Similarly the Export Council of Australia noted that 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'.²⁶

Investment Facilitation Arrangements

4.25 The concerns of organisations and individuals in regard to the removal of the requirement for labour market testing and mandatory skills testing were reiterated in a number of submissions which discussed the Memorandum of Understanding (MOU) on Investment Facilitation Arrangements (IFA). A key concern was that Australian workers may be displaced by temporary migrant workers on 457 visas. The Australian Council of Trade Unions noted:

A mandatory requirement for Australian workers to have first priority on Australian infrastructure projects would be entirely consistent with the position advocated by Australian unions and in line with community expectations. However, there is nothing in the text of ChAFTA or in the MOU that provides such a guarantee...In fact, the MOU states explicitly that 'there will be no requirement for labour market testing to enter into an IFA'.²⁷

4.26 As with 457 visa arrangements, some organisations also believed IFAs could leave migrant workers vulnerable to exploitation. The Textile Clothing and Footwear Union of Australia noted that workers employed under IFA provisions would be more vulnerable than those on 457 visas:

...a worker's migration status is tied to their employment, and there is no entitlement to remain in the country to find a new job before the visa's expiration (even 457 visa workers have 90 days to find a new job). Dr Joanna Howe, Senior Lecturer of Law, University of Adelaide, explains:

The worker's right to remain in Australia is wholly contingent upon the employer's continuing demand for their labour. Withdrawal of support from the employer-sponsor may mean cancellation of the visa. This threat, actual or perceived, may induce an IFA worker to accept any degree of substandard working conditions and creates a strong disincentive for these workers to voice concern for fear of being sent home.²⁸

24 *Submission 66*, p. 22.

25 *Submission 68*, p. 3.

26 *Submission 60*, p. 3.

27 *Submission 50*, p. 15.

28 *Submission 65*, p. 5.

4.27 Civil Liberties Australia noted that the lack of a requirement for labour market testing could lead to lesser conditions for Australian workers:

The likely lower rate paid to Chinese workers who have not had the chance to negotiate their terms and conditions will give Chinese firms or firms with Chinese investors an unfair advantage over local Australian firms. As the numbers of such special condition firms expands, their freedom from paying the going rate and lesser requirements for occupational health and safety provisos could be used to drive down Australian wages and conditions more generally in the relevant industries.²⁹

4.28 The Migration Council of Australia called for further information regarding IFA provisions, requesting 'the government clarify whether labour market testing can occur for an IFA or whether this is precluded given Chapter 10 of ChAFTA as labour market testing is not referenced in the MOU'.³⁰

4.29 However, some organisations believed that the IFA provisions would require investors to provide evidence of a lack of suitable Australian workers to complete projects. The Australian Chamber of Commerce and Industry (ACCI) noted that '...the labour agreements will require evidence of labour market shortages as part of the rigorous process the Department of Immigration and Border Protection puts in place to finalise an agreement'.³¹ The ACCI also maintained that the IFAs would not place downward pressure on the wages of Australian workers as labour agreements:

...provide some ability to seek concessions to the 457 program (similar to those mentioned in the MOU). But no concessions are available on the 457 sponsor obligations, including the need to pay market wage rates and comply with all workplace laws.³²

4.30 The Minerals Council of Australia was also supportive of the IFA provisions, perceiving them as beneficial for Australia:

IFAs are innovative 'umbrella' project-wide agreements designed to promote increased investment in large infrastructure projects above \$150 million, leading to increased jobs and economic prosperity for Australians. They respond to Chinese companies' concern that they were unable to secure skilled staff for projects in a timely way during the mining boom.³³

Environmental standards

4.31 Some submitters considered that ChAFTA should contain additional environmental protections.³⁴ AFTINET observed that while Australia's free trade agreement with Korea contained an environment chapter, ChAFTA does not. It stated

29 *Submission 30*, p. 6.

30 *Submission 5*, p. 6.

31 *Submission 35*, p. 7.

32 *Submission 35*, p. 7.

33 *Submission 53*, p. 27.

34 For example, Dr Romaine Rutman, *Submission 24*, p. 4.

that this indicated 'that neither government has made any commitment to implement agreed international environmental standards':

China still has very high levels of industrial pollution which harms both the environment and public health...Lack of compliance with environmental standards reduces costs for both local Chinese firms and global firms subcontracting to China, cost reductions not available to local Australian firms. The ChAFTA places no obligations on the Chinese government to improve its environmental standards. In fact it rewards current standards by granting preferential market access to Australia for its products.³⁵

Chapter 5

Conclusion and recommendations

Treaty-making process reform

5.1 The committee recently completed an inquiry into the treaty-making process which made four key findings:

1. All treaties are presented to Parliament and subject to scrutiny after agreements have been signed, leaving the Parliament 'with an all-or-nothing choice' when considering treaty implementation legislation.
2. The Joint Standing Committee on Treaties does not commence inquiries until after agreements are signed, and this 'does not provide an adequate level of oversight and scrutiny'.
3. The Department of Foreign Affairs and Trade's consultation is falling short of expectations and adding to stakeholders' frustrations.
4. There is 'an insufficient amount of publicly available information about agreements under negotiation and independently sourced economic analyses of their likely benefits are not mandatory'.¹

5.2 The committee made a number of recommendations including: that independent analyses be undertaken prior to the commencement of negotiations (as well as an evaluation of likely costs and benefits after negotiations have concluded); granting confidential access to draft treaty texts; and the creation of a 'model trade agreement' that could cover 'controversial topics'.

5.3 The committee's inquiry into ChAFTA illustrates that these findings and recommendations have continuing relevance. It is worth considering whether the issues with the labour mobility components of ChAFTA would have surfaced if improvements to the treaty-making processes had been made. In the view of the committee, it is possible these issues could have been appropriately resolved before the final treaty text was agreed. In this context, the committee reiterates its recommended reforms to the treaty-making process.

Labour market testing, skills assessments, protections for wages and conditions, and foreign workers

5.4 Where there are genuine labour shortages, temporary overseas workers and skilled migration can play an important role in economic growth. However, Australians should always have priority in the labour market, and overseas workers should only be recruited when suitably qualified Australian workers are not available. The text of ChAFTA, the Memorandum of Understanding on Investment Facilitation

1 Senate Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015.

Agreement and the side letter on skills assessment processes raised legitimate concerns that this important principle would be undermined.

5.5 The committee considers that many of these concerns have been mitigated through the agreement reached between the Government and the Australian Labor Party. This agreement will facilitate protections through amendments to the Migration Regulations and through changes to immigration policy.

5.6 The committee acknowledges the work done by the Shadow Minister for Trade and Investment, Senator the Hon Penny Wong, Minister Robb and Minister Dutton, to deliver these important safeguards for Australian jobs, wages and conditions. However, the committee's view is that the scope of these agreed safeguards was limited due to explicit commitments made by the Australian Government in ChAFTA. This is an area worthy of continued scrutiny and, if necessary, further reform.

Investor-state dispute settlement mechanism

5.7 There has been strong and consistent community opposition to the inclusion of ISDS provisions in Australia's trade agreements. This has mirrored the rapid and worrying increase in the number of ISDS claims made against national governments. This committee has previously recommended the Australian Government not include ISDS mechanisms in future trade agreements noting 'fundamental procedural flaws' and 'potential impacts on Australia's justice system'.²

5.8 It is worth noting that the Productivity Commission has also recommended that the Australian Government should seek to avoid the inclusion of investor-state dispute settlement provisions in [bilateral and regional trade agreements] that grant investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'.³ In relation to Australia's ISDS liabilities, it has recently observed that the 'ongoing costs to Australian taxpayers of funding the preparation and defence of the tobacco plain packaging legislation are likely to be substantial'. The Productivity Commission considered that this 'highlights the need for advance liability provisioning and transparency about the true cost of including ISDS provisions in Australia's trade agreements and investment treaties'.⁴

5.9 In this context, the unfinished nature of the ISDS provisions within ChAFTA is concerning. The committee acknowledges that the ISDS provisions appear to include more safeguards for the Australian Government than those included in previous trade and investment agreements. Nonetheless, the extent of Australia's trade relationship with China means the impact of a flawed ISDS mechanism could be significant.

2 Senate Foreign Affairs, Defence and Trade References Committee, *Korea-Australia Free Trade Agreement*, 1 October 2014, p. 52.

3 Productivity Commission, *Australia bilateral and regional trade agreements*, 2010, pp xxxvi.

4 Productivity Commission, *Trade and Assistance Review 2013-14*, 2015, p. 147.

5.10 The committee notes that the ISDS mechanism will be reviewed to potentially broaden its scope. The committee urges the Australian Government to utilise this opportunity to further restrict the potential impact of the ISDS mechanism in ChAFTA on Australia.

Recommendation 1

5.11 The committee recommends the Australian Government utilise the review of the investor-state dispute settlement provisions to further enhance the safeguards for Australia.

Conclusion

5.12 The committee continues to have misgivings regarding ChAFTA, including in relation to the sectors which will be affected by inequitable tariff changes, the requirements to conduct labour market testing and the eventual scope of the ISDS mechanism. However, it is clear from the submissions received that Australian businesses will benefit from tariff reductions and improved access to the Chinese market. This in turn will provide modest increases in job opportunities for Australians. For example, Blackmores has outlined that it had employed an additional 100 staff across its Australian operation largely as a result of growth in sales of its products to Chinese consumers.⁵

5.13 Further, in order to take advantage of the tariff reductions, the committee agrees it is preferable for ChAFTA to be ratified this year. Any renegotiation of ChAFTA is not compatible with achieving this objective. Taking these factors into account, the committee has concluded that the ratification of ChAFTA is in the national interest. The committee's view is that binding treaty action should be undertaken as soon as possible to take advantage of the schedule of tariff reductions.

Recommendation 2

5.14 The committee recommends that binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*.

Senator Alex Gallacher
Chair

5 *Submission 31*, p. 2.

Dissenting Report by Senator Peter Whish-Wilson

Australian Greens Senator for Tasmania

1.1 The Australian Greens acknowledge the relatively measured tone of the committee report. This is notable in comparison to the more partial tone of the report of the Joint Standing Committee on Treaties (JSCoT) report on ChAFTA.

1.2 The Australian Greens agree with a number of the conclusions made by the references committee, which are summarised in the statement:

The committee continues to have misgivings regarding ChAFTA, including in relation to the sectors which will be affected by inequitable tariff changes, the requirements to conduct labour market testing and the eventual scope of the ISDS mechanism.

1.3 The Australian Greens also support the conclusion that “the unfinished nature of the ISDS provisions within ChAFTA is concerning” and support the intention of Recommendation 1 being to ensure that the future review of the ISDS provisions in ChAFTA does not further erode Australia's sovereignty. There is a very real prospect that the most insidious aspects of ISDS that are absent in the current provisions, such as indirect expropriation, will be put on the negotiating table during the future review of these provisions. This fear is based on the explanation provided by DFAT as to why the ISDS chapter is unfinished. DFAT stated during the JSCoT public hearings that China preferred to wait until it had completed bilateral negotiations with the EU and the US before finalising ISDS provisions. In other words, China will wait to see what it works out with the EU and the US, and will then likely ask Australia to replicate whatever is agreed to with the EU and the US.

1.4 As such, the Australian Greens do not support the final recommendation of the committee that binding action be taken. The Australian Greens do not support justification for this recommendation on the basis that Australian businesses are assured to benefit from ChAFTA. One of the fundamental problems with Australia's treaty-making process is that there is no requirement for an independent economic analysis of the benefits of a trade agreement before it is signed or enabled. Even so, the economic analysis commissioned by the department shows that ChAFTA is only expected to provide a competitive advantage to Australia for the next five years, principally because China is in the process of negotiating bilateral treaties with the EU and the US.

1.5 Further, the Australian Greens believe that the incomplete protections provided for labour-market testing requirements, and the absence of any consideration of environmental standards, are further reason for the committee to recommend that binding action not be taken.

Recommendation 1

1.6 That binding treaty action not be taken in relation to the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China.

**Senator Peter Whish-Wilson
Australian Greens**

Appendix 1

Public submissions

- 1 Australian Nursing & Midwifery Federation
- 2 Winemakers Federation of Australia
- 3 Ms Kimm Woodward
- 4 Mr Angelos Kenos
- 5 Migration Council of Australia
- 6 Madge Australia Inc
- 7 Dr Luke Nottage
- 8 Dr Kyla Tienhaara
- 9 Armstrong World Industries (Australia) Pty Ltd
- 10 Fletcher International Exports
- 11 Sutherland Shire Environment Centre
- 12 Confidential
- 13 Miss Dennielle Cooke
- 14 Australian Fair Trade and Investment Network (AFTINET)
- 15 Wellard
- 16 Australian Red Meat Industry
- 17 Hunt & Hunt Lawyers & Freight Trade Alliance
- 18 Australian Grape and Wine Authority
- 19 Mr Daniel Laws
- 20 Mr Rodney Clarke
- 21 Mr Wayne Ford
- 22 National Farmers' Federation
- 23 Lexbridge Lawyers
- 24 Dr Romaine Rutnam
- 25 Australian Nut Industry Council
- 26 Teys Australia
- 27 Master Builders Australia
- 28 Australian Pork
- 29 Australian Lot Feeders' Association
- 30 Civil Liberties Australia

- 31 Blackmores Limited
- 32 Name Withheld
- 33 Name Withheld
- 34 Public Health Association of Australia
- 35 Australian Chamber of Commerce and Industry
- 36 Australian Bankers' Association
- 37 Australian Services Union
- 38 Electrical Trades Union of Australia
- 39 GrainGrowers
- 40 Australian Dairy Industry Council and Dairy Australia
- 41 Equity Trustees
- 42 Australian China Business Council
- 43 Mr Terry Croft
- 44 Australian Food and Grocery Council
- 45 Victorian Association of Forest Industries
- 46 United Dairyfarmers of Victoria
- 47 Financial Services Council
- 48 Australian Forest Products Association
- 49 CHOICE
- 50 Australian Council of Trade Unions
- 51 Chamber of Minerals and Energy of Western Australia
- 52 NSW Government
- 53 Minerals Council of Australia
- 54 Alexandrina Council
- 55 China-Australia Chamber of Commerce
- 56 Australian Council of Wool Exporters and Processors
- 57 ANZ
- 58 The Hon Christopher Pyne, Minister for Education and Training
- 59 Mr Phil Rolfe
- 60 Export Council of Australia
- 61 Dr Nick Legge
- 62 The Australian Industry Group
- 63 Citrus Australia

- 64 Department of Immigration and Border Protection
- 65 Textile Clothing and Footwear Union of Australia
- 66 Construction, Forestry, Mining and Energy Union
- 67 Committee for Gippsland
- 68 Business Council of Australia
- 69 South Australian Government

Additional information received

- Form letter 1 - example of form letter opposing the China-Australia Free Trade Agreement.

Appendix 2



THE HON ANDREW ROBB AO MP

MINISTER FOR TRADE AND INVESTMENT

The Hon Senator Penny Wong
Shadow Minister for Trade and Investment
Parliament House
CANBERRA ACT 2600

20 October 2015

Dear Senator,

Penny

I write to confirm our agreement which will ensure the passage of the legislation to implement the Chinese Australia Free Trade Agreement so that the Agreement comes into effect this year.

The following proposed changes have not, to date, been reviewed by the Office of Parliamentary Counsel and may, upon that review, be edited for drafting purposes. I undertake to consult with you on any wording changes.

Labour market testing

To ensure that current practice providing for labour market testing is enshrined in regulations pertaining to the *Migration Act*, the Government will amend Regulation 2.76 (head of power s140GC of the *Migration Act*) to read as follows:

For the purposes of section 140GC, the proposed party to the work agreement (other than the Minister) must have demonstrated that they have made recent and genuine efforts to recruit Australian workers in the occupation and location covered by the work agreement.

This Regulation will be disallowable by the Parliament.

Project Agreement and Labour Agreement Guidelines

The Government will amend *Project Agreement* and *Labour Agreement Guidelines* to incorporate additional criteria for the Minister of Immigration and Border Protection to consider in approving a Project Agreement or Labour Market Agreement as set out in the attached draft Guidelines. These criteria include: analysis of labour market need; training plans; overseas worker support plans; and additional conditions that may be imposed by the Minister.

To ensure observance of the criteria, the Government will create a new Regulation to state:

Project Agreements and Labour Agreements must have policy guidelines that set out further details on the negotiation of these agreements and will include objectives and principles of the labour agreement programme, eligibility requirements to be considered for a labour agreement, and obligations agreed to within labour agreements.

Temporary Skilled Migration Income Threshold (TSMIT) and market rates of pay

The Government will amend Regulation 2.72 relating to terms and conditions of employment, as set out below, noting that this amendment reflects existing practice:

(10) If the person is a standard business sponsor—the Minister is satisfied that:

(c) the terms and conditions of employment of the person identified in the nomination will be no less favourable than the terms and conditions, including, where applicable, the terms and conditions that are set out in an enterprise agreement under the Fair Work Act 2009, that:

- (i) are provided; or*
- (ii) would be provided;*

to an Australian citizen or an Australian permanent resident for performing equivalent work at the same location;

This Regulation will be disallowable by the Parliament.

Further, the guidelines setting out obligations on employers requesting a project labour agreement will continue to stipulate that all overseas employees under a project agreement must be employed under terms and conditions of employment, which are no less favourable than those provided to the employer's Australian workforce working in the same position at the same location.

However, as currently applies, the Minister will retain the requisite flexibility to be able to tailor arrangements to meet the needs of individual industries, including in meat processing and tourism.

The Government will also include the following references in the terms of reference of a forthcoming review of the TSMIT:

- determine an appropriate base level for the TSMIT, which is supported by evidence;

- consider whether TSMIT should be indexed, and if so, advise on the methodology for indexation of the TSMIT (eg. whether is it appropriate to use CPI, Average Weekly Ordinary Time Earnings or other indicators for indexation purposes);

I confirm that the TSMIT Review will commence before the end of 2015, and that the review panel will consult relevant stakeholders, including peak business bodies and the Australian Council of Trade Unions, in the course of their review.

Skills – visa condition 8107

To address your concerns regarding licensed trades, the Government will amend visa condition 8107 3(c) in the *Migration Regulations 1994* as follows:

(c) if the holder is required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder, in the location where the holder's position is situated—the holder:

(i) must hold the licence, registration or membership when performing the occupation; and

(ii) must hold the licence, registration or membership within 90 days after the holder's arrival in Australia; and

(iii) must comply with each condition or requirement to which the licence, registration or membership is subject; and

(iv) must not engage in work that is inconsistent with the licence, registration or membership, including any conditions or requirements to which the licence, registration or membership is subject;

(v) must notify the Department, in writing, as soon as practicable if the licence, registration or membership is refused, revoked, ceased or cancelled.

This Regulation will be disallowable by the Parliament.

I can also confirm that the Department of Immigration and Border Protection will continue to investigate evidence-based allegations of non-compliance with visa conditions, including visa conditions concerning licensing and registration. The Government will report annually on visa compliance monitoring in the Department of Immigration and Border Protection's annual report.

Transparency

Finally, the Government will ensure that information on the number of work agreements signed in any given year, the number of 457 visa holders engaged under those work agreements, together with the occupations and industries in which they are engaged are reported in the Department of Immigration and Border Protection's annual report. Doing so will ensure greater transparency of the labour agreement programme.

Yours sincerely,



Andrew Robb