



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY



KAFTA SUBMISSION

Joint Standing Committee on Treaties

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EXECUTIVE SUMMARY

The Australian Chamber of Commerce and Industry (ACCI) welcomes the recent completion of the Korea-Australia Free Trade Agreement (KAFTA) negotiations, and looks forward to working with business and government to make the agreement a success.

Bilateral Preferential Trade Agreements such as KAFTA can bring significant benefits for the Australian economy. In particular they can be a more practical way to increase market access into foreign trade partner markets of interest to Australian exporters than waiting for global WTO round finalisation.

We welcome the reduction and elimination of tariffs on Australia's exports of industrial products to Korea. With tariff peaks of over 200 per cent on some agri-food products, and more than 53 per cent of each Korean farmer's income provided by government subsidies, Korea can be a difficult market for Australian agri-food exports. While KAFTA would not remove all tariffs, and would not address subsidies to Korean farmers, it will reduce or eliminate a wide range of tariffs and enable Australian exporters to trade more effectively.

Well known outcomes under KAFTA include:

- The elimination of Korea's 40 per cent tariff on beef and 18 per cent tariff on bovine offal progressively over 15 years.
- The elimination of Korea's 15 per cent tariff on Australian wine immediately on entry into force of the Agreement
- The elimination of Korea's 3 per cent tariff on raw sugar on entry into force
- The elimination of Korea's high tariffs of 36 per cent on cheese and 89 per cent on butter will be eliminated over 13 and 20 years;
 - o Australian dairy exporters will also benefit from growing duty free quotas for cheese, butter and infant formula.
- The elimination of Korea's 22.5 per cent tariff on sheep and goat meat over 10 years. Tariffs on key pork exports of 22.5 to 25 per cent will be eliminated in five to 15 years.
- A wide ranging outcome on horticultural products from the elimination of tariffs on some lines, to greater access for fresh produce to the Korean on a counter-seasonal basis. Highlighting the complementarity between Australia and Korea.

For processed and packaged food (broadly captured under Chapters 16-22 of the Harmonised System of Commodity Description and Coding System), Korea will eliminate a wide range of tariffs of up to 63 per cent over different timeframes. The

outcome will benefit a wide range of processed and packaged food products and enable Australian exporters to more effectively compete with other major exporters including the United States, the European Union and Canada.

While the long timeframes for tariff elimination on particular products and some of the exclusions from liberalisation are disappointing, taken in context, KAFTA will create a framework for Australian exporters to develop in the Korean market to 2050. These benefits will flow more advantageously if the agreement can reach entry into force in the shortest possible time and ideally in 2014.

PTAs can also bring benefits to the domestic economy through lower priced imports and increased inbound investment. However, these benefits can be equally achieved through unilateral actions, rather than holding out particular inbound preferential arrangements with specific countries as negotiating 'coin'. For example, offering a preferential reduction in tariffs on goods from one country and not all countries only disadvantages Australian consumers in the long run. Similarly, preferential access for inbound investment based on the investor country of origin only limits our investments choices. Australia can make unilateral decisions on such matters without needing a preferential trade agreement.

ACCI is interested in ensuring the commercial operability of Australia's preferential trade agreements (PTAs), and so to that end, we focus primarily on the aspects of the agreement that relate to what an exporter or importer needs to do to access the benefits of the agreement. That is, we focus on the market access arrangements and the Rules of Origin, along with the investment aspects. Beyond the hype we ask: how does a company actually access and use the agreement and what are the administrative requirements for doing so?

It is important for all stakeholders to understand that a preferential trade agreement does not automatically confer preferential access to all products from the agreement parties. The agreement only confers preferential terms for market access and tariff concession to those goods, services and investments that comply with the terms and conditions of the agreement.

Whilst we support the work the Australian Government has done with Korea in negotiating a preferential trade treaty to benefit Australian business, there are some concerns we wish to raise with the details of the draft treaty, particularly regarding the Rules of Origin chapter and associated text, and the lack of commercially responsive dispute mechanisms for border-crossing.

The KAFTA agreement is over 1,700 pages long and contains over 4,000 separate product specific rules. Companies need to navigate through these for their own import and export requirements and if compliance is too complex and difficult, then commercial trade will avoid the agreement and utilisation will be low. Container turnarounds in Australian ports already require up to 120 informational transactions,¹ let alone new trade agreement procedures adding to this complexity.

¹ NICTA National Port Community System Submission, 2014 (p. 90).

We are more generally concerned that this agreement, when considered in the aggregate sense along with all of Australia's other PTAs, may increase red tape for business due to the **cumulative effects of divergent and novel procedures across the full range of Australia's PTAs**. These cumulative impacts create ambiguities and are in many cases incompatible with international standards designed to harmonise and facilitate international trade. The irregularities in KAFTA may result in low utilisation if they are not changed prior to ratification.

We conclude our comments with calls for a permanent role for an independent body to analyse the national benefits of PTA negotiations and then regular reporting of performance on each one during their implementation. The success of a trade agreement depends on how much the commercial sector uses it, and so it is important that utilisation rates are regularly reported and scrutinised.

Minister for Trade and Investment, Andrew Robb, recently stated that Australia's bilateral Free Trade Agreements (PTA):

[A]re like bricks in a wall and in fact are prompting important structural changes in countries. They are not multilateral agreements, they are not perfect, but over time you are starting to see a lot of liberalisation in participating countries, a lot more structural change, and so, as you build the wall, we are heading towards a multilateralised result.²

We agree with the Minister, and our comments in this submission are intended to ensure that Australia will construct a wall using PTA building blocks that complement one another, rather than risk piling up an assortment of rocks hoping structural integrity will result.

² The Hon Andrew Robb AO MP, Address to APEC Study Centre: 'Bricks in the Wall: Building Trust, Building Trade', 30 April 2014
<http://www.trademinister.gov.au/speeches/Pages/2014/ar_sp_140430.aspx>.

RECOMMENDATIONS SUMMARY

No.	Recommendation
1	Australia should develop a 'model' Preferential Trade Agreement based on international standards that is fully transparent to Australian Industry and to international Governments, so that all stakeholders are aware of what Australia sees as the ideal outcome from a PTA. The template would be used as a basis for all future negotiations, and will drive a level of consistency and improved confidence as to what is included in the negotiations.
2	The 'Certificate of Origin' is a document in KAFTA that should be certified by a third party, according to internationally accepted standards and in the interests of retaining trust in the trading system for all stakeholders. An exporter declaration without Certification and without the same supporting systems is properly a 'Declaration of Origin', and should be titled accordingly.
3	That if the Government persists with a self-declaration option in PTAs, it must be a system consistent with international best practice and should therefore be underpinned with a 'trusted' or 'compliant' trader regime.
4	<p>Article 3.15(2) should be reworded as follows:</p> <p style="text-align: center;"><i>The certificate of origin shall be completed by an authorised body and shall: ...</i></p> <p style="text-align: center;"><i>(e) include a declaration by the exporter or producer that the goods comply with appropriate rules of origin.</i></p>
5	<p>Article 3.15(3) should be reworded as follows:</p> <p style="text-align: center;"><i>Where an exporter in the territory of a party is not a producer of the good, the exporter may complete and sign a declaration of origin on the basis of:</i></p> <p style="text-align: center;"><i>(a) its knowledge that the good qualifies as an originating good supported by documentary evidence to this effect.</i></p> <p style="text-align: center;"><i>(b) [delete this point].</i></p>
6	KAFTA Chapter 3 Articles 3.15 (5)(b), 3.15(6) and 3.15(7) should be rewritten to include substantive procedure that Customs authorities and exporters/importers may have a clear understanding of the exact time limitations on documentary evidence of origin and preferential claims, so no ambiguity results when attempting border crossing under these vague

	provisions.
7	That the provisions in 3.16 clarify that a Certificate of Origin as described throughout the KAFTA can only be obtained via the Australian Government or its authorised representative, and that if the exporter chooses to make their own declaration without Certification, this will be titled a 'KAFTA Declaration of Origin' in accordance with international documentary standards (described in the definitions).
8	That procedure under Article 3.17 be clarified, and linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see section on appeal issues under KAFTA) at the border-crossing.
9	That guidelines for the discretionary operation of the waiver under Article 3.19 be set out explicitly in the terms of the treaty, to ensure transparency in the operation of the agreement generally.
10	That Article 3.20 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters of variation in export documentation, via government-to-government channels (see section on appeal issues under KAFTA) at the point of border-crossing.
11	Verification processes in Articles 3.23 and 3.24 should be commenced from importing Customs, to the government authorities of the exporting Party, which would then request the information of its own exporter, and relay that advice to its government counterparts in the importing Party.
12	That Article 3.25 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see section on appeal issues under KAFTA) at the point of border-crossing.
13	That Article 3.29 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see section on appeal issues under KAFTA) at the point of border-crossing.
14	That the Certificate of Origin under KAFTA be only issued by authorised bodies (as per the internationally accepted definition of 'Certification') on the basis of the UN Layout Key, in the interests of harmonisation of international trade documentation. Exporters wishing to produce their own declaration should be provided with a prescribed template for a document titled a 'Declaration of Origin', in line with the UN Layout key and internationally accepted definitions of this document.

15	That the Government adopt an 'electronic by default' stance in Chapter 3 to encourage trade facilitative document exchange and encourage this in our trade partners.
16	<p>Australia and Korea should negotiate an Article to be inserted in the Rules of Origin chapter in KAFTA that specifically defines how and when exporters, importers, and Customs administrations are to address appeals and disputes in relation to preference claims, within a commercially responsive timeframe.</p> <p>Such an Article should detail Customer Service Obligations so that industry can understand the timeframes for resolution of any matters concerning the granting of preferential treatment for goods.</p>
17	Article 4.12(1) should be amended to include industry representation.
18	That a review of each negotiation outcome be conducted by an independent body, such as the Productivity Commission, before PTAs are considered by the Parliament to ensure that the national interest has been served by the negotiation outcome.
19	That the Government publish information about the utilisation rate for each of Australia's PTAs on an annual basis and or in other regular trade performance reporting to ensure that the nation is maximising the opportunities available through each agreement.
20	That the Government support the establishment of a Centre of Excellence for International Trade Policy to support and consider issues of trade policy and trade liberalisation. Such a Centre could also include a system of accredited advisers from industry who are able to directly assist with trade liberalisation negotiations.
21	That the Government provide appropriate annual resourcing to ensure that Australian industry is fully informed about the opportunities available in the markets covered by Australian trade agreements, and how they might utilise these agreements.

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1. PROCEDURAL CONSISTENCY ACROSS AUSTRALIA'S PTA

The Australian Chamber of Commerce and Industry (ACCI) welcomes the Korea-Australia Free Trade Agreement (KAFTA), but calls for consistency in procedural requirements for business cumulatively across Australia's existing and newly created Preferential Trade Agreements (PTA).

Part of safeguarding regulatory consistency in trade treaties is to ensure that processes required of business are performed in the same internationally compatible manner as they are in general trade and some current treaties. Trade occurs wherever there is an opportunity in a market, regardless of whether there is a trade treaty in existence or not. Goods are often subject to multiple movements through different ownership and trade zones before reaching a final consumer – thus it makes sense to encourage unified, internationally compatible procedures in trade treaties as a goal, rather than deliberately creating a multitude of different processes in each new trade treaty.

We note KAFTA's ambition for harmonised procedures, particularly where concerned with documentary requirements:

KAFTA Chapter 4, Article 4.3: Harmonisation Of Documents And Data Elements

1. Each Party shall endeavour to pursue the harmonisation of documentation used in trade and data elements in accordance with international standards.

Accordingly, in developing our views we have considered the following existing domestic and international standards:

1. The World Customs Organisation (WCO - 179 members, Australia being a member since 1961) updated *Glossary of International Customs Terms* (November 2013).
2. Precedent Australian preferential trade agreements.
3. The *2006 Revised Kyoto Convention (Convention on the Simplification and Harmonization of Customs procedures)* which Australia has ratified, noting particularly Annex K of the Convention, which contains information on improving border crossing arrangements.
4. The International Trade Centre (ITC), the joint agency of the World Trade Organisation and the United Nations, particularly its *Glossary on Trade Financing Terms*.
5. The 2012 United Nations Economic Commission for Europe (UNECE), acting as the body within the United Nations system for the development of norms, standards

and policy regarding the facilitation of international trade, and its publication the *Trade Facilitation Terms*.

6. The International Organization for Standardization (ISO) accreditation standards for certification, contained within ISO/IEC 17020:2012. As an authorised issuing body for preferential Certificates of Origin, ACCI and its agent chambers are required by the Government to meet this standard, which is administered via an audit scheme by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ).
7. The Australian Customs and Border Protection Blueprint for Reform 2013-2018. This document promotes trade facilitating measures for 'trusted and compliant traders'.

General rules for exporters along with product-specific rules and compliance arrangements are contained in a 'Rules of Origin' chapter within PTAs. The phrase 'Rules of Origin' is somewhat misleading, since aside from containing the criteria for determining the origin of the goods, this chapter *most importantly* also contains the methods by which exporters are to claim their PTA tariff concession from foreign Customs.

Unfortunately, the draft treaty text of KAFTA Chapter 3 contains several procedural requirements that are not only inconsistent with a number of Australia's other PTA, but are also inconsistent with customary international trade documentation for ordinary trade occurring outside the PTA. With the growing importance of supply chains and multiple movements of goods through trade zones, such needless inconsistency risks an obstruction to trade, rather than being trade facilitating.

While the negotiation of the agreement is about bilateral trade, the commercial world rarely works in this manner. Companies seek inputs from multiple countries before the 'last substantial transformation', which provides the final 'origin' of the good for PTA preference purposes. These companies may then supply these goods to multiple buyer nations, requiring compliance on a shipment-specific basis with the needs of market entry for each market. If each market has unique requirements that further branch into multiple means of entry such as MFN or PTA, then companies need to know and understand the value in each option, in each market. The more complex and numerous these rules and procedures are, the higher the costs to business. If these costs exceed the benefits of using the PTA, companies will avoid the treaty and utilisation will be low.

The commercial business interest is in accessing and complying with the terms of each agreement in the most efficient way. To this end, standardisation of procedural requirements across international trade is trade facilitating. If producers and manufacturers know that by doing something the same way each time they develop a product, then they may predict the requirements with certainty. This means the process can be repeated and then automated, which reduces costs for repetitive processes.

The use of harmonised starting points from which to commence negotiations for trade agreements – for example the recently agreed WTO Bali Package and

standards endorsed by the World Customs Organisation (WCO) in the *Revised Kyoto Convention* reflecting existing business practices – should be utilised by Australian PTA negotiators to aid in improving the streamlining of international trade and ultimately reduce costs for business and consumers, rather than the current trend of divergent and burgeoning regulatory requirements. We believe that the problem of aggregate complexity in differing PTA can be overcome through the acceptance of a set of standard definitions and procedures for all border crossing and market access – such as those on offer through the WCO's 2006 *Revised Kyoto Convention*.

The costs of border crossing can be a sizable component of the final built-up costs to production costs for manufacturers, and ultimately transfers to end consumers. Complex market entry requirements mean that companies need to have staff or advisers analysing their market entry systems. Internal staff at each level of the transaction process must understand these processes so they can take advantage of the entry requirements. Business costs are reduced when these systems are predictable and repeatable. In this circumstance, we are extremely concerned that the Rules of Origin Chapter in KAFTA is novel, and fails to utilise tried and tested simple systems that were in place before the agreement, and are presently utilised in general trade and other agreements. It appears instead that KAFTA is creating further novel and divergent regulatory requirements for exporters and producers to overcome – ie red tape.

ACCI's concerns are founded on the experience of Australian exporters and their claims with **counterparty customs** in precedent PTA. The risks to which we refer are of valid claims being rejected in Korea; of non-party goods being claimed for preferential treatment; and to Australian exporters of exposure to direct investigation by Korean authorities.

Our position is based on the practical questions arising from the type of issues Australian exporters face every day when engaging in trade, and how an exporter takes advantage of the preferences conferred in the treaty. This leads to simple questions such as:

- How does a company make a claim for preference?
- What happens to the Australian exporter when a valid claim is unfairly rejected?
- Who represents the exporter?
- What are the agreed timeframes for commercially responsive dispute resolution of the exporter's claim for preference, so that additional costs are not incurred?
- Who bears liability for costs and loss if the exporter's claim was perfectly valid but an administrative oversight causes a delay?
- What prevents non-party goods from being claimed?
- What prevents criminal networks from seeking to utilise the PTA?

Trade documentation and procedures have, over centuries, become international customary standards recognised by international practice, precisely because they answer these questions. Creating a new species of procedures and standards in each new preferential trade agreement, however, makes processes opaque for Australian companies engaged in international trade and exposes them to greater risk when conducting trade. It also raises the possibility of fraudulent behaviour that will be harder to monitor, and provides avenues for non-party goods entering the trade zone, raising also the possibility of reputational risk for Australian produce. It is these risks to exporters about which we are concerned.

Australia has now negotiated nine PTAs, either bilateral or regional, and has another nine under negotiation. Each one of these so far has contained a different set of rules and procedures for their use. ACCI agrees strongly with the Minister regarding the direction Australia should be taking towards world trade, as the Chamber movement is part of an international push to finalise the Doha Round of multilateral trade talks. If bilateral trade agreements such as KAFTA are interim measures or 'building blocks' on the path to an eventual agreement at the multilateral level, then procedures for traders contained within these types of agreements must be harmonised in order to facilitate trade now, and under a future multilateral deal.

→ **Recommendation 1:**

Australia should develop a 'model' Preferential Trade Agreement based on international standards that is fully transparent to Australian Industry and to international Governments, so that all stakeholders are aware of what Australia sees as the ideal outcome from a PTA. The template would be used as a basis for all future negotiations, and will drive a level of consistency and improved confidence as to what is included in the negotiations.

2. TECHNICAL ISSUES IN KAFTA PROCEDURES

Preferential trade agreements are specifically designed to benefit the signature parties and exclude all others. They do this through establishing barriers to trade known as the Rules of Origin. That is, only goods that meet the origin conferring criteria of an agreement are eligible to be offered the preferential treatment of the agreement.

Aside from containing criteria to establish the origin of goods, the Rules of Origin (Chapter 3 in KAFTA) contain the procedures that an exporter must follow to take advantage of the PTA. The Rules on their own (such as 'Change in Tariff Classification' or CTC) are one aspect, and the procedures to make a claim using a given rule are another, but both are contained within the chapter. The schedules then contain more than 4,000 product specific rules.

Chapter 3 also contains various calculation methods for defining compliant goods, and then dictates the procedures by which a claim for preference may be made and how this can be granted by importing Customs. In KAFTA these procedures have not been constructed in a manner consistent with other agreements Australia is party to.

Both the rules and procedures for making claims should be internationally consistent with Most Favoured Nation (MFN) trade and Australia's current successful preferential trade agreements, rather than novel and divergent in each new agreement.

Customs authorities in the importing country also need to be sure that the goods are compliant in order to grant the tariff concession to the goods. We imagine that multiple divergent systems are also adding to the time and cost pressures on the Australian Customs services, who are also attempting to cope with increase trade volumes and increasingly sophisticated criminal networks. Failure to ensure adequate integrity in the claim for the tariff concession and origin may mean that non-compliant goods trade will seek to take advantage of the preferential arrangements, and could also see non-party goods enter the agreement. If the Government is seeking to have a laissez-faire approach to treaty compliance, then there is little point spending many years undertaking negotiations for such trade treaties if the resulting procedures are not robust or commercially relevant.

This is why international harmonisation of the procedures for making such claims is so important. A risk-based system should be encouraged with Australia's trading partners, but such systems need to have appropriate integrity. The administrative processes described in KAFTA fail in some aspects to provide for the requisite levels of 'trust' needed by importing Customs to have confidence to grant tariff concessions. The agreement even holds itself out as having customary international trade procedures by naming certain documentary evidence incorrectly. However, an examination of the detail in the treaty text reveals underpinning trust systems that should operate in support of these documents is missing. Further information follows in this regard.

2.1 Article 3.15 – Certificate of Origin

Chapter 3, Article 3.15: Certificate Of Origin

1. *A claim that a good should be treated as originating and accepted as eligible for a preferential tariff shall be supported by a Certificate of Origin.*
2. *The Certificate of Origin shall be completed by the exporter or the producer and shall:*
 - a. *specify that the goods described therein are originating;*
 - b. *be made in respect of one or more goods and may include a variety of goods;*
 - c. *be in a printed format or such other medium including electronic format; and*
 - d. *be completed in English and contain the data elements set out with instructions in Annex 3-C. A model format for a Certificate of Origin is provided in Annex 3-D.*

Nomenclature issues and ambiguities are a feature of a number of sections in the KAFTA Rules of Origin chapter. Under international standards supported by the World Trade Organisation and World Customs Organisation, customary international law and Trade Finance principles, a *Certificate of Origin* requires a process of certification to an internationally accepted standard (in Australia's case, *ISO 17020* standard under the administration of JAS-ANZ), which in turn provides commercial trust and confidence to the trade transaction for all parties and stakeholders involved in the trade (ie producer, exporter, importer, importing Customs and importing Revenue Office, banks via Letters of Credit requirements, etc).

The process of certification of claims for tariff concessions in both preferential and non-preferential (MFN) trade is an act of Government (or agents of Government) in the originating country. In order to improve the service delivery and provide trade facilitation, this process is usually delegated to a third party (known as a 'competent authority') such as a Chamber of Commerce, which has no interest in the respective commercial transaction. The third party agent verifies and makes a record within its own legal jurisdiction the statements or claims about a product made by a party with a vested interest (such as an exporter). This certified statement is provided to a foreign entity, at the time the import takes place, in order to provide a layer of trust in the transaction – the exporter has declared to their own Government the statement they make in relation to being eligible for the tariff concession, and is therefore legally accountable for false declarations within their own jurisdiction. The definition of the act of certification is neatly laid out by the *International Organization for Standardization (ISO/IEC Guide 2)*:

'Certification is a procedure by which a third party gives written assurance that a product, process or service conforms to specified requirements'

There is no third party involvement in the production of an origin document in KAFTA as per Chapter 3 Article 3.15. Therefore no 'certification' or recording of claims can occur, and the document is not properly a 'Certificate'.

And yet, we note that the Declaration of Origin (see international definitions below) contained within KAFTA is incorrectly labelled a 'Certificate of Origin', even though no Government (or agent of Government) Certification has actually taken place. The KAFTA document that carries the exporter's claim for tariff concession to the importing Government is not a certified document; it is only a Declaration by the exporter alone.

We are extremely concerned that along with Customs, financiers and banks who request transfer of funds on the basis of receiving a KAFTA Certificate of Origin (eligibility for the tariff concession) will be doing so under the false impression that the required Government Certification of the claim has occurred.

Without a Certification process there is no basis for trust in the statement of the exporter, and entities engaged in international trade along with Customs authorities will be rightly sceptical of the claims of the transaction.

In ordinary trade and in other PTA, Certification results in proper intra-jurisdictional compliance checking, which then provides the exporter with a 'passport' (the Certificate) for the goods issued by the Australian Government, confirming that the goods are compliant and preference should be granted.

Such a system then makes possible the removal of shipment-specific assessment by the recipient Government border authorities, and creates the environment for a risk-based assessment of imports, since the issuing exporter Government makes the appropriate checks and no further assessment beyond a statistically relevant review should take place. Such a system also provides an appropriate legal defence to importers and exporters should their claims for preference be improperly challenged by local importing authorities.

→ **Recommendation 2:**

The 'Certificate of Origin' is a document in KAFTA that should be certified by a third party, according to internationally accepted standards and in the interests of retaining trust in the trading system for all stakeholders. An exporter declaration without Certification and without the same supporting systems is properly a 'Declaration of Origin', and should be titled accordingly.

In support of the above recommendation, we submit a number of internationally accepted procedural definitions of the processes expected by customary international trade practice and trade finance.

According to the World Customs Organisation *Glossary* (2013), a 'Certificate of Origin' is:

A specific form identifying the goods, in which the authority or body empowered to issue it certifies expressly that the goods to which the certificate relates originate in a specific country. This certificate may also include a declaration by the manufacturer, producer, supplier, exporter or other competent person. (WCO Glossary pg. 4).

According to the United Nations Economic Commission for Europe (2012), *Trade Facilitation Terms*, a '**Certificate of Origin**' is:

A specific form identifying the goods, in which the authority or body empowered to issue it certifies expressly that the goods to which the certificate relates originate in a specific country. This certificate may also include a declaration by the manufacturer, producer, supplier, exporter or other competent person. COO is typically issued by national chambers of commerce following the model of the International Chamber of Commerce. (UNECE Trade Facilitation Terms, pg. 24)

According to the ITC (the joint trade agency of WTO and UN) *Glossary on Trade Financing Terms*, (2014) a '**Certificate of Origin**' is:

A document certifying the country of origin of the merchandise exported. Such documents, required by some nations for tariff purposes, are usually obtained through a semi-official organization such as a local chamber of commerce. A certificate may be required even if the accompanying commercial invoice provides such information.

To reiterate our points above, we refer to internationally accepted procedural definitions that relate to the type of document that is completed *before* Certification occurs, which is a 'Declaration of Origin'. The international materials define this un-certified and unrecorded statement as follows. According to the WCO *Glossary* (2013), a '**Declaration of Origin**' is:

An appropriate statement as to the origin of the goods made, in connection with their exportation, by the manufacturer, producer, supplier, exporter or other competent person on the commercial invoice or any other document relating to the goods.

According to the UNECE *Trade Facilitation Terms* (2012), a '**Declaration of Origin**' is:

An appropriate statement as to the origin of the goods made, in connection with their exportation, by the manufacturer, producer, supplier, exporter or other competent person on the commercial invoice or any other document relating to the goods.

The requirement of KAFTA Article 3.15 for a 'Certificate of Origin' to be completed by the exporter or producer *without* Certification actually occurring is inconsistent with international procedural conventions relating to this document type. The KAFTA document is, properly, a Declaration of Origin, and should be titled as such.

Furthermore, the KAFTA agreement undermines internationally accepted conformity assessment procedures that support confidence in the trade, for a 'Certificate of Origin'.

There are self-declaration models in use around the world, but these are based on intra-jurisdictional trade (much like trade between Australian states) where the trade falls under an overarching legal framework. In these cases each system is based on a system of trust. **Not all traders can self-declare their own document in these systems, only those who meet the criteria.**

Self-declaration is only possible with the presence of an underpinning system of trust, monitored by Government or Government agencies, to retain the trust in the trading system. This is not present in the KAFTA procedures.

For example, on January 20-21, 2014 the World Customs Organisation held a workshop on origin.³ Two notable presentations were given relating to self-declaration systems currently being developed in ASEAN and the EU. The presentations included the following information about their scheme design, which required exporters who wished to self-declare to first be accredited or registered. The following are the criteria for an exporter to be registered to self-fill their Declaration of Origin:

ASEAN Pilot SC General Selection Criteria [for registration as a self-declaring exporter]:

- Regular exporter with reasonable transaction value
- Good past track record with integrity
- Good compliance over time using current certification system
- Regularly applying for COO under ATIGA
- Products are critical to support a single market and production base
- Reputation for good financial management and financial viability
- Good record keeping facilities for audit and inspections
- Enough trained personal understand and calculate ROO requirements.
- The selected exporters/ importers will need to attend outreach sessions to participate with officials to enhance Self-Certification
- Having a history of using the ATIGA Form D (Brunei)
- Not blacklisted by any authority or agency (Malaysia)
- Must agree to share the update information (Brunei)

[EU system of self-declaration registration] How does it work?

- Exporter lodge **application** with competent authorities
- Authorities check whether application is **complete**

³ see <http://www.wcoomd.org/en/events/upcoming-events/wco-origin-conference-2014/program.aspx>

- Authorities accept application and **register** exporter in the system
- European Commission receives information on registration of exporter and maintains **central database** of registered exporters
- Information about exporter is **published on the internet**, with exception of 'confidential' data

Obligations [between trading partners]

- **Of Beneficiary Countries:**
 - Submit **comprehensive undertakings**
 - Notify EU Commission of names and addresses of authorities empowered to:
 - register exporters
 - provide administrative cooperation

The measures in the above ASEAN and EU systems also reflect ACCI's understanding of what other nations and regions are considering regarding self-declaration. To date we are unaware of any discussions that DFAT have had with industry about the detailed design requirements of self-declaration systems. We note that DFAT has negotiated systems in ANZCERTA and MAFTA that do not conform to the models above. The above models indicate the requirement in both ASEAN and the EU for a system of **accredited or registered trader** to underpin the 'trust' elements of the scheme. To note, both models are created within an internal jurisdiction (much like internal trade within Australia) for trade, between sovereign states within a single administrative zone like the EU, and prospectively for an ASEAN Single Economy. The ASEAN presentation also refers to development of an external ASEAN Certificate of Origin – which we presume will be the means for extraterritorial trade beyond the ASEAN.

It is essential that DFAT not misrepresent these self-declaration schemes to exporters as being appropriate for international trade without underpinning registered trader systems. Conversely, registered trader systems have consistently been rejected by Australian exporters as being too costly to be of value. The closest system in Australia to the registered exporter system is within AANZFTA, for which ACCI and AiG are accredited by JAS-ANZ, and are required by the Government to keep a register of exporters, check and assist with statements – all at low cost.

The laissez-faire systems of declarations masquerading as Certificates being negotiated by Australia in MAFTA and now via another set of procedures in KAFTA do not involve any level of trust. This exposes exporters to risk, and undermines international systems of trade. It also makes compatibility with electronic systems nearly impossible, as under these PTA exporters are not completing their data in uniform ways. We believe that well-run electronic systems satisfy the needs of exporters for ease and low cost documentation, whilst affording a high degree of

accountability and certainty in the trading environment. Such systems require data and documentary harmonisation in order to be effective – the same type of harmonisation KAFTA calls for at Chapter 4 Article 4.3. It is therefore imperative that this treaty meet its own objective by requiring documentation of exporters that is harmonised with world trade, rather than divergent.

In many economies the granting of preference comes at an economic cost and so Customs administrations are charged with seeking to disallow the claims for preference. Exporters self-declaring their claims for tariff concessions have no legal standing in foreign countries, unless they have the backing of the Australian Government. Certificates of Origin, however, are already a document backed by the exporter's own Government, and so do not suffer the same risk. Exporters also suffer reputational risk as Product of Australia declarations may potentially be supplied from non-complying sources. Importers face similar risks if they rely on a non-accredited Declaration from an international supplier. It is the importer who is the first line of inquiry if a claim for preference is questioned, but the exporter is also likely to be drawn in. The AUSFTA, for example, allows for the direct inquiry of an Australian exporter by the Office of Homeland Security. We have examples of companies incurring significant costs under the AUSFTA relating to their declared claim for preference, and who finally satisfied the inquiry by providing a Certificate of Origin as a Government-backed claim.

We have also experienced cases where perfectly valid claims for preference on Certificates of Origin by Australian exporters are rejected by foreign Customs. These exporters are assisted by the issuing bodies and by the Department of Foreign Affairs and Trade, who by virtue of the record of Certification can make representations to foreign Customs regarding the export. Self-Declaration, however, has no such record of Certification. Without a domestically managed scheme supported by the Australian Government, exporters who self-declare without support will potentially suffer the costs of demurrage while they sort out the paperwork, interest, opportunity costs, potential loss of contracts and possible fines and legal costs. Under a system such as AANZFTA, which contains the Certificate of Origin, they are supported by the Australian Government and organisations like ours, from certification through the post entry process. Self-declared exports are not supported in the same way.

We submit that it is impossible for an exporter to comply with the requirement in article 3.15, because no Certification actually occurs, and the document described by that section is an unsupported Declaration of Origin, which does not provide the same level of confidence to international trade stakeholders.

➔ **Recommendation 3:**

That if the Government persists with a self-declaration option in PTAs, it must be a system consistent with international best practice and should therefore be underpinned with a 'trusted' or 'compliant' trader regime.

➔ **Recommendation 4:**

Article 3.15(2) should be reworded as follows:

*The certificate of origin shall be completed by an authorised body and shall: ...
(e) include a declaration by the exporter or producer that the goods comply with appropriate rules of origin.*

→ **Recommendation 5:**

Article 3.15(3) should be reworded as follows:

Where an exporter in the territory of a party is not a producer of the good, the exporter may complete and sign a declaration of origin on the basis of:

(a) its knowledge that the good qualifies as an originating good supported by documentary evidence to this effect.

(b) [delete this point].

Furthermore, we note Article 3.15(5)(b) currently reads:

A Certificate of Origin shall be applicable to:

(a) a single importation of one or more goods into a Party's territory; or

(b) multiple importations of the goods described therein that occur within the period of validity of the Certificate of Origin.

This is an incomplete provision – there are no procedural obligations for importing Customs and it is not clearly established what is expected of the importer or the exporter in such circumstances. There is also no appropriate limitation or conditions of the use of such a waiver. We are not aware of any international precedent for a Certificate of Origin to apply to multiple importations in such a vague manner. There is a grave danger that the shipment origin could change from shipment to shipment. It would be commercially negligent for any exporter or agent or authorised body to sign a document pertaining to yet-to-be-prepared shipments, even less an importing Customs to have confidence in granting a tariff concession for goods arriving under such a recycled statement.

This section is therefore unworkable. It is unclear in KAFTA which authority prescribes the period of certificate validity, and to what types of goods.

We also note Article 3.15(6) currently reads:

A Certificate of Origin shall remain valid for at least two years, or for such longer period specified by the laws and regulations of the importing Party, after the date on which the Certificate of Origin was signed.

This section is similarly unworkable due to the inability of anyone involved in the statement having the foresight to be able to make such a statement. Similarly to the above section, this is a vague requirement and is fundamentally incompatible with

customary international trade practices. The treaty text is also completely silent on the enforceable process for acceptance of such a waiver document by importing Customs, and there is no procedural binding text by which Custom authorities on both sides are to proceed.

It is not practical for the Certificate of Origin to apply for a blanket period as described in 3.15(6), as the issuing body has no foresight of the future transactions in order to ensure conformity. Is it expected that the importer will have to present the same document over and over each time they import goods? What happens if the original is currently with Customs when another shipment is to be cleared? What happens if the original document is lost during the course of its two-year currency? Is there a procedure whereby the import authorities retain an electronic copy of the blanket Certificate of Origin in their records with some form of reference that can then be mentioned on each relevant import clearance declaration?

Article 3.15(7): currently reads:

For any originating good that is imported into the territory of a Party on or after the date of entry into force of this Agreement, each Party shall accept a Certificate of Origin that has been completed and signed prior to that date.

This article allows for Certificates of Origin to be presented seemingly with no limit to the pre-dating capacity described. There is no description of the procedure for dispute resolution if such pre-dated certificates are not accepted by Customs officials. This is completely incompatible with use of Certificates of Origin beyond the trading zone, and undermines customary international trade procedure in relation to accountability and trust principles.

→ **Recommendation 6:**

KAFTA Chapter 3 Articles 3.15 (5)(b), 3.15(6) and 3.15(7) should be rewritten to include substantive procedure that Customs authorities and exporters/importers may have a clear understanding of the exact time limitations on documentary evidence of origin and preferential claims, so no ambiguity results when attempting border crossing under these vague provisions.

2.2 Article 3.16 – Authorised Bodies

KAFTA Chapter 3, Article 3.16: Authorised Bodies

- 1. Further to Article 3.15, for Australia, a Certificate of Origin may be issued by an authorised body following a written application submitted by an exporter or producer.*
- 2. Australia shall provide that its authorised bodies carry out proper examination of each application for a Certificate of Origin to ensure that:*

(a) the goods described therein are originating; and

(b) the data to be contained in the Certificate of Origin corresponds to that in supporting documentary evidence submitted.

3. *Australia shall provide that its authorised bodies retain copies of Certificates of Origin and supporting documentary evidence for five years after the date of issue. Such documentation may be maintained in any medium that allows for prompt retrieval, including but not limited to, digital, optical, magnetic or written form.*
4. *Australia shall provide that an authorised body that has reason to believe that a Certificate of Origin, which it has issued, contains information that is not correct, shall promptly notify in writing the person to whom the Certificate of Origin was issued.*
5. *Australia shall notify the names, addresses, specimens of the impressions of the official seals of its authorised bodies and other details that the Parties may agree to Korea. Any subsequent change shall be promptly notified.*

This article appears to only provide for Australia to have Certificates of Origin issued by an authorised body – except the provisions in Article 3.15 appear to directly contradict this section. This also means that similar arrangements are not available for goods exported from Korea to Australia. This highlights the capacity in PTAs for Australia to negotiate unilateral procedural arrangements specific for Australian exporters and ensuring trade facilitating outcomes. If it is possible for Australia to negotiate unilateral procedural requirements in PTA, then there should be no reason for Australia's PTA to have different rules and procedures for making a claim for tariff concession under our in-force PTA.

It would appear incongruous that Australian importers are forced to rely upon simple unaccredited declarations of origin from Korean exporters without any requirement for third party validation of the claims of complying origin and claims for preference. There is no process described that relates to the nature of by whom and under what circumstances a valid declaration can be made. Such a system would allow for non-party goods to be supplied by traders who claim (self-declare) the goods comply and are eligible for preference. Such a system has no veracity, and undermines the international trade principles for ordinary trade. An importer relying on a statement declared in this way would have no legal defence should the local authorities in the importing party commence action to address non-conformity.

Similarly, there is no guidance on what validation steps should be taken by an authorised body in issuing a Certificate of Origin. Article 3.16 (5) states that the national Government of Australia is required to provide a list of names and signatures for authorised bodies, yet the KAFTA agreement is silent on what is required of individual exporters attempting to utilise article 3.15. Such an ambiguous and uneven scheme risks recipient Customs officers rejecting claims under Article 3.15.

It is unclear whether Customs authorities in each party are to assign a record of exporter names and goods exported to a register, and it is unclear under what conditions a multiple entry certification will be accepted by importing Customs.

Furthermore, it is unclear which obligations relating to Certification are owed by which stakeholders, when those obligations are transferred or met, and how disputes arising under this system are to be resolved in a commercially responsive manner.

Article 3.16 (1) states:

Further to Article 3.15, for Australia, a Certificate of Origin may be issued by an authorised body following a written application submitted by an exporter or a producer

Having consideration for the above requirements of a 'Certificate', we further submit it is incorrect for the treaty to use the word 'may' at 3.16 (1) in relation to obtaining a Certificate of Origin, given the above discussion and particularly in light of the Governmental authority to issue Certificates of Origin granted to competent bodies under the 1923 *International Convention Relating to the Simplification of Customs*.

We further submit that under the Department of Foreign Affairs and Trade *Scheme for the Recognition of Bodies to Issue Certificates of Origin* (2010), which requires JAS-ANZ to assess conformity assessment bodies (issuing bodies such as ACCI and AiG) using ISO 7020 standards, all bodies involved in issuing Certificates of Origin need to be complying bodies under this scheme. The 'may' at 3.16(1) should be a 'shall', unless exporters wish to complete a Declaration of Origin, which is a different document in international trade, that does not have the same components of trust attached, and therefore will not meet the requirements of Letters of Credit and similar financial documents.

→ **Recommendation 7:**

That the provisions in 3.16 clarify that a Certificate of Origin as described throughout the KAFTA can only be obtained via the Australian Government or its authorised representative, and that if the exporter chooses to make their own declaration without Certification, this will be titled a 'KAFTA Declaration of Origin' in accordance with international documentary standards (described in the definitions above).

2.3 Article 3.17 (1) – Claims for Preferential Tariff Treatment

KAFTA Chapter 3, Article 3.17: Claims for Preferential Tariff Treatment

1. Unless otherwise provided in this Chapter, each Party shall grant preferential tariff treatment to a good imported into its territory from the other Party,

provided that:

- a. *the importer requests preferential tariff treatment at the time of importation;*
 - b. *the good qualifies as an originating good;*
 - c. *the importer has the Certificate of Origin in its possession at the time the customs import declaration is made, if required by the laws or regulations of the importing Party; and*
 - d. *the importer provides, on request of the importing Party's customs administration, a copy of the Certificate of Origin and such other documentation relating to the importation of the good in accordance with the laws and regulations of the importing Party.*
2. *An importer should promptly make a corrected customs import declaration in a manner required by the customs administration of the importing Party 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.*

While article 3.17 (2) provides for corrections and repayment in the event of incorrect statements, the KAFTA agreement is silent on the course of action if a valid claim is unfairly rejected by recipient Customs. This needs to be addressed. Under Article 3.17 (d), what is the validation process for a 'copy' of the certificate that may be presented to Customs administration?

→ **Recommendation 8:**

That procedure under Article 3.17 be clarified, and linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see below section on appeal issues under KAFTA) at the border-crossing.

2.4 Article 3.19 – Waiver of Certificate of Origin

KAFTA Chapter 3, Article 3.19: Waiver of Certificate of Origin

Each Party shall provide that a Certificate of Origin shall not be required for:

- a) *an importation of a good whose customs value does not exceed 1,000 Australian dollars for Australia or 1,000 US dollars or its equivalent amount for Korea, or such higher amount as each Party may establish; or*
- b) *an importation of a good for which the importing Party has waived the requirement for a Certificate of Origin, provided that the importation does not form part of a series of importations that may reasonably be considered to*

have been undertaken or arranged for the purpose of avoiding the certification requirements of Articles 3.15 and 3.17.

ACCI supports the concept of a waiver for low value goods consistent with the revised Kyoto Convention, however Article 3.19 (a) allows for discretion in the threshold applying for any waiver. The article is silent on what process will be utilised to vary the threshold that 'each Party may establish', and how such advice is to be communicated to industry.

The *Revised Kyoto Convention* supports such a waiver but Governments should not operate this threshold on the basis of a whim. The system should be known, understood and predictable.

→ **Recommendation 9:**

That guidelines for the discretionary operation of the waiver under Article 3.19 be set out explicitly in the terms of the treaty, to ensure transparency in the operation of the agreement generally.

2.5 Article 3.20 – Discrepancies and Variations

KAFTA Article 3.20: Discrepancies and Variations

- 1) Where the origin of the good is not in doubt, minor transcription errors or discrepancies in documentation shall not ipso facto invalidate the Certificate of Origin, if it is duly established that it does correspond to the goods submitted.*
- 2) Variations in the format of the Certificate of Origin from the model format set out in Annex 3-D shall not invalidate the Certificate of Origin, provided that the Certificate of Origin contains the data elements set out in Annex 3-C.*

ACCI supports this article, however the KAFTA text is silent on the process for commercially responsive dispute resolution in cases where valid claims for preference are rejected by a Party, as occurs from time to time in international trade, and is likely to occur if commercial entities fail to utilise the model form. Exporters attempting to use the KAFTA should experience consistency with other PTA, and trade generally, which is why internationally harmonised documentary standards are essential for trade facilitation. Divergent and ad hoc documentation prepared differently by each different exporter is not trade facilitating, and will likely lead to confusion at importing Customs.

→ **Recommendation 10:**

That Article 3.20 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters of variation in export

documentation, via government-to-government channels (see below section on appeal issues under KAFTA) at the point of border-crossing.

2.6 Articles 3.23 & 3.24 – Claim Verification

KAFTA Article 3.23: Origin Verification

1. *For the purposes of determining whether a good imported into a Party from the other Party qualifies as an originating good, the customs administration of the importing Party may conduct a verification action by means of:
 - a. *written requests for information from the importer;*
 - b. *where the Certificate of Origin was issued by an authorised body, requests to that authorised body to verify the validity of the Certificate of Origin;*
 - c. *written requests for information from the exporter or producer of the exporting Party;*
 - d. *requests that the customs administration of the exporting Party assist in verifying the origin of the good; or*
 - e. *verification visits to the premises of the exporter or the producer in the territory of the other Party to observe the facilities and the production processes of the good and to review the records referring to origin, including accounting records.**
2. *For the purposes of paragraphs 1(a), 1(b) and 1(c), the customs administration shall allow the importer, exporter, producer or authorised body a period of 30 days from the date of the written request to respond. During this period the importer, exporter, producer or authorised body may request, in writing, an extension not exceeding 30 days.*
3. *For the purposes of this Article and Article 3.24, all the information requested by the importing Party and responded to by the exporting Party shall be communicated in English.*
4. *The customs administration of the importing Party shall complete any action under paragraph 1 to verify eligibility for preferential tariff treatment within the period specified in the laws, regulations or administrative procedures of the importing Party. Upon the completion of the verification action, the customs administration shall provide written advice to the importer, exporter or producer of its decision as well as the legal basis and findings of fact on which the decision was made. Where a verification visit was undertaken, the customs administration shall also provide advice of the decision to the exporting*

Party.

KAFTA Article 3.24: Verification Visit

- 1. Prior to conducting a verification visit under Article 3.23.1(e), the customs administration of the importing Party shall:
 - a. make a written request to the exporter or producer to conduct a verification visit of their premises; and*
 - b. obtain the written consent of the exporter or producer whose premises are to be visited.**
- 2. An exporter or producer should provide its written consent to a proposed verification visit within 30 days from the receipt of notification in accordance with paragraph 1(a).*
- 3. The written request referred to in paragraph 1(a) shall include:
 - a. the identity of the customs administration issuing the request;*
 - b. the name of the exporter of the good in the exporting Party to whom the request is addressed;*
 - c. the date the written request is made;*
 - d. the proposed date and place of the visit;*
 - e. the objective and scope of the proposed visit, including specific reference to the good that is the subject of the verification referred to in the Certificate of Origin; and*
 - f. the names and titles of the officials of the customs administration of the importing Party who will participate in the visit.**
- 4. The customs administration of the importing Party shall notify the customs administration of the exporting Party when it requests a verification visit in accordance with this Article.*
- 5. Officials of the customs administration of the exporting Party may participate in the verification visit as observers.*

These articles provide for direct investigation of exporters in either Party by the authorities of the importing Party, with seemingly no simple precursor steps to validate claims for preference via government-to-government channels, and no protection from the originating Party government from such actions in the event of valid claims.

It is imperative that the Australian Government reverts to a system of intra-jurisdictional control points and internationally recognised methods of Certificate of Origin issue in order to provide appropriate strength to valid claims of preference. The Certificate of Origin system which has been developed internationally over centuries is a domestic validation of a claim via the issuance of a government-assured document that the claim is valid. Undermining this process of government-based assurance is to undermine internationally established systems of confidence in trade.

The approach in KAFTA and other PTA the Australian Government has recently entered into is a significant departure from international standards and the system deployed in previous PTAs such as AANZFTA, and for ordinary trade. In doing so, the Government is placing enormous risks and incompatibilities on Australian traders, which may have equally significant cost impacts on trade, and may result in the under-utilisation of PTA.

→ **Recommendation 11:**

Verification processes in Articles 3.23 and 3.24 should be commenced from importing Customs, to the government authorities of the exporting Party, which would then request the information of its own exporter, and relay that advice to its government counterparts in the importing Party.

2.7 Article 3.25 – Denial of Preferential Tariff Treatment

KAFTA Article 3.25: Denial of Preferential Tariff Treatment

1. *The importing Party may deny a claim for preferential tariff treatment or recover unpaid duties in accordance with its laws and regulations, where:*
 - a. *the good does not meet the requirements of this Chapter;*
 - b. *the importer, exporter or producer of the good fails or has failed to comply with any of the relevant requirements for obtaining preferential tariff treatment, or to maintain records or documentation in accordance with Article 3.22;*
 - c. *the importer, exporter or producer fails to provide information that the Party requested in accordance with Article 3.23.2 demonstrating that the good is an originating good; or*
 - d. *after receipt of a written notification for a verification visit in accordance with Article 3.24.1, the exporter or producer fails to provide its written consent in accordance with Article 3.24.2 or to provide access to records, production processes or facilities referred to in Article 3.23.1(e) demonstrating that the good is an*

originating good.

2. *The importing Party may suspend or deny, in accordance with its laws and regulations, the application of preferential tariff treatment to a good that is the subject of an origin verification action under Article 3.23 for the duration of that action, or any part thereof.*
3. *When the importing Party determines that a good is not eligible for preferential tariff treatment, the right of suspension or denial shall extend to any subsequent import of goods that are the same in all respects relevant to the particular rule of origin, until it has been demonstrated that those goods comply with the provisions of this Chapter.*

This article provides for a process for a party to deny a claim for preference, however, the KAFTA agreement is silent on the protections for commercial entities when valid claims are unfairly not honoured by Parties. The process of dispute resolution between exporter and importing Customs, as we indicate below, is not commercially responsive when crossing the border, and is directed to the impractical treaty dispute mechanism in Chapter 4. This needs to be addressed.

→ **Recommendation 12:**

That Article 3.25 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see below section on appeal issues under KAFTA) at the point of border-crossing.

2.8 Article 3.29 –Appeal Procedures

KAFTA Article 3.29: Appeal Procedures

The rights of review and appeal in matters relating to the determination of origin under this Chapter shall be granted, in accordance with Article 4.8 (Appeal Procedures), to an importer, exporter or producer of a good.

This article provides for dispute resolution only via the general dispute provisions in Article 4.8 and Chapters 19 and 20, rather than explicit and commercially responsive dispute resolution at the time of the border crossing.

KAFTA is silent on situations in which an exporter and an importer make a valid claim for preferential treatment via a Declaration of Origin under KAFTA, and that valid claim is unfairly rejected by importing Customs. There is no commercially responsive system of support for the validity of the claim by the exporter or the importer, when goods may be sitting on the dock waiting to cross the border. This is discussed in the section below.

It is also that in some instances, make a false or fraudulent claim can also result in additional corrective actions being taken by the relevant authorities. Therefore it is

essential that the commercial users of the PTA have appropriate due diligence tools to support their claims for preference. Such tools should include a third party issued certificate of origin.

→ **Recommendation 13:**

That Article 3.29 be linked directly to a commercially responsive dispute settlement mechanism capable of resolving matters via government-to-government channels (see below section on appeal issues under KAFTA) at the point of border-crossing.

2.9 Annex 3-D – Model Format

ANNEX 3-D MODEL FORMAT		
AUSTRALIA-KOREA FREE TRADE AGREEMENT CERTIFICATE OF ORIGIN		
Please Print or Type		1. Issuing number:
2. Exporter - name and contact details:	3. Blanket period for multiple shipments: From: (DD/MM/YYYY) To: (DD/MM/YYYY)	
4. Producer - name and contact details (optional field):	5. Importer - name and contact details (optional field):	
6. Description of good(s) <small>(including quantity, invoice number or other unique reference number where appropriate):</small>	7. Harmonized System code <small>(six digits):</small>	8. Preference criterion:
9. Observations (optional field):		
10. Declaration: I certify that: - The information in this document is true and accurate and I assume the responsibility for proving such representations. I understand that I am liable for any false statements or material omissions made on or in connection with this document. - I agree to maintain, and present upon request, documentation necessary to support this Certificate, and to inform, in writing, all persons to whom the Certificate was given of any changes that would affect the accuracy or validity of this Certificate. - The goods originate in the territory of one or both Parties and comply with the origin requirements specified for those goods in the Australia – Korea Free Trade Agreement. This Certificate consists of _____ pages, including all attachments.		
11. Signature:	Company or Authorised Body:	
Name:	Title:	
Date:	Contact details:	

The model format form at Annex 3-D is inconsistent with the UN Layout Key, which is the main international standard for trade documentation. Our experience of other PTAs suggests that once a form has been identified, this becomes the form Customs agents are looking for, despite variation seemingly being available. When we have considered variations in the example of the Malaysia PTA, DFAT informed us that no variations are covered by the PTA agreement.

The guidance notes on KAFTA Annex 3-D include that this form must be completed 'in the case of Australia by an authorised body ...'. As discussed above, it is not possible for an authorised body to complete the form on behalf of the exporter, as

the process of certification is one of arm's-length assessments of the exporter's own claims, against conformity standards.

The language and nomenclature of the documents is also incorrect by international standards, and needs to be changed to reflect an intra-jurisdictional 'declaration' by the exporter to a competent authority, which then 'certifies' the claims being made once satisfied as to their veracity. The form also doesn't contain any field for certification by an authorised body (cf Article 3.16 above). If the missing field is meant to be the box adjacent to field 11, ACCI would have difficulty completing this field, as we would become liable for the statement in field 10. It is the exporter who makes the declaration, and the authorised body who certifies and records the declaration made to the Government agency (issuing body) inside the exporting jurisdiction.

Furthermore, the form at field 10 contains a personal – rather than exporting company – declaration, which appears to contain the personal statement of the individual person signing. This in turn leads to a corresponding personal liability for the statement, which is commercially unworkable.

The field at item 3 is not marked optional; however the guidance notes suggest that it is. Notwithstanding our concerns above about the capacity to provide this information, our experience of international trade is that fields left blank will automatically attract an inquiry into the claim by foreign Customs, and in most cases, a denial of preferential tariff treatment.

→ **Recommendation 14:**

That the Certificate of Origin under KAFTA be only issued by authorised bodies (as per the internationally accepted definition of 'Certification' above) on the basis of the UN Layout Key, in the interests of harmonisation of international trade documentation. Exporters wishing to produce their own declaration should be provided with a prescribed template for a document titled a 'Declaration of Origin', in line with the UN Layout key and internationally accepted definitions of this document.

2.10 Other Chapter 3 issues

KAFTA is silent on transmission methodology for Certificate of Origin from the exporter to the importer/importing Customs, and so provides no guidance on what the acceptable form for submission will be. ACCI believes that electronic Certificates of Origin is best practice and should be clearly identified in the agreement. Given Australia's experience with the Thailand-Australia Free Trade Agreement (TAFTA), a specification for electronic transmission of preference claims must be made in the treaty text itself, and expressly agreed by all parties at the time of ratification.

→ **Recommendation 15:**

That the Government adopt an 'electronic by default' stance in Chapter 3 to encourage trade facilitative document exchange and encourage this in our trade partners.

3. COMMERCIALY RESPONSIVE DISPUTE RESOLUTION AT THE BORDER CROSSING

The ACBPS *Compliance Update* of November 2013 demonstrates that claims of origin and preference made by foreign exporters transporting goods into this country are not always error-free. For example, the ACBPS *Update* on importation data concludes that detections of 'Origin' errors increased from 3.5% in 2012-13, to 4.02% in 2013-14. Similarly, the *Update* states that detections of 'Tariff Concession or other Concession' errors increased from 4.79% in 2012-13, to 6.03% in 2013-14.⁴ These trends are likely due to the increasing complexity of trade documentation – and corresponding error detection – for goods entering Australia. As there is no official record of misdeclaration by Australian exporters into other nations, from our experiences assisting Australian exporters negotiating the border-crossing in other countries, we know that the majority of errors in such claims and associated documentation are not deliberate, and that with growing complexity in procedural requirements, exporters often simply need to know what the issue with their documentation is at the importing end, so that they might quickly clarify and correct any errors and obtain the preference claimed. We are concerned that divergent procedures in KAFTA, however, may prevent the quick and commercially responsive clarification process.

An example of divergent procedures operating in KAFTA is the requirement for exporters to rely on the importer for an appeal, should their exported good be unfairly denied the tariff concession. For example, KAFTA is silent on situations in which an exporter and an importer make a valid claim for preferential treatment via a Declaration of Origin under KAFTA, but where that valid claim is unfairly rejected by importing Customs. KAFTA Chapter 3 Article 3.29 provides for dispute resolution for exporters only via the general dispute provisions in KAFTA Chapter 4 Article 4.8.

Article 4.8, however, gives an exporter a vague right to appeal ('substantially the same rights') as per below:

KAFTA Chapter 4, Article 4.8 – Appeal Procedures

1. *Each Party shall ensure that with respect to its determinations on customs matters, importers in its territory have access to:*
 - a. *at least one level of administrative review independent of the official or authority responsible for the determination under review; and*
 - b. *judicial review of the determination or decision taken at the final level*

⁴ ACBPS, *Compliance Update Nov 2013*,
<<http://www.customs.gov.au/webdata/resources/files/ComplianceUpdateNov2013Interactive.pdf>>

of administrative review.

2. *Each Party shall grant substantially the same rights of review and appeal of determinations of origin and advance rulings by its customs administration as it provides to importers in its territory to any person who has:*
 - a. *completed and signed, or applied for, a Certificate of Origin for a good that has been the subject of a determination of origin; or*
 - b. *received an advance ruling in accordance with Article 4.7.*
3. *Each Party shall allow an exporter or producer to provide information directly to the Party conducting the review and to request that Party to treat that information as confidential in accordance with the laws, regulations and rules of that Party.*

There is no system of support for the validity of the claim by the exporter or the importer. Time-sensitive exports will normally require review of decisions within hours in order to cross the border, rather than months as would be expected under Article 4.8 disputes. Similarly, Chapters 19 and 20 contain only general and unspecified provisions that aspire to dispute resolution, rather than explicitly laying down an agreed procedure that is commercially responsive and tailored to the border-crossing.

ACCI's experience in other PTAs has confirmed it is essential for exporters to be able to seek Government assistance to back up their claims for preference in a timely manner, particularly to destination ports where there may be less resources available to importing Customs (such as access to databases), or where mistakes made in the processing of international trade documentation by importing Customs need to be dealt with swiftly to avoid goods clearance delays. Not having such procedures in place could end up costing exporters and importers demurrage fees and additional charges and costs including the potential loss of the market if supply is unreliable.

In the event that an exporter or importer feels their claims for preference and tariff reduction have been unfairly treated by importing Customs, there is no mention of a commercially responsive procedure relating to appeals for review on the decisions of importing Customs (in either party).

It may be useful to consider the hypothetical exporter with a time-sensitive cargo, with goods on the importing dock, but whose valid claim for preferential tariff concessions is not accepted by the importing Customs on account of a misunderstanding about the exporter's uncertified and unrecorded Declaration. On direct investigation by foreign Customs, the exporter has a choice of either paying penalty fees for the goods to remain on the dock, or not using the KAFTA and paying the tariff. If we turn to the appeal mechanism available to the hypothetical exporter, we find the following:

- The exporter is entirely reliant on the importer taking up a right to an undescribed and vaguely supported administrative review suggested by Article 4.8(1)(a)&(b) above.
- Under Article 4.8(2) the exporter is only entitled to ‘substantially’ the same rights of appeal as the importer might exercise on importing Customs. This is ultimately a vague and meaningless provision, and provides no compulsion on the part of either Customs in Australia or Korea to concede to appeals made by exporters, particularly at the commercially responsive speeds of review necessitated by the nature of some time-sensitive cargos. There is no solid regulatory value that can be relied on in this provision for exporter support.

→ **Recommendation 16:**

Australia and Korea should negotiate an Article to be inserted in the Rules of Origin chapter in KAFTA that specifically defines how and when exporters, importers, and Customs administrations are to address appeals and disputes in relation to preference claims, within a commercially responsive timeframe.

Such an Article should detail Customer Service Obligations so that industry can understand the timeframes for resolution of any matters concerning the granting of preferential treatment for goods.

4. COMMITTEE ON RULES OF ORIGIN AND TRADE FACILITATION

Article 4.12 provides for a committee of officials from both parties to meet to ‘consider and, as appropriate, resolve any matter arising under this Chapter or Chapter 3 (Rules of Origin and Origin Procedures) by means of, inter alia, considering common approaches to the interpretation and implementation of those Chapters.’

From previous PTA experience we have seen that such committees continue the closed-door confidential type meetings utilised in negotiating the original agreement. It would increase business confidence if this committee also included a number of formal positions for industry representatives to attend these meetings and assist to identify and resolve issues from time to time. After all, it is the commercial sector that is meant to benefit from the agreement.

→ **Recommendation 17:**

Article 4.12(1) should be amended to include industry representation.

5. INVESTOR STATE DISPUTE SETTLEMENT

ACCI believes the protection of investments from uncompensated expropriation or nationalisation in a trading partner via Investor-State Dispute Settlement (ISDS) is a two-way street – it is good for investors both in Australia and in Korea. The inclusion of such provisions in KAFTA provides a high level of confidence for investors in both parties, and promotes the good-faith objectives of the trade agreement in both partners. ACCI also notes the importance of carve-outs for public interest matters, the inclusion of which should more than settle misunderstandings about the traditional function of ISDS provisions. For example, KAFTA Annex 11-B on Expropriation contains the following exception:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

ACCI supports this pragmatic and balanced approach to protecting both investors and public interests.

6. MOVEMENT OF NATURAL PERSONS

ACCI supports all efforts to improve and streamline the movement of people for economic purposes. This is a particularly important issue for increasing services trade and allowing people with skills and commercial need to travel between economies.

7. INDUSTRY CONSULTATION AND INDEPENDENT ASSESSMENT OF PERFORMANCE

Australia's trade agreements must be subjected to independent assessment in the public sphere, both prior to ratification after negotiations have concluded and periodically after implementation, in order to allow for appropriate economic assessment to occur to ensure maximum economic benefit is being achieved. Each trade agreement should also contain a basic requirement for all parties to collect and share data on the utilisation rates of the agreement once it is in force. This has not been a compulsory requirement in Australia's previous trade treaties previously, and as a result it remains impossible for transparent and accurate domestic assessment of the performance of trade flows falling under a trade agreement, let

alone for better domestic economic reforms resulting from the agreement, and most importantly for appropriate tailoring of outreach programs to business.

Part of the requirement for greater transparency and independent consultation should be the formal inclusion of a system of Advisory Committees, sourced from industry and other stakeholders, who are consulted during the negotiation phases of a PTA. We envision such a system would be similar to the United States' accredited adviser committee arrangements, which have been managed by the Office of the United States Trade Representative since 1974.⁵

ACCI suggests that as the current Government has a strong forward program on trade liberation, it should be supported by a new Centre of Excellence for International Trade Policy. Under this model, industry groups, academia and the Productivity Commission would be included directly in the negotiation process. In order to assist with broader transparency to reduce suspicion about what is actually being negotiated, the Government should develop a publicly available 'hypothetical model' of what it sees as an ideal 21st century agreement.

We note the Productivity Commission has recommended numerous times in its previous reports that this step be included in negotiations:

Productivity Commission – Trade & Assistance Review 2011-12 (p. 111):

Current processes for assessing and prioritising BRTAs [Bilateral and Regional Trade Agreements] lack transparency and tend to oversell the likely benefits. To help ensure that any further BRTAs entered into are in Australia's interests:

- *Pre-negotiation modelling should include realistic scenarios and be overseen by an independent body. Alternative liberalisation options should also be considered.*
- *A full and public assessment of a proposed agreement should be made after negotiations have concluded — covering all of the actual negotiated provisions.*

Productivity Commission – Bilateral & Regional Trade Agreements – November 2010 (p. 311):

As noted...the present JSCOT process cannot be utilised to provide improved information to Cabinet before a decision is made. While JSCOT would still of course be at liberty to undertake its own assessment, it could draw on the already published independent analysis during its considerations, supplementing it with further analysis if it saw fit.

Furthermore, we argue that once the agreement enters into force, the Productivity Commission should annually be provided with the utilisation data, to allow appropriate independent investigation in relation to the operation and success of

⁵ USTR Office of Intergovernmental Affairs & Engagement (IAPE) <<http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees>>

each PTA. We note the JSCOT concluding response to the Malaysia Australia Free Trade Agreement (MAFTA) 2012 was as follows:

While the Committee welcomes these public consultations, and the subsequent statements to Parliament, it still does not receive the detailed independent analysis it has previously requested.⁶

There appears to be no Government response to the JSCOT MAFTA report – it has been nearly two years pending. The type of independent analysis JSCOT has previously requested is able to be brought about by actual data once a PTA is in operation. The types of hypothetical data that will be presented to JSCOT prior to a PTA entering into force are unfortunately based on a best-case scenario, and it assumes all variables are correct and the PTA functions optimally. The reality is, however, that arms-length, independent analysis is required once the PTA is in existence and operating, to ensure the PTA actually does work and is not a mere political trophy. The only way to conduct this type of analysis is to mandate the collection and sharing of PTA utilisation data by all parties involved, and have it independently assessed by a group such as the Productivity Commission.

When ACCI has attempted to obtain data from the Australian Customs and Border Protection Service with regard to the gross rates of utilisation of particular trade agreements currently in force, the response has been that the information is unavailable due to commercial confidentiality reasons. Another common response to queries the provision of statistics relating to trade as a whole for the particular export destination, rather than for trade occurring under the PTA. ACCI requests that all Australia's future PTA (including KAFTA) contain provisions requiring importing Customs to collect and publish data on the flows of trade occurring under the PTA, in order to appropriately assess their operation, function in improving economic outcomes, and appropriately tailor outreach and administration.

➔ **Recommendation 18:**

That a review of each negotiation outcome be conducted by an independent body, such as the Productivity Commission, before PTAs are considered by the Parliament to ensure that the national interest has been served by the negotiation outcome.

➔ **Recommendation 19:**

That the Government publish information about the utilisation rate for each of Australia's PTAs on an annual basis and or in other regular trade performance reporting to ensure that the nation is maximising the opportunities available through each agreement.

⁶ JSCOT Report 130: Review into Treaty tabled on 14 August 2012
<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/14august2012/report.htm>

→ **Recommendation 20:**

That the Government support the establishment of a Centre of Excellence for International Trade Policy to support and consider issues of trade policy and trade liberalisation. Such a Centre could also include a system of accredited advisers from industry who are able to directly assist with trade liberalisation negotiations.

8. OUTREACH TO AUSTRALIAN EXPORTERS TO UNDERSTAND AND MAKE USE OF KAFTA

The knowledge requirements to understand each agreement and how to use a PTA, not to mention the compliance arrangements, add a huge amount to the transaction costs for business in order to seek the benefits of each PTA – let alone understand them all if companies are servicing multiple markets or have a multinational supply chain that crosses multiple PTA zones. The result is the risk of low utilisation rates of any given PTA. Australia does not publish utilisation rates for its PTAs, but across Asia utilisation rates suggest that, on average, less than 30 per cent of respondents utilised concessions available under PTAs, with the People's Republic of China having the highest utilisation rate of 45 per cent.⁷

Australia might have the best trade agreements in the world, but they are wasted if the Australian Government does not follow through and ensure that Australian businesses know how to use them.

In our recent (end 2013) trade survey, businesses were asked about their understanding of Australia's PTAs. Their responses were as follows:

⁷ Kawai, Masahiro, and G. Wignaraja. "A closer look at East Asia's free trade agreements." In *East Asia Forum*, vol. 1. 2011.

Q. In respect of Australia’s general trade and FTAs, how would you rate your understanding of the following:				
	I have read the text and understand it well	I have read the text but don’t understand it	I use the FTA but don’t understand it	I don’t understand it at all
ASEAN-Australia-New Zealand FTA	22.6%	11.3%	21.7%	44.3%
Australia-Chile FTA	7.9%	5.8%	9.0%	77.2%
Australia-New Zealand Closer Economic Relations	13.7%	6.8%	13.7%	65.8%
Australia-United States FTA	13.4%	9.4%	20.8%	56.4%
Malaysia-Australia FTA	15.9%	6.2%	12.8%	65.1%
Singapore-Australia FTA	15.7%	7.1%	16.2%	61.1%
Thailand-Australia FTA	17.8%	8.4%	17.3%	56.4%
WTO Agreement (most favoured nation provisions)	10.9%	5.7%	11.5%	71.9%

The highest level of understanding by Australian exporters is of AANZFTA – but the real message is that exporters do not understand PTAs (or in fact Most Favoured Nation). We have frequently made the point that exporters do not have a good understanding of the requirements of PTAs and this has become even more complex with diverse PTAs overlaying the same markets (the noodle bowl). The Australian Government needs to improve outreach to Australian business in order to maximise the positive impacts and economic benefits from the trade agreements it enters into.

➔ **Recommendation 21:**

That the Government provide appropriate annual resourcing to ensure that Australian industry is fully informed about the opportunities available in the markets covered by Australian trade agreements, and how they might utilise these agreements.

ABOUT ACCI

8.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

8.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY
BUSINESS SA CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF
COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY
WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF
COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE &
INDUSTRY ACCI MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE,
COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL
CONTRACTORS' ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL **AUSTRALIAN DENTAL
INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES
AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION AUSTRALIAN HOTELS
ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN
MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN
PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION**
AUSTRALIAN SELF MEDICATION INDUSTRY **BUS INDUSTRY CONFEDERATION** CONSULT
AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER
BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF
AUSTRALIA (THE) **NATIONAL BAKING INDUSTRY ASSOCIATION** NATIONAL ELECTRICAL &
COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL
RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF
AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES
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