



Export Council of Australia

The Voice for Australia's Exporters

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Foreign Affairs, Defence and Trade
Committee Department of the Senate
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Canberra ACT 2600

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Field

Export Council of Australia (ECA) Submission to the Senate Inquiry into the Customs Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014 and Customs Tariff Amendment (Japan-Australia Economic Partnership Agreement Implementation) Bill 2014

The ECA welcomes the opportunity to make this submission to the Inquiry in relation to the abovementioned Bills (the "JAEPA Customs Bills").

Introductory comments

Before commencing its submission on the detailed provisions of the Customs Bills, the ECA would wish to make the following introductory comments which relate to the process of the review into the Customs Bills and the corresponding Bills ("KAFTA Customs Bills") introduced to implement the provisions of the Korea-Australia Free Trade Agreement ("KAFTA").

- 1.1 As the Committee would be aware, the ECA made a number of comments and recommendations regarding the KAFTA Customs Bills. The ECA has now been provided with a response to one of those recommendations which was subsequently adopted and endorsed by the Senate Legal and Constitutional Affairs Legislation Committee by way of the Australian Customs and Border Protection Service ("Customs") providing a Table which shows where the provisions of Chapters 3 and 4 of the KAFTA have been included in the KAFTA Customs Bills. While the ECA is pleased that such a response has been forthcoming, the ECA did raise a number of other issues in its submission on the KAFTA Customs Bills but has yet to receive a response on those issues. The ECA would appreciate the receipt of the response to those issues as soon as practicable and certainly before the KAFTA is implemented and comes into effect. As much as the ECA is eager for the early commencement of the KAFTA and appreciate the provision of the Table, the ECA believes it is important that its members and other traders are aware of the position on its concerns.
- 1.2 The ECA is aware that the Government has organised a number of "Information Sessions" to communicate the terms of the KAFTA and the KAFTA Customs Bills to those parties who may be using the KAFTA, including exporters, importers and their service providers. Such Sessions are vital to assist in the adoption of the KAFTA (or any other Free Trade Agreement). The ECA, as with other industry associations, had offered to assist with those Sessions, however there has yet to be any approach to the ECA to assist with the development for delivery of the Sessions. The ECA is heavily involved in the delivery of training and information sessions in other



areas and believes it could make a valuable contribution.

- 1.3 As with the KAFTA Customs Bills, the ECA has some concerns that many of the "Customs" provisions of the JAEPA are being implemented by way of Regulations and not by the JAEPA Customs Bills, although the Regulations have yet to be made available. While the ECA appreciates the rationale for the use of the Regulations, it is concerned that the Regulations have yet to be made available for scrutiny and will not be made available before the JAEPA Customs Bills have passed through Parliament.
- 1.4 The ECA would also like to note the very limited amount of time that has been granted to prepare submissions to this Inquiry and the fact that parties do not have access to the Regulations, which makes it difficult to provide detailed comments or recommendations. While the ECA is eager for the JAEPA to come into effect at the earliest opportunity, the ECA remains of the view that there should still be public scrutiny of the JAEPA Customs Bills with adequate time afforded to consider and comment on the JAEPA Customs Bills. The ECA is concerned that the limited time available could compromise both the review of the JAEPA Customs Bills and also the ability of parties such as the ECA to inform its members of the terms of the JAEPA, the JAEPA Customs Bills and the Regulations.

Nevertheless, the ECA is pleased to have the opportunity to put forward this Submission to the Committee.

Background on the ECA

A not-for-profit, membership based organisation, the ECA is the peak industry body representing Australia's exporters. With a membership base of 1,000 and a reach of 15,000, the ECA represents companies of all sizes and across a wide range of industries. The ECA's core activities include research, advocacy, skills development and events.

In 2013 the ECA collaborated with Austrade, Efic and the University of Sydney to undertake a longitudinal study, Australia's International Business Survey (AIBS 2014), designed to capture data on the export behaviour of Australian companies. The first survey captured data from over 1,600 Australian exporters, making it the most comprehensive investigation into Australia's international business activity in more than 15 years. The second survey is currently in the field.

More recently, the ECA released its "Trade Policy Recommendations 2014/2015" (TPR 2014/15) which built on the Recommendations for 2013/2014. TPR 2014/15 includes commentary and recommendations regarding the Government's FTA agenda and ways in which Government should work with industry to raise the level of use of FTAs. The ECA would commend TPR 2014/15 to the Committee as it underpins many of the comments regarding the KAFTA, the KAFTA Customs Bills, the JAEPA and the JAEPA Customs Bills.

The ECA also works collaboratively with a number of Federal and State Government Departments and Agencies to advance its business and the interests of its members; these include DFAT, Austrade, Efic, Customs, the Defence Export Controls Office and the Department of Agriculture. The work with Customs includes representation on the Customs and Border Protection National Consultative Committee and representation on the Industry Advisory Group convened for Customs Trusted Trader Programme.

Previous engagement on the JAEPA

The ECA has already engaged in consultations regarding the negotiation and completion of the Japan-Australia Economic Partnership Agreement ("JAEPA"). This has included:

- a) expressing its congratulations upon the conclusion of the JAEPA : and

- b) making a submission to the inquiry by the Joint Standing Committee on Treaties ("JSCOT") into the JAEPA

Accordingly, the ECA is now pleased to make this submission on the JAEPA Bills.

Issues associated with the Bills to implement the JAEPA

The ECA wishes to make the following comments regarding the JAEPA Customs Bills .

- 2.1 As set out in its submission to JSCOT the ECA generally welcomes the JAEPA and its associated initiatives.
- 2.2 On the assumption that all necessary Parliamentary approvals are secured to allow the enactment and commencement of the JAEPA it is vital that the JAEPA is adapted as early as possible The ECA **recommends** that the Committee seek confirmation of the likely date for commencement of JAEPA.
- 2.3 The ECA is of the view that not only is it important that JAEPA is implemented at the earliest opportunity but is equally important that:
 - a) it is done in a manner consistent with the terms of the JAEPA;
 - b) the terms of the JAEPA and the legislation enabling the JAEPA (including, without limitation, the JAEPA Customs Bills) are communicated thoroughly to the trading community, which will use JAEPA (for instance, importers, exporters, freight forwarders, licensed customs brokers or the providers of air and sea cargo transportation) in a way which makes JAEPA readily accessible and comprehensible to those parties; and
 - c) the administration of the JAEPA and its provisions is undertaken in a manner which is sympathetic to its complexities especially in relation to the compliance with the Rules of Origin ("ROO"). The ECA would refer to its submission to JSCOT, where it was suggested that ongoing consultation, pursuant to the mechanism provided in Article 3.28.3 of JAEPA, should be used to ensure the ROO in JAEPA do not form a barrier to utilisation.

For these purposes the ECA **recommends** that the Committee seek detailed guidance on engagement on JAEPA contemplated by paragraph 3.28.3 of the ECA submission to JSCOT..

- 2.4 By way of further support to the commentary in paragraphs 2.2 and 2.3 above, the ECA would refer the Committee to the recommendations of the B20 Committee as to impediments to the proper adoption and implementation of FTAs and as to the findings of the Survey by the Intelligence Unit of The Economist as commissioned as HSBC, both of which identified that complexities with FTAs pose some of the most significant impediments to adoption and usage of those FTAs. These are also addressed in TPR 2014/15. Accordingly, the ECA is currently discussing this issue and potential solutions with various federal government agencies, including DFAT , Efic and Austrade. For these purposes, the ECA would **recommend** that an education program be developed on the benefits and access to the JAEPA to be funded either by DFAT itself or jointly with other agencies using funding from Australian and Japanese Government sources. The ECA believes that the program be focussed in a way to ensure that SME importers and exporters and their service providers are best able to benefit from the JAEPA.
- 2.5 As to the provisions of the JAEPA Customs Bills, the ECA notes that they largely address the specifics of the JAEPA provisions referred to in the Explanatory

Memorandum associated with the JAEPA Customs Bills in a manner generally consistent to the way in which other Free Trade Agreements have been legislated in Australian practice.

- 2.6 Notwithstanding the observations in the preceding paragraph, the ECA notes that many of the operative provisions of the legislation intended to implement the JAEPA are to be contained in Regulations which are not subject to the current Inquiry. The ECA would **recommend** that Customs and other Government agencies which have been tasked to introduce and adopt legislation to implement the JAEPA should also be obliged to introduce the associated Regulations at an early stage and for those Regulations (and any related procedures) to be subject to review prior to introduction, including review by the Committee.
- 2.7 The ECA is further concerned that the Customs Bills may not specifically address the effect of the JAEPA on other provisions of the Customs Act 1901 ("**Act**") . This is especially important given that a number of offences in the Act which could be triggered in the use of the JAEPA are imposed on a strict liability basis. The ECA believes that the examples below are an accurate representation of the some of the potential inconsistencies between the JAEPA and other provisions of the Act. Accordingly the ECA **recommends** that the Committee should either require amendments to be included in the JAEPA Customs Bills to accommodate the concerns or for Customs to provide a Notice or other Practice Statement that its administration of the Act in the context of the JAEPA will be adjusted to accommodate the concerns expressed below. By way of example:
- a) the "voluntary disclosure" provisions of the Act provide for an exception to liability under sections 243T and 243U of the Act in circumstances where a party identifies an error before Customs gives a notice of intent to audit that party or institute proceedings in relation to a potential breach of the Act. However, Article 3.17.3 of the JAEPA suggests that a party can "promptly" correct an import declaration and pay any duties owing where the importer has reason to believe that a "Documentary Evidence of Origin" on which a claim was based contains information that is not correct. It would appear to follow that such a party should not be subject to prosecution or penalty action even if a notice of intent to audit has been issued (or action has commenced against that party). Accordingly, the terms of the JAEPA appear to be broader to allow for voluntary disclosure without liability than that which is contained in sections 243T and 243U of the Act;
 - b) Article 2.5 of the Implementing Agreement for the JAEPA provides certain concessions from denial of preferential status in relation to minor discrepancies and variations in a Documentary Evidence of Origin. If those discrepancies and variations do not invalidate the claim for preferential status, at the same time, such discrepancies and variations should not lead to the prosecution of a party using that Documentary Evidence of Origin. Such a concession does not appear in the Act or the Guide associated with the Infringement Notice Scheme and should be included;
 - c) Article 3.17.5 of the JAEPA provides for the ability to seek post-importation claims for preferential tariff treatment. This would allow for the claim of preference and the claim for a refund. The ability to seek a refund in these circumstances would be contained in the Customs Regulations 1926 ("Regulations") and the Committee should seek assurance that such a specific provision will be included in the Regulations;
 - d) Article 3.21.3 of the JAEPA provides that a party will be provided with a 45 day period to respond to request for information pursuant to Articles 3.21.2 (b) and (c) of the JAEPA. However, paragraph 126 ANC of the Customs

Amendment JAEPA Implementation Bill 2014 ("**Customs Act Implementation Bill**") does not provide such time periods and should do so;

- e) Article 3.21.4 proposes a timeline on customs administrations to verify eligibility for preferential status and an obligation on written reporting of the decision which does not appear in the Customs Act Implementation Bill. This should be included expressly or by way of administrative arrangement;
- f) Article 3.22 refers to the right to undertake a verification visit by consent. However, there is no corresponding provision with the Customs Act Implementation Bill and the Act allows access by consent or by warrant (without consent). Accordingly the Act should be amended to reflect that access to verify JAEPA compliance is only by consent in which the terms of Article 3.24.3 must also be observed; and
- g) Article 3.23 provides for a denial of preferential treatment under JAEPA if any of the provisions of Articles 3.23.1 (a) to (e) are not observed. However, paragraphs 126ANC and 126AND of the Customs Act Implementation Bill then refer to sections of the Act which provide for strict liability offences which will apply if the provisions of the Customs Act Implementation Bill are not observed. The ECA believes that these offence provisions (section 243SA and 243SB of the Act) should not apply to JAEPA issues as the denial of preferential status should be the extent of liability.

- 2.8 Arising from paragraphs 2.3 and 2.7 of this submission, the ECA **recommends** that the Committee request Customs to provide a Table which refers to each of the specific provisions of Chapters 3 and 4 of the JAEPA and that also identifies where those provisions have been adopted or are proposed to be adopted whether by the JAEPA Customs Bills, otherwise in the Act by the Regulations or by procedure. The ECA recommends that such Table should also include reference to the issues raised in paragraph 2.7 of this submission and how they are to be addressed. This Table will ensure that the Committee is satisfied that the provisions of the JAEPA have been properly accommodated in Australian law and practice.
- 2.9 The ECA **recommends** that it should also request Customs to ensure that its correspondent Japanese Customs Service provides a similar Table in which provisions in its laws and practice accommodate the specific obligations in the JAEPA. This would assist the Committee and would also assist exporters in ensuring that their rights under the terms of the JAEPA are being protected under corresponding Japanese laws.
- 2.10 Without limiting the generality of the abovementioned provisions, the ECA believes that where a party (whether importer or exporter) has relied on a Certificate of Origin properly issued by an authorised party under the terms of the JAEPA which Certificate of Origin proves to have been incorrectly issued (through no fault or proven prior knowledge of the importer or exporter) then the party relying on that Certificate of Origin should not be subject to prosecution, penalty or other compliance action or adverse finding by Customs either here or in Japan.
- 2.11 Further to the comments in the preceding paragraphs, the ECA **recommends** to the Committee that Customs shall also be asked to advise on the following:
 - a) the adequacy of resources available to provide rulings and advice and the mechanisms to resolve disputes regarding claims on preferential access under the JAEPA;

- b) the details of mechanisms and timeframes for parties to be able to secure advance rulings as contemplated by Article 4.5 of the JAEPA and Article 3.4 of the Implementing Agreement and to seek appeals regarding the implementation of the JAEPA as provided for in Chapter 4 of the JAEPA;
- c) the proposed work programs and timings to effect the "facilitation" and "co-operation" provisions as set out in Article 4.9 of the JAEPA;
- d) the availability of "helpdesk" facilities to those wishing to trade using the benefit of the JAEPA to satisfy inquiries;
- e) the protocols or any Memoranda of Understanding as between Customs and its correspondent Japanese Customs Service which would allow each country's officers to travel to the other party and undertake investigations regarding compliance with the terms of the JAEPA as provided for in Article 3.22 of the JAEPA and as otherwise provided for in the Customs Act Implementation Bill : and
- f) whether the JAEPA Customs Bills would benefit from a specific provision allowing the creation of a "Trusted Trader Programme" specific to those likely to be trading under JAEPA or whether that will be addressed in Customs new Trusted Trader Programme which is currently being developed

2.12 Given that the provisions of the JAEPA and especially its ROO and the Certificate or Declaration of Origin regime may be complicated, the ECA is concerned that Customs does not adopt an unnecessarily strict approach to compliance by penalising inadvertent errors using the strict liability provisions of the Act or its associated Infringement Notice Scheme. While recognising the obligations of Customs to protect the revenue, the ECA believes that it is especially important that Customs (and its correspondent colleagues in the Japanese Customs Service) do not unnecessarily impose administrative penalties or institute prosecutions against parties for minor or inadvertent errors in claims of preference or in strict compliance with the terms of the legislation associated with the JAEPA. This is more important than ever given that Customs has made a number of public statements as to its increased compliance activities and the imposition of penalties and the issue of Infringement Notices. It is also important in the context that the terms of the Infringement Notice Scheme was recently amended to increase and facilitate the ability of Customs to issue Infringement Notices and limits the availability of review or the withdrawal of those Infringement Notices.

2.13 Accordingly, the ECA **recommends** that Customs amends the Guide associated with the Infringement Notice Scheme so that:

- a) there should be a general moratorium against prosecution activity, the issue of Infringement Notices or compliance activity for inadvertent breaches associated with JAEPA provisions of the Act for a six month period from the commencement of the JAEPA Customs Bills;
- b) when considering whether to issue an Infringement Notice in respect of claim of preference or trade pursuant to the JAEPA, the relevant decision maker should be required to specifically take into account the wordings of the JAEPA in addition to the Act;
- c) if a party has relied on a Certificate of Origin which has been issued by an authorised body then that party should not be subject to an Infringement Notice if that Certificate of Origin is incorrect for reason of error by the party relying on the Certificate of Origin or error by the issuing party provided the party relying on the certificate was not aware of the error nor caused the error;

- d) the provisions regarding voluntary disclosure should be re-stated in the context of JAEPA so that if a party has made a corrected customs import declaration in the manner contemplated by Article 3.17.3 of the JAEPA, then that party should be deemed as having undertaken voluntary compliance in the context of sections 243T and 243U of the Act and should not be subject to Infringement Notice or other compliance action (including prosecution) even if the terms of these sections have not all been observed;
 - e) no compliance action, Infringement Notice or prosecution should follow if a party has made an inadvertent error associated with the issue or reliance on a Documentary Evidence of Origin in a manner consistent to Article 3.21.3 of the JAEPA; and
 - f) when considering the compliance history of a party as part of a decision whether to issue an Infringement Notice, a decision maker should take into account that the JAEPA is of very recent introduction and therefore there may not be an extensive compliance history in respect of claims of preference under the JAEPA and that the absence of such a history should not mitigate against the interests of the party subject to the investigation.
- 2.14 The ECA points out that this practice as set out in paragraph 2.13 would generally be consistent to the practice which was adopted at the time of the introduction of the FTA between Australia and the US. At that stage Customs specifically adopted amendments to the (then) guidelines associated to the Infringement Notice Scheme which made particular provision regarding the terms of the AUSFTA and ensured that parties were treated in a manner consistent with the specific terms of the AUSFTA even if particular amendments were not made to the relevant legislation.
- 2.15 For those purposes, the ECA **recommends** that the Committee seek other assurances from Customs that the considerations of associated with the issue of an Infringement Notice and the terms of the JAEPA should also extend into decisions as to prosecution (or otherwise) for parties trading under the JAEPA.

Recommendations

Based on the commentary above, the ECA would make the recommendations to the Committee as set out in paragraph 2.2, 2.3, 2.4, 2.6, 2.7, 2.8, 2.9, 2.11, 2.13 and 2.15 of this letter.

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

Yours sincerely

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Export Council of Australia