Additional Comments – Senator the Hon J Ludwig

Trade drives growth, creates jobs and improves living standards.

Labor has been the party of trade liberalisation – and Asian engagement – for decades. Closer engagement with the People's Republic of China is critical for Australia's future. China is set to become the world's biggest economy in coming years.

That growth presents great opportunities for Australia.

Labor members of the committee understand the potential benefits of the China-Australia Free Trade Agreement:

- removing Chinese tariffs on 95 per cent of Australian exports;
- boosting our farm exports to China; and
- improving access for our services industries to the Chinese market.

However, I hold grave concerns about a number of issues which have not been adequately addressed in the Committee's report on the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*.

Memorandum of Understanding: Investment Facilitation Arrangement

The Memorandum of Understanding (MOU) on an Investment Facilitation Agreement (IFA) establishes arrangements between the Department of Immigration and Border Protection (DIBP) and an eligible Chinese project company. A project company is eligible to establish such arrangements where either a single Chinese enterprise owns 50 per cent or more of a project company, or if no single enterprise owns 50 per cent or more of the project company, a Chinese enterprise holds a substantial interest in the project company. A 'substantial interest' is defined as per Australia's Foreign Investment Policy, as '15 per cent or more, or several foreign persons (and any associates) have 40 per

cent or more, of the issued shares, issued shares if all rights were converted, voting power, or potential voting power, of a corporation'.[1]

The project company must be involved in a proposed infrastructure development project with an expected capital expenditure of $150 million over the term of the project.[2] The infrastructure development project must be within the food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment, or tourism sectors.[3]

Evidence to the Committee indicated that the low threshold for IFA projects could capture the majority of infrastructure projects in a wide range of industries.[4]The Electrical Trades Union of Australia (ETU) identified large residential and commercial construction ventures, mining operations and tourism development as well as power supply companies as falling within this threshold:

> There are a number of Chinese companies considered likely buyers for the privatised New South Wales power transmission and distribution networks. The maintenance and upgrade contracts for these assets, as well as those in the Victorian energy sector that are already owned by Chinese companies, are well in excess of $150 million.[5]

Although the Government has compared the IFA arrangements with Enterprise Migration Agreements (EMAs), the Australian Council of Trade Unions (ACTU) pointed out that the threshold for the EMAs is capital expenditure of $2 billion. Additionally, the EMAs apply only to the resource sector and are available to projects with a peak workforce of more than 1 500 workers while the IFAs have no minimum workforce requirement.[6] Finally, EMAs require labour market analysis to show detailed projected shortages to justify the need for 457 visa workers in semi-skilled and skilled occupations. IFAs have no requirement for labour market testing.[7]

Labour market testing regime

Requirements for sponsors to undertake labour market testing (LMT) before employing temporary foreign workers under 457 visa arrangements, ensure that Australian workers are given priority in the labour market. Chapter 10 of ChAFTA on the Movement of Natural Persons specifically states that there will be

1 Memorandum of Understanding between the Government of Australia and the Government of the People's Republic of China on an Investment Facilitation Arrangement 9IFA), 2(a).

2 IFA, 2(b).

3 IFA, 2(c).

4 Australian Fair Trade & Investment Network Ltd (AFTINET), Submission 21, p. 8.

5 Electrical Trades Union of Australia (ETU), Submission 44.

6 Australian Council of Trade Unions 9ACTU), Submission 51, pp. 3 and 4.

7 ACTU, Submission 51, p. 4.

no requirement for LMT or economic needs testing for temporary Chinese skilled workers including contractual service suppliers and installers and servicers.[8] Neither Australia nor China will impose any limits on the total number of visas granted under these provisions, raising concerns that unlimited numbers of Chinese workers could be brought into Australia to fill vacant positions without first checking if qualified local workers are available.[9]

Under 457 temporary work visa arrangements, Skill level 3 (mostly trade-level) occupations have been subject to labour market testing since 2013. Skill Levels 1 and 2 occupations have been exempted from labour market testing (except engineering and nursing occupations) by Ministerial discretion. The provisions in Chapter 10 of ChAFTA appear to remove Ministerial discretion suggesting that engineering and nursing positions would no longer be subject to labour market testing.

In addition to the provisions in Chapter 10, the IFA arrangements will extend concessional 457 visas to semi-skilled workers. The IFA states that there will be no requirement for LMT for these concessional 457 visas.[10] The IFA is the first step in a three step process to make these projects operational: the IFA, a Project Agreement and a Labour Agreement.[11]

The Government maintains that LMT will be applied at the second step in the process, the Project Agreement stage.[12] The DIBP says that 'labour market *analysis* would be required' to demonstrate a labour market shortage (emphasis added).[13] Labour market analysis is only a projection of possible market conditions at a future date. At stage three of the process, the Labour Agreement, DIBP says that 'labour market testing *may* be required' (emphasis added).[14] Clause 8 of the IFA says that under the Labour Agreement, direct employers will have to meet the 'sponsorship obligations associated with the labour agreement, including any requirements for labour market testing'.[15] However, the footnote says that only 'where labour market testing is required' will employers need to demonstrate that there are no suitable Australian workers available.[16]

8 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (ChAFTA), Article 10.4:3(b).

9 ChAFTA, Article 10.4:3(a); Construction, Forestry, Manufacturing and Energy Union (CFMEU), Submission 80, p. 15.

10 IFA, 6.

11 Department of Foreign Affairs and Trade (DFAT), Submission 78.

12 Department of Immigration and Border Protection (DIBP), Submission 88, p. 9; DIBP, Submission 88.2, question 28.

13 DIBP, Submission 88, p. 9.

14 DIBP, Submission 88, p. 9.

15 IFA, 8.

16 IFA, footnote 6.

The process depends on Departmental Guidelines, not legislation or regulation, and is therefore subject to easier change. There is no indication that LMT will be mandatory at any stage of the process.

The Migration Council of Australia (MCA), who otherwise support ChAFTA, have called for the Government to clarify whether or not LMT can occur for an IFA or whether it is precluded by the provisions in Chapter 10.[17] The Government argues that the IFA 'does not form part of the formal treaty agreement' and therefore 'is not bound by international treaty law or the commitments made under the ChAFTA'.[18] According to the Government the commitments under ChAFTA will be provided for through the 'standard' subclass 457 visa program while the IFA will be provided for under the DIBP agreement programme and will be 'facilitated by the subclass 457, but, it is not part of the 'standard' subclass 457 visa programme'.[19]

Despite the Government claims, there is still confusion around LMT requirements in ChAFTA. Labour market testing will not be required for sponsors nominating Chinese nationals under the provisions of Chapter 10, thus opening up the possibility of qualified Australians missing out on the opportunity for local jobs. The requirement for LMT for IFA projects are couched in ambiguous terms and contained in Departmental Guidelines rather than legislation or regulations.

Skills assessment

Under a side letter to ChAFTA, Australia has agreed to remove the requirement for mandatory skills assessment for Chinese nationals in 10 occupations including some electrical, building and mechanical trades. In effect, China has been removed from the existing list of 10 countries requiring applicants for 457 visas to undertake a skills assessment prior to lodging a visa application and moved to the list of all other countries where an applicant is required to include evidence of skills as part of their application. The DIBP claims that this arrangement will only 'change the administrative pathway' for these 10 occupations and does not change the required skill level.[20]

All visa applicants under either list have 28 days from the date of arriving in Australia to obtain any mandatory licence, registration or membership required to perform their occupation in the place where the position is situated. Licencing and registration are usually the responsibility of States and Territories.

Witnesses to the Committee voiced concern over safety standards being compromised by the new arrangements, particularly with regard to the electrical trades. The CEPU explained that 'Australia has a unique wiring protocol that

17 Migration Council of Australia (MCA), Submission 72.

18 DIBP, Submission 88.2, question 28.

19 DIBP, Submission 88.2, question 28.

20 DIBP, Submission 88, p. 7.

overseas trained workers are unlikely to be familiar with'.[21] China was on the list of countries requiring mandatory skills assessment because trade qualifications in the two countries are not equivalent:

> [China's] qualifications, the colour of the wiring, the voltages and a whole range of things do not comply directly with the Australian standards, and that is why there is that mandatory skills assessment first to determine whether they have the necessary skill sets to even come into that country to work in that occupation.[22]

When an applicant has entered Australia, the DIBP told the Committee that neither the visa applicant nor the sponsor is required to notify that Department of the outcome of their application for registration or certification.[23] The DIBP does not contact States and Territories to request confirmation of registration or certification as the requirements are imposed by the States and Territories.[24] DIBP does conduct targeted, risk-based monitoring 'to verify that sponsors have complied with sponsorship obligations, including [licencing] requirements'.[25] However, there was scepticism that the Government had the resources to effectively police compliance with the requirements for licencing or registration:

> Of all of the workplace visits that were conducted - and there were about 3,000 workplace visits conducted of the 36,000 or 37,000 sponsoring employers - over a third of them were failing to meet their obligation under the sponsorship arrangements.[26]

The Committee was also presented with evidence that visa applicants are being exploited during the waiting period for their licence and employed as unlicensed trade assistants.

Investor-state Dispute Settlement mechanisms

ChAFTA, like the Korea Australia Free Trade Agreement, contains an investor-state dispute settlement mechanism. The fact that these clauses are becoming common in free trade agreements does not alleviate concerns that the Committee has previously raised regarding the threat they pose to state sovereignty and policy decision making. The relevant chapter in ChAFTA is unfinished and the

21 Mr Allen Hicks, National Secretary, Communications, Electrical and Plumbing Union (CEPU), Committee Hansard, Sydney, 31 July 2015, p. 34.

22 Mr Hicks, CEPU, Committee Hansard, Sydney, 31 July 2015, p. 36.

23 DIBP, Submission 88.2, question 10.

24 DIBP, Submission 88.2, question 11.

25 DIBP, Submission 88.2, question 12.

26 Mr Hicks, CEPU, Committee Hansard, Sydney, 31 July 2015, p. 35.

Committee has been assured that the revised provisions will come before JSCOT when they are completed.[27]

Despite claims that the inclusion of caveats and safeguards in ISDS provisions are mitigating the risks presented, such clauses continue to leave the Australian Government open to expensive litigation. The Government should consider the findings of the Productivity Commission with regard to ISDS mechanisms and take steps to find a workable solution to avoid their inclusion in future FTAs.[28]

Conclusion

There is no doubt that access to the burgeoning Chinese market will prove an advantage to many sectors of Australian business and industry. China is already our largest trading partner and it is essential that Australian business and industry are provided with the competitive advantage that ChAFTA will provide. In particular, our reputation for premium quality, clean, green food will benefit Australian producers. The Committee heard ample evidence of the growth already being experienced in many sectors and the investment commitments being undertaken to maximise the opportunities presented by ChAFTA.

However, while it is important that ChAFTA be ratified as quickly as possible to enable business and industry to gain the full advantage provided by a double tariff reduction, it cannot be done at the expense of Australian jobs. If the Government agrees to address the issues raised regarding labour market testing and skills assessment to ensure that Australians are not disadvantaged in the labour market, there is no reason why the ratification of ChAFTA cannot be supported. These issues can be solved through legislative changes without re-negotiating ChAFTA.

The 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.

Senator the Hon Joe Ludwig

27 Ms Jan Adams, Deputy Secretary, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 7 September 2015, p. 22.

28 Productivity Commission, *Bilateral and Regional Trade Agreements*, November 2010, pp. 276–77.