Export Council of Australia
The Voice for Australia's Exporters

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Legal and Constitutional Affairs
Legislation Committee
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Export Council of AustraliaSubmission to the Inquiry into the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill and the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014

Dear Committee

We refer to your letter of 5 September 2014 and thank you for the invitation to the Export Council of Australia ("**ECA**") to make a submission to the abovementioned Inquiry.

The ECA is now pleased to make the following submission in relation to the Inquiry. The ECA would also be pleased to appear before a Hearing of the Committee and provide further information should the Committee believe that is appropriate.

1. Background on the ECA

A not-for-profit, membership based organisation, the ECA is the peak industry body representing Australia's exporters and importers. 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.

Recently 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 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, the Australian Customs and Border Protection Service and the Department of Agriculture.

2. Previous engagement on the KAFTA

The ECA has already engaged extensively in consultations regarding the

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negotiation and completion of the Korea-Australia Free Trade Agreement ("**KAFTA**"). This has included:

2.1 submissions to DFAT during the course of negotiations regarding the KAFTA;

2.2 making a submission into the inquiry by the Joint Standing Committee on Treaties ("**JSCOT**") into the KAFTA;

2.3 making a submission to the Inquiry by the Senate Standing Committee on Foreign Affairs, Defence and Trade into the KAFTA; and

2.4 appearing at a Hearing before the Senate Standing Committee on Foreign Affairs, Defence and Trade in relation to its inquiry into the KAFTA.

In addition, the ECA has also engaged extensively with submissions on other Free Trade Agreements ("**FTA**") and work with relevant Government agencies.

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

3. Issues associated with the Bills to implement the KAFTA

The ECA wishes to make the following comments regarding the Bills the subject of the Inquiry.

3.1 As set out in other submissions and in evidence before the Standing Committee on Foreign Affairs, Defence and Trade, the ECA generally welcomes the KAFTA and its associated initiatives.

3.2 On the assumption that all necessary Parliamentary approvals are secured to allow the enactment and commencement of the KAFTA it is vital that the KAFTA is adapted as early as possible and preferably before the end of 2014. This would enable Australian traders to secure the benefits of the first reduction in tariffs and protection scheduled to take place in 2014 as well as the reductions scheduled to be effected in 2015. For these purposes, the ECA would refer the Committee to a number of the submissions to the other Inquiries regarding the KAFTA which refer to this benefit and which are specifically referred to in Report 142 by JSCOT (see paragraphs 3.20 to 3.22 of the Report). The ECA **recommends** that the Committee seek confirmation of the likely date for commencement of KAFTA.

3.3 The ECA is of the view that not only is it important that KAFTA is implemented at the earliest opportunity but is equally important that,

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

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

(c) the administration of the KAFTA and its provisions is undertaken in a manner which is sympathetic to its complexities especially in relation to the compliance with the complex rules of origin. Again, the ECA would refer to a number of submissions made to the previous Senate Inquiries regarding the KAFTA which have identified that rules of origin continue to provide difficulties in the adoption of the KAFTA and can also create an impediment to parties actually using the KAFTA and other FTA.

For these purposes the ECA **recommends** that the Committee seek detailed guidance on engagement on KAFTA contemplated by paragraph 3.3(b).

3.4 By way of further support to the commentary in paragraphs 3.2 and 3.3 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. Accordingly, the ECA is currently making submissions to a number of parties (including the Minister for Trade and Investment) that Government agencies should be making steps to change and improve their levels of engagement with the trading community on the FTA.

3.5 As to the provisions of the Bills, the ECA notes that they largely address the specifics of the KAFTA provisions referred to in the Explanatory Memorandum associated with the Bills in a manner generally consistent to the way in which other agreements have been legislated in Australian practice.

3.6 Notwithstanding the observations in the preceding paragraph, the ECA notes that many of the operative provisions of the legislation intended to implement the KAFTA are to be contained in Regulations which are not subject to the current Inquiry. The ECA would **recommend** that the Australian Customs and Border Protections Service ("**Customs**") and other Government agencies which have been tasked to introduce and adopt legislation to implement the KAFTA 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.

3.7 The ECA is further concerned that the Bills may not specifically address many of the actual provisions of the KAFTA. These need to be considered in the context that a number of potential offences are imposed on a strict liability basis. By way of example:

(a) the "*voluntary disclosure*" provisions of the Customs Act 1901 ("**Act**") provide for an exception to 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 3.17.2 of the KAFTA suggests that a party can "*promptly*" correct an import declaration and pay any duties owing where the importer has reason to believe that a Certificate 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 KAFTA 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 3.20 of the KAFTA provides certain concessions from liability in relation to discrepancies and variations in Certificates of Origin or in the format of Certificates of Origin. If those discrepancies and variations do not invalidate the claim for origin then, at the same time, such discrepancies and variations should not lead to the prosecution of a party using that Certificate of Origin. Such a concession does not appear in the Act or the Guide associated with the Infringement Notice;

(c) Article 3.21.3 of the KAFTA provides that each party may provide for penalties for issuing "*false*" Certificates of Origin or documentation. It is the view of the ECA that the reference to "*false*" requires a level of **deliberate** action by a party rather than **inadvertent** failure to comply (in which case the KAFTA could have adopted the term "*incorrect*"). However, neither the Act nor the provisions of the Infringement Notice Scheme provide that prosecution or Infringement Notices pursuant to the KAFTA should only be issued in relation to such **false** Certificates of Origin;

(d) Article 3.18 of the KAFTA 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;

(e) Article 3.23.2 of the KAFTA provides that a party will be provided with a thirty (30) day period to respond to request form information pursuant to Articles 3.23.1 (a), (b) and (c) of KAFTA with the right to ask for a further 30 day period. However, paragraph 126 AMC of the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 ("**Customs Bill**") does not provide such time periods and should do so;

(f) Article 3.24 refers to the right to undertake a verification visit by consent. However, there is no corresponding provision with the Customs 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 KAFTA compliance is only by consent in which the terms of Article 3.24.3 must also be observed; and

(g) Article 3.25 provides for a denial of preferential treatment under KAFTA if the provisions of Articles 3.25.1 (c) and (d) are not observed. However, the Customs Bill then refers to sections of the Act which provide strict liability offences which will apply if the equivalent provisions of the Customs Bill are not observed. The ECA believes that these offence provisions (section 243 SA and 243 SB of the Act) should not apply to KAFTA issues as the denial of preferential status should be the extent of liability.

3.8 Arising from paragraph 3.7, 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 KAFTA and which also identifies where those provisions have been adopted or are proposed to be adopted whether by the Bills, otherwise in the Act or the Regulations or by procedure to ensure that the Committee is satisfied that the provisions of the KAFTA have been properly accommodated in Australian law and practice. This should explain any inconsistencies between the KAFTA and the Bills as set out above.

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

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

3.11 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 KAFTA;

(b) the details of mechanisms and timeframes for parties to be able to secure advance rulings as contemplated by Article 4.7 of the KAFTA and to seek appeals regarding the implementation of the KAFTA as provided for in Chapter 4 and 8 of the KAFTA;

(c) the proposed work programs and timings to effect the "*facilitation*" and "*co-operation*" provisions as set out in Articles 4.9 and 4.10 of the KAFTA;

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

(e) the protocols or any Memoranda of Understanding as between Customs and its correspondent Korean 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 KAFTA as provided for in Articles 3.23 and 3.24 of the KAFTA and as otherwise provided for in the Customs Bill.

3.12 Given that the provisions of the KAFTA and especially its rules of origin and the Certificate or Declaration of Origin regime may be complicated, the ECA is concerned that Customs does not adapt an unnecessarily strict approach to compliance by penalising inadvertent errors using the strict liability provisions of the Act or its associated Infringement Notice Scheme. While recognising the obligations of Customs to protect the revenue, the ECA believes that it is especially important that Customs (and its correspondent colleagues in the Korean 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 KAFTA. 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.

3.13 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 KAFTA provisions of the Act for a six (6) month period from the commencement of the Bills;

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

(c) if a party has relied on a Certificate of Origin which has been issued by an authorised body then the party should not be subject to an Infringement Notice if that Certificate of Origin is incorrect for reason other than error by the party relying on the Certificate of Origin;

(d) the provisions regarding voluntary disclosure should be re-stated in the context of KAFTA so that if a party has made a corrected customs import declaration in the manner contemplated by Article 3.17.2 of the KAFTA, then that party should be deemed as having undertaken voluntary compliance in the context of sections 243T and 243U of the Act and should not be subject to Infringement Notice or other compliance action (including prosecution) even if the terms of these sections have not all been observed;

(e) no compliance action, Infringement Notice or prosecution should follow if a party has made an **inadvertent** error associated with the issue or reliance on a Certificate of Origin as opposed to one which is deliberately false in a manner consistent to Article 3.21.3 of the KAFTA; 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 KAFTA is of very recent introduction and therefore there may not be an extensive compliance history in respect of claims of preference under the KAFTA and that the absence of such a history should not mitigate against the interests of the party subject to the investigation.

3.14 The ECA points out that this practice as set out in paragraph 3.13 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.

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

4. Recommendations

Based on the commentary above, the ECA would make the recommendations to the Committee as set out in paragraph 3.2, 3.3, 3.6, 3.8, 3.9, 3.11, 3.13 and 3.15 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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