

# Chapter 3

## Key issues and committee view

### Key issues raised in submissions

3.1 While the committee's inquiry is focused on the provisions of the implementing bills for ChAFTA, many submitters restated or reiterated their positions on issues in relation to the broader agreement. These issues included:

- benefits of the agreement;
- timely entry into force;
- specific tariff changes;
- services and investment;
- rules of origin issues;
- support of Australian exporters;
- investor-state dispute settlement (ISDS); and
- labour issues.

### *Benefits of the agreement*

3.2 There were conflicting views expressed by submitters regarding the value of the tariff outcomes achieved through ChAFTA. Those opposed often characterised the tariff changes as one-sided. For example, the Construction, Forestry, Mining and Energy Union (CFMEU) stated:

The proposed Bill, consistent with the agreement, eliminates all tariffs on Chinese imports (95% of tariff lines on ratification and 100% within 5 years) whereas China maintains tariff protection under the agreement for no less than 257 tariff lines, for eternity.

Some of Australia's principle agricultural sectors such as cotton, rice, wheat, sugar, and vegetable oil do not benefit from any changes to China's high tariff regime under the agreement.<sup>1</sup>

3.3 The CFMEU noted that under the China-New Zealand trade agreement affected sectors were given longer periods of adjustment 'as opposed to Australia's proposed commitments [under ChAFTA] which sees 95% of tariffs removed immediately'.<sup>2</sup>

3.4 Other submitters were strongly supportive of the outcomes achieved. AustCham Beijing noted that ChAFTA would enable tariff reductions that would be hugely beneficial to Australian exporters; improve access to the Chinese market for

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1 *Submission 12*, p. 2.

2 *Submission 12*, p. 4.

Australian companies; and streamline approval processes for subsidiaries of Australian businesses operating in China.<sup>3</sup> Similarly, the Australian Chamber of Commerce and Industry (ACCI) stated:

ChAFTA removes a wide range of tariff barriers, benefitting many Australian exporters, particularly in agriculture and food (agri-food). Thousands of tariff lines will receive concessions obtained by negotiators in ChAFTA, benefitting Australian business. Within 10 years of ChAFTA entering into force, tariffs on 95 per cent of Australian goods exported to China will be completely eliminated. We applaud this achievement.<sup>4</sup>

3.5 The Export Council of Australia stated:

As with other agreements, ChAFTA represents a compromise outcome reflecting the respective negotiating strengths of the parties and their respective political sensitivities...[W]hile not all parties are satisfied with all the outcomes, the ECA believes that the ChAFTA delivers significant commercial outcomes across a wide range of product sectors including barley, sorghum, seafood, sheepmeat, pork, dairy, beef, wine and wool, as well as resources, which should not be downplayed.<sup>5</sup>

***Timely entry into force***

3.6 Several submitters recommended rapid passage of the bills to allow Australia to take advantage of the schedule for tariff cuts under ChAFTA. The ACCI noted that 'apart from the significant economic benefits in the medium to long term, if the ChAFTA enters into force early, Australian business will get a double tariff cut under the deal which will reap immediate rewards for many industries who will benefit from better access to the China market'.<sup>6</sup> Similarly, the Australian Red Meat Industry ChAFTA Taskforce stated:

Timely passage of the Bills is essential to facilitate ChAFTA entry into force (EIF) in 2015. The resultant initial tariff cut (in calendar 2015), followed by a second cut on 1 January 2016, will be extremely beneficial as it will reduce the competitive disadvantage currently faced by our sector (vis-a-vis the tariff preference enjoyed by our major competitor, New Zealand).

It has been estimated that the failure to secure ChAFTA entry into force in 2015 will cost our industry around \$110 million in 2016.

The expeditious completion of domestic legislative requirements is critical if the commercial advantages to be derived from ChAFTA are to be realised in a timely manner.<sup>7</sup>

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3 *Submission 9*, p. 3.

4 *Submission 5*, p. 1.

5 *Submission 14*, p. 10.

6 *Submission 5*, p. 2.

7 *Submission 2*, p. 1.

3.7 AustCham Beijing also urged the committee to consider 'the broader positive implications of the agreement and support its timely ratification'. It argued any 'additional delays in the agreement will only serve to damage the relationship with our largest and most strategically important trading partner'.<sup>8</sup>

### ***Specific tariff outcomes***

3.8 A number of submitters highlighted the impact of specific tariff outcomes with the committee. The ACCI noted that several sectors in Australia (including the sugar and rice industries) would not receive specific benefits under ChAFTA. It hoped that these sectors would be covered in future agreement reviews and encouraged the Australian Government 'to pursue further and better concessions with China on behalf of these sectors'.<sup>9</sup>

3.9 Armstrong World Industries outlined their concerns that the immediate removal of all import tariffs on PVC flooring cover would adversely affect their ability 'to remain competitive against imported products'. It noted that the 'imbalance in the proposed agreement places manufacturers like Armstrong at a distinct disadvantage when competing with imported products with minimal infrastructure and employment investment'.<sup>10</sup>

3.10 Similarly, the Australian Forest Products Association (AFPA) considered that 'the proposed ChAFTA delivers an inequitable tariff outcome for paper products which would have an adverse impact on investment and trade in the Australian paper industry'. The AFPA argued that further reform of ChAFTA was needed to address the adverse treatment of paper tariffs for the domestic paper industry with efforts directed to removing the Chinese paper import tariffs. Further, it argued that positions taken under the ChAFTA should not be 'allowed to set expectations regarding the shape of future negotiations for the forthcoming Australia-India Comprehensive Economic Cooperation Agreement'.<sup>11</sup>

3.11 The AFPA's position was supported by the CFMEU who recommended that 'Australian wood and paper sectors maintain their tariff duties pending acceptable outcomes achieved through bilateral discussions with China on a timeline for reciprocal tariff reduction/abolition or alternative acceptable compensation for the Australian industry being agreed'.<sup>12</sup>

### ***Services and investment***

3.12 The beneficial changes under ChAFTA for the Australian services sector and for investment were also emphasised during the inquiry. For example, ANZ noted that 'ChAFTA provides Australian businesses with access to around forty Chinese service

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8 *Submission 9*, p. 4.

9 *Submission 5*, p. 2.

10 *Submission 1*, pp 1-2.

11 *Submission 3*, pp 1-2.

12 *Submission 12*, p. 4.

sectors at levels either equivalent to, or better than, those enjoyed by other nations'.<sup>13</sup> The Financial Services Council (FSC) considered that ChAFTA was 'firmly' in Australia's national interest. It noted:

[The] growing middle class in China will increasingly want to invest beyond China's borders. But Australia cannot export to this market unless a regulatory structure such as this free trade agreement is in place. Similarly, Australian fund managers are looking to meet their client demand for exposure to the growth within China. The FTA secures the ability for this exposure. China is starting from a relatively low base of capability - only 3% of the 145 trillion Renminbi (RMB) Chinese finance sector are assets are held in managed funds. Australian managers will be able to access this market if the ChAFTA is entered into force, to the huge benefit of our financial services sector and the economy.<sup>14</sup>

3.13 However, the FSC emphasised there was further work to be done, noting that there was no equivalent implementing legislation for the services sector:

It is essential that ChAFTA ultimately result in true mutual recognition between Australian and Chinese regulators. A roadmap should be developed on how market access (through licensing and mutual recognition) will be facilitated by the regulators.

ASIC should take an active role in this process, including involvement in the financial services committee. We note the commitment of the two regulators to strengthen cooperation and we welcome this.<sup>15</sup>

### ***Rules of origin issues***

3.14 The Export Council of Australia (ECA) commended the Australian Government for negotiating 'such a trade liberalising agreement with Australia's largest trade partner'. However, it cautioned that 'there is a significant amount of information which is now needed urgently from the Department of Immigration and Border Protection (DIBP) to clarify many of the procedures required to use ChAFTA for imports and exports, including but not limited to the Regulations required for the Rules of Origin'. These included:

- details on Certificates of Origin (CoO);
- information on Advance Rulings for Declarations on Origin (DoO);
- the approach of the DIBP when the importer named on the CoO or DoO is not the importer named on the Import Declaration; and
- the approach of the DIBP to ChAFTA compliance and small discrepancies in tariff classifications.<sup>16</sup>

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13 *Submission 8*, p. 2.

14 *Submission 7*, p. 5.

15 *Submission 7*, p. 6.

16 *Submission 14*, p. 4.

3.15 The potential for transshipment issues for Australian exports to China was also raised during the inquiry. For example, Australian Council of Wool Exporters and Processors noted the experience of New Zealand wool exports who have been required to obtain 'transshipment certificates' where shipments change vessels before reaching their destination.<sup>17</sup> The ECA also highlighted the need for information from DIBP regarding how transshipment through Hong Kong would be treated.<sup>18</sup>

3.16 The DIBP outlined that the approach to implementing the rules of origin in ChAFTA is consistent with the approach taken in Australia's other preferential trade agreements such as the Japan-Australia Economic Partnership Agreement. The DIBP acknowledged that 'concerns have been raised by industry bodies regarding the complexity and lack of harmonisation of the rules of origin processes across Australia's Free Trade Agreements (FTAs)'. It stated that 'concerns have been noted and taken account of wherever possible in the negotiation of the treaty and drafting of the Bills'.<sup>19</sup>

### ***Support for Australian businesses***

3.17 The ECA noted that China has a relatively complex and multi-layered regulatory framework. A recent survey of Australian exporters identified 'China as the most difficult market to do business in, with the most significant barriers including information about local language, culture &/or business practices (37 per cent), understanding local regulations (10 per cent), payment issues (9 per cent), and regulations that favour local firms (9 per cent)'. The ECA recommended:

[T]he adoption of a program to fully promote the benefits of ChAFTA to all those in trade including importers, exporters and service providers. It seems to be widely accepted that there is a significant lack of awareness and understanding of FTAs across the board. The ECA commends the work currently being undertaken by DFAT and Austrade to promote the benefits of the North Asian FTAs. However, the ECA believes sector specific engagement and expanding the scope to include the promotion of information about all of Australia's FTAs is necessary.<sup>20</sup>

3.18 The ECA sought information regarding when DIBP would issue its usual guides and notices and conduct its usual information sessions for ChAFTA.<sup>21</sup>

3.19 The DIBP outlined that it will hold information seminars in Brisbane, Sydney, Melbourne, Adelaide and Perth with the aim of providing industry with information on accessing preferential customs duty under ChAFTA. It stated:

These information sessions will follow a similar format to those provided for the implementation of other recent FTAs, such as the Korea-Australia

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17 *Submission 13*, p. 2.

18 *Submission 14*, p. 4.

19 *Submission 15*, p. 3.

20 *Submission 14*, p. 5.

21 *Submission 14*, p. 4.

Free Trade Agreement and the Japan-Australia Economic Partnership Agreement.

These information seminars target customs brokers, freight forwarders and other professional service providers, and will provide advice on preferential customs duty commitments under ChAFTA and how to use the rules of origin, including the product specific rules. The information sessions will be underpinned by detailed Instructions and Guidelines and other material, which will be available publically on the DIBP website before the commencement of ChAFTA.<sup>22</sup>

### ***Investor-state dispute settlement***

3.20 The Investment Chapter of ChAFTA contains an investor-state dispute settlement (ISDS) mechanism under which commitments can be enforced directly by Australian and Chinese investors. The Australian Manufacturing Workers' Union (AMWU) reiterated its concerns regarding ISDS clauses within Australia's trade agreements:

These clauses mean that when Australian governments make laws or policy in the interests of Australian people, foreign investors can sue for damages if their profits are affected in an international 'kangaroo court'. Kangaroo court is a fitting description because these ISDS tribunals don't need to consider the benefits of the policy change for the population, don't have an independent judiciary, don't need to respect precedent and don't have an appeal mechanism. By being restricted to foreign investors, these clauses also discriminate against local businesses which can only access our domestic court system for any claims for compensation.<sup>23</sup>

3.21 In contrast, ANZ considered that ChAFTA would increase certainty for Australian investors and that the 'negotiation of a comprehensive investment chapter will create further opportunities'.<sup>24</sup> Similarly, the ECA also did not consider that the concerns regarding the ISDS provision were warranted and pointed out that these protections 'will also be available to Australian investors and exporters'.<sup>25</sup>

3.22 Further, Lexbridge Lawyers observed:

In the case of ChAFTA the scope of ISDS is much narrower than any other Australian FTA which includes ISDS and also much narrower than the vast majority of Australia's older bilateral investment treaties. ChAFTA contains a set of safeguards which are similar to those found in other recent agreements including the Korea-Australia FTA. In addition ChAFTA contains additional procedural safeguards which have not been included in any existing Australian agreement. Most notably, these include an innovative safeguard to block – and potentially prevent – claims against non-discriminatory public welfare regulation. Taken together, these factors

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22 *Submission 15*, p. 4.

23 *Submission 6*, p. 3.

24 *Submission 8*, p. 3.

25 *Submission 14*, pp 11-12.

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lead to the conclusion that the exposure under ChAFTA – in terms of a challenge to legitimate government regulation – is significantly less than the vast majority of Australia's agreements.<sup>26</sup>

### ***Labour mobility issues***

3.23 The provisions of the bills under consideration do not implement the movement of natural persons commitments made under ChAFTA. Nonetheless, several submissions reiterated concerns raised with other inquiries regarding these arrangements. These labour mobility issues were extensively discussed within the JSCOT's report on ChAFTA.<sup>27</sup>

3.24 On 21 October 2015, Minister Robb and Minister Dutton announced that support had been secured from the Opposition to ensure the passage of the implementing legislation for ChAFTA.<sup>28</sup> The key components of the agreement were:

To provide Labor with greater assurance...the Government has agreed to amend an existing regulation. The amendment will simply prescribe the existing requirement under policy that employers seeking to sponsor skilled workers on 457 visas under work agreements will have to demonstrate that they have made recent and genuine efforts to recruit local Australian workers first.

This provision will apply to all work agreements, including those under the Investment Facilitation Arrangement (IFA), linked to ChAFTA. It is important to note that labour market testing is indeed already a mandatory requirement under current Government policy which is detailed in existing DIBP guidelines.

The Government has also agreed to make minor amendments to guidelines for companies seeking a work agreement. The amendments will incorporate additional criteria for the Minister to consider in approving work agreements. To ensure observance of the guidelines they will also be referenced in a new regulation.

The Department of Immigration and Border Protection (DIBP) will include in its annual report details about the number of work agreements signed, including the number of 457 visa holders engaged under the agreements, together with occupations and industries in which they are engaged. This will ensure programme transparency.

In regard to subclass 457 visas for overseas tradespersons, the Government will amend a visa condition to make it clear that visa holders must also obtain any licenses, registrations or memberships required under

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26 *Submission 4*, p. 6.

27 Joint Standing Committee on Treaties, Treaty tabled on 17 June 2015, *Report 154*, October 2015, pp 27-41.

28 Minister for Trade and Investment, the Hon Andrew Robb AO MP and the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, 'Government and Opposition reach agreement on support for China-Australia free trade deal', *Joint Media Release*, 21 October 2015.

commonwealth or state or territory law. The visa holder will be required to notify the Immigration Department if their licence or registration is refused, revoked, ceased or cancelled.

We have also reaffirmed that DIBP will continue to investigate evidence-based allegations of non-compliance with visa conditions, including those concerning licensing and registration. The Department will also report annually on visa compliance monitoring.

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As recommended by the recent Independent Review of the Integrity of the Subclass 457 Programme, the Government will undertake an evidence-based review of the TSMIT (Temporary Skilled Migration Income Threshold). This review was scheduled to commence by the end of 2015, but has been brought forward as part of the agreement with Labor.

The TSMIT is the entry level point into the 457 programme, and positions with a market salary below the TSMIT are not eligible to be sponsored under the Subclass 457 programme.

The forthcoming review of the TSMIT will consider its current level (currently \$53,900), whether it should be indexed and if so advise on an appropriate methodology.

The base rate will not be increased prior to this review which will commence before the end of this year. All relevant stakeholders will be consulted including peak business groups and the ACTU.<sup>29</sup>

3.25 Commenting on this agreement, the ACTU did not consider it addressed 'the real shortcomings of ChAFTA and the related [Memorandum of Understanding (MOU)]:

[A]ny requirements for labour market testing set out in the Regulations or in guidelines as a result of this agreement, while welcome, will not cover positions filled by Chinese nationals under the standard 457 visa program. Under the terms of CHAFTA, these workers would not be subject to labour market testing. Neither do the agreed amendments address the issue of labour market testing for installers and servicers on 400 visas who under the terms of CHAFTA cannot be made subject to labour market testing.

The problem remains that the express terms of CHAFTA remove labour market testing for all occupations – trade, technical and professional – under the standard 457 visa program. Therefore, while the changes initiated by Labor make some improvements they do not (and, more to the point, cannot) reverse what CHAFTA says in black and white. The only real solution to this would be the renegotiation of CHAFTA itself.<sup>30</sup>

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29 Minister for Trade and Investment, the Hon Andrew Robb AO MP and the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, 'Government and Opposition reach agreement on support for China-Australia free trade deal', *Joint Media Release*, 21 October 2015.

30 *Submission 11*, p. 21.



3.26 The ACTU recommended further amendments to 'help strengthen protections for both Australian and temporary overseas workers'. These recommendations included:

A requirement for an online 'Project Jobs Board' to be established for each IFA to advertise all project positions.

A provision for the Minister to impose as a further condition on IFA projects 'a minimum number of apprentices and trainees to be employed (or graduate employment places be provided)'.<sup>31</sup>

Aligning the TSMIT for 457 visa workers with Average Weekly Earnings (currently around \$77 000 p.a.).

Extending the requirement to pay 'market rates' to installers and servicers on short-term 400 visas.

A requirement for a public register of work agreements that includes the full text of all agreements, available online once they are finalised.

Specific requirements for consultation with relevant unions and other stakeholders as part of the negotiation of IFAs.

Placing the onus of proof on sponsoring employers to provide evidence that the visa holder has obtained the appropriate licence within 60 days of the visa being issued.

Ensuring that all 457 visa holders under IFA work agreements are direct employees and not contractors.

A provision for training plans under work agreements to specify the occupations the training relates to, with a requirement for training to be focused on those same occupations which are purportedly in shortage and where 457 visa workers are being used.<sup>31</sup>

3.27 The ACTU argued these amendments 'should be implemented through the Migration Act' and stated it was 'not clear why the agreement between Labor and the Government has settled in the end on the amendments being implemented through the Regulations and departmental policy guidelines'.<sup>32</sup>

### **Committee view**

3.28 The committee's inquiry is into the provisions of the ChAFTA implementation bills, however the committee recognises this proposed legislation cannot be viewed completely apart from the broader agreement.

3.29 By any measure, this is an important trade agreement for Australia. China is Australia's largest trading partner in goods and services (valued at almost \$160 billion in 2013-14), our largest goods export destination (\$100 billion in 2013-14), and our largest source of merchandise imports (\$50 billion in 2013-14). On entry into force,

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31 *Submission 11*, pp 21-22.

32 *Submission 11*, p. 22.

more than 85 per cent of Australia's trade to China will have tariffs set at zero and on the full implementation of ChAFTA, 95 per cent of trade will enter duty-free.

3.30 In the view of the committee, some of the most significant outcomes are in the trade in services component of the agreement. Under ChAFTA, many Australian companies will be able to operate within China with improved market access conditions. Australia has also achieved Most-Favoured Nation treatment provisions for major services sectors.<sup>33</sup>

3.31 The committee acknowledges that some Australian exporters did not receive the tariff reductions or the market access they hoped might be achieved. This situation is not unexpected where negotiations are concluded between two trading partners with each representing their own national interests. However, the committee agrees with the FSC that 'ChAFTA is not an end-point, but rather a base from which to build' on Australia's growing trade and investment relationship with China.<sup>34</sup> The committee notes that China has agreed to a review three year after ChAFTA enters into force to consider future liberalisation of trade and further expansion of market access.<sup>35</sup>

3.32 The committee urges the Australian Government to continue to work with Australian businesses and exporters seeking further access to the Chinese market and to consider the position of these sectors during negotiations for future trade agreements, for example with India, Indonesia or the European Union. Further, the committee considers the Australian Government should expand its programs to improve the utilisation and awareness of Australia's free trade agreements. In this regard, the committee notes that Austrade, the Department of Foreign Affairs and Trade and other government agencies are currently conducting information seminars around Australia regarding the North Asia Free Trade Agreements.

3.33 Labour mobility issues were clearly the most contentious aspect of the agreement. The committee notes the work done by Minister Robb, Minister Dutton and the Shadow Minister for Trade and Investment, Senator the Hon Penny Wong, to secure a bipartisan agreement to allow passage of the implementing bills. It is encouraging that a pragmatic compromise has been achieved to address the concerns raised regarding labour issues within the agreement. This outcome will secure a timely implementation of ChAFTA and allow Australian businesses to capture the full value of the tariff reductions and improved access to the Chinese market. Importantly, these agreed changes are non-discriminatory and will not contravene the commitments that have been made by Australia under ChAFTA.

3.34 The committee acknowledges that not all concerns raised regarding labour issues have been addressed through the compromise reached. There may be opportunities to consider additional changes, provided these do not contravene Australia's commitments. The committee's view is that there is continuing merit in the recommendation from the majority JSCOT report that the Australian Government

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33 Department of Foreign Affairs and Trade, *ChAFTA: Summary of Chapter Outcomes*, p. 2.

34 *Submission 7*, p. 8.

35 National Interest Analysis, p. 4.

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ensure all government departments and agencies responsible for regulating this area be adequately resourced to carry out their functions effectively.<sup>36</sup>

3.35 The ISDS mechanism in ChAFTA was another area where concerns were raised. This is an area of the agreement that is currently limited and will be the subject of further development between Australia and China. The committee is satisfied the additional safeguards which have been incorporated will be sufficient to protect Australian interests.

3.36 An important consideration for the committee is that ChAFTA cannot be considered in isolation. Australia must maintain a competitive advantage in a dynamic global trading environment. In this context, the committee's view is that ChAFTA is clearly in Australia's national interest. The bills should be expeditiously passed to facilitate the implementation of the agreement.

### **Recommendation 1**

**3.37 The committee recommends that the Senate pass the Customs Amendment (ChAFTA Implementation) Bill 2015 and Customs Tariff Amendment (ChAFTA Implementation) Bill 2015.**

**Senator Chris Back  
Chair**

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

