Australia-European Union Free Trade Agreement
Office of Trade Negotiations
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221

27 June 2019

**By email: a-eufta@dfat.gov.au**

Dear Madam / Sir,

**Submission regarding Free Trade Negotiations with the European Union (EU) and Australia**

## Summary

Negotiations for the Australia-EU Free Trade Agreement (FTA) were formally launched in Australia on 18 June 2018, with the first negotiation round taking place in July 2018. Since that time, progress has been made on a number of the chapters of the Agreement.

The purpose of this submission is to provide empirical input and relevant experiences from the members of a number of business associations operating between Australia and Europe, and Australia and various EU Member States, for consideration during the July 2019 negotiations of the Australia-EU FTA. Such input may not be readily available to governments, and could constitute important 'grass roots' considerations for the long-term success of the Australia-EU FTA.

## Introduction

Australian Business in Europe (ABIE) brings together multiple organisations representing Australian and Australian-interested organisations across Europe with the shared objective of growing and strengthening the trade, investment, business and diplomatic ties between the two regions.

There are a number of organisations participating in ABIE, with the following providing input to this joint submission: Australia-United Kingdom Chamber of Commerce; Australian Network in Belgium

ASBL/VZW; ABIE Netherlands; ABIE France; Australia Spain Business Association; Finnish Australian Business Council, the German Australian Business Council e.V.; Irish Australian Chamber of Commerce; Australia New Zealand Chamber of Commerce asbl; Australasian Business in Europe Czech Republic; European Business Inc.; and Bulgarian-Australian Business Council (together, the "ABIE organisations").

Collectively, our remit is very much one of encouraging sustainable international trade and deeper relations between companies and citizens of Europe and Australia. Our submission is focused on the benefit from free trade agreements and instruments to enable them to mutually benefit in the future.

This submission has been prepared by the ABIE organisations independently of their patrons and sponsors and reflects the view of the boards of the ABIE organisations only, not that of any individual members.

We would also like to draw negotiators' attention to several submissions by various ABIE organisations made to the Joint Standing Committee on Foreign Affairs, Defence and Trade of the Australian Parliament, notably on the access to free trade agreements by small and medium-sized enterprises and the impact of the UK exiting the European Union on trade between Australia and the United Kingdom.

The following reflects input received by the ABIE organisations on the following work items:

1. Labour Mobility;
2. Trade in Goods and Services (particularly in the context of E-Commerce/Digital Trade);
3. Technical Barriers to Trade;
4. Intellectual Property; and
5. Energy and Raw Materials

We continue to receive input regarding other Chapters relevant to the Australia-EU FTA negotiation, and intend to provide relevant input in time for your next round of negotiations.

## 1. Labour Mobility

One of the most challenging areas to address in free trade agreements is that of labour mobility.

### (i) Visa Regulations

We have heard from some companies that the changes to Australia's visa regulations have complicated the movement of staff. Larger companies employ their own HR or expert staff to manage the movement of employees between countries (and/or they have sufficient funds to engage agencies). SMEs in particular rely on their own, often limited resources and experience in such context. The current Australian business visa allows SME employees to market their products and services into Australia but moving key personnel to Australia is apparently more difficult. The provisions of CETA under which key personnel should be given a visa for up to three years seem to be a reasonable basis.

On the other hand, we know of a number of Australians who have come to Germany to support their businesses and have found little difficulty in obtaining the necessary visas. One of our contacts, for example, in Munich has received significant help from the Bavarian state government. The state government sees a benefit in encouraging a subsidiary of an Australian company to set up in the state and also provides some funding to help the company.

Experiences differ across the EU regarding ease of immigration and other formalities associated with establishing a business presence. To have parity on these issues across the EU is considered to be conducive to increasing trade between Australia and the EU. Consistent with the EU's long-term initiatives to cut red tape and smart regulation, feedback has been received that there are a number of areas to ameliorate the lengthy and complicated procedures being experienced in some Member States.

Further, confidential feedback can be provided on this topic, if considered useful to the Australia-EU negotiations.

Related issues associated with labour mobility, including employment of life partners (spouses), health insurance, and recognition of pension contributions may also need to be addressed.

### (ii) Pension Portability

With particular regard to pension portability, we have received feedback that working as an expatriate in European countries may result in a person being required to leave significant retirement savings 'trapped' in a European country rather than being able to roll the pension amount into an Australian superannuation fund. Further, in order to preserve any pension benefits paid into the Europe-based pension fund, there may be a requirement to make continuing contributions (in one case, in the amount of 740€ per annum) until the age of retirement. The risks which arise relate to the future value of a Europe-based pension due to exchange rates, uncertainty as to tax treatment, and risk of loss of pension if ongoing contributions are not paid. It is considered that these issues confront many Australian who have worked in Europe, presenting a significant barrier to building the cultural and business ties which come from labour mobility.

It has also been experienced that social security agreements in place between Australia and Member States differ regarding the ability to accumulate pension based on years worked. The German-Australian Social Security Agreement, for example, does not allow for the accumulation towards the minimum 35 years threshold of years worked in both Australia as well as any third EU country. This means that an Australian who has lived and worked in both Germany and other EU countries has to decide to either (i) accumulate years under the EU system alone (including Germany and other EU countries but omitting Australia) or (ii) under the Social Security Agreement between Australia and Germany (including Australia and Germany, but omitting any third EU country). This is not the case, for example, under the Czech Australia Social Security Agreement, where an Australian resident in the Czech Republic can accumulate work / pension years from Czech, Australia and any third EU country in order to attain the 35 years.

One avenue which may be open for dialogue under the umbrella of an Australia-EU FTA is the establishment of an agreement at European Union level with Australia, which facilitates transparent and simplified transfers between European and Australian contributory pension funds. It is noted that Australia has reached agreements with New Zealand under the Trans-Tasman Retirements Savings Portability scheme (NZ scheme), which has been in place since 2013, and which appears to achieve the goal of pension portability. Similarly, it is understood that the United Kingdom permits transfers to Australian superannuation funds under the QROPs scheme. Conversely, Australia permits superannuation savings to be paid out in cash to departing temporary residents with such payments being subject to Australian taxation.

While pensions are regulated at national level within the EU, labour mobility and trade ties could be more effectively promoted and strengthened for the benefit of both the European Union and Australia (and perhaps also within the EU) if umbrella arrangements could be agreed for pension portability and pension accumulation across Europe, which in turn support portability of funds to recognised, well-regulated pension funds (including to non-EU Member States).

### (iii) Mutual Recognition of Professions

In light of the withdrawal of the United Kingdom from the European Union, the mutual recognition of professions has come to the fore for a number of Australians who work within the European Union by virtue of having mutual recognition of a profession by England and Wales, Scotland and Northern Ireland. This pathway may have been pursued for mutual recognition due to historical legacies, with many professions in Australia being initially recognised and regulated by UK law. Indeed, it is only since the Australia Acts 1986 that it is beyond doubt that the United Kingdom Parliament is no longer able to

pass legislation which effects Australia (noting that the Statute of Westminster 1931 also impacted the ability of UK law to apply to Australia).

There is significant uncertainty whether the professional status of individuals, recognised initially by the United Kingdom for consequential recognition throughout the European Union, will remain recognised in the European Union after the UK withdraws from the European Union. If there is UK withdrawal without transition arrangements in place, there could be a significant impact on Australians living and working in the European Union as well as many businesses. Professions impacted include doctors, nurses, dentists, veterinarians, midwives, pharmacists, and lawyers. Some professions are practised in many of the sectors the subject of the FTA negotiation.

Mutual recognition of professions, subject to appropriate regulation, would ensure that there is continued access to market and the building of trade and cultural relations between Australia and the European Union. As time frames are unknown for the UK to withdraw from the European Union, and it is unknown whether there will be a transition agreement which might include mutual recognition topics, the ABIE organisations propose to include provisions in the FTA to mitigate any negative effects.

It is requested that this subject matter be considered as part of the Australia-EU FTA negotiation, with the possibility of Australia being granted a special status by the European Union so that professions are able to be more readily mutually recognised between Australia and EU Member States, as currently occurs for some professions now by virtue of mutual recognition in the UK.

As regards labour mobility by Europeans to Australia, some European members have noted difficulty experienced in having professional qualifications mutually recognised by professional bodies in Australia, such as the law societies. These difficulties have extended to being unable to establish a law firm office branch in Australia. Regulatory equivalence between professionals admitted in Europe and Australia would be helpful in these instances.

Short term objectives which have been suggested are:

(i) to permit fly-in, fly-out work visas - noting that this is relevant beyond the professional services sector, extending to other industries as well (for example, mining, infrastructure and construction); and

(ii) simplifying the process for the grant of visa authorisation to work as a foreign lawyer.

## 2. Trade in Goods and Services (in the context of E-Commerce/Digital Trade)

With the growth of e-commerce, it is considered that there is a strong need for Australian privacy and data law to be fully compliant with the General Data Protection Regulation (GDPR). This is highly relevant to both Australian and European Union interests, in order to diminish the impact of physical distance between the two markets.

It has also been drawn to our attention that European companies with Australian subsidiaries have concern regarding parity between the European Union *General Data Protection Regulation* (GDPR) and Australian privacy and telecommunication laws. This is because there appears to be incompatibility of laws between European Member States and Australia, regarding threshold levels for security of data and private information. In Germany, for example, there is an obligation to encrypt communication.[1] We are aware that the Chief Technology Officer of one German company has recommended the closure of its

1 See Article 32 GDPR, section 109 of the Telecoms Act (Telekommunikationsgesetz, Germany), and section 8a of the Federal Office for Information Security Act (Gesetz über das Bundesamt für Sicherheit in der Informationstechnik (BSI-Gesetz – BSIG, Germany)

Australian subsidiary because of the *Telecommunications and Other Legislation Amendment (Assistance an Access) Act 2018* (Cth).

Increased compatibility with the GDPR and communications laws is considered to be a positive initiative which could be undertaken by the Australian government, in order to advance trade between EU Member States and Australia. Another suggestion received is that guidance notes on compatibility of privacy and data laws be prepared to assist in educating market participants, and facilitate ease of trade. It is considered that SMEs in particular would benefit from guidance, as they are often unable to shoulder the administrative burden themselves (personnel, cost and time).

## 3. Technical Barriers to Trade

### (i) Mutual Recognition of Standards and Certification

The European Union is probably the most integrated free trade area in the world. At least since 1992, it has been possible for companies to rely on the so-called mutual recognition of standards according to which products that may be sold in one member state of the European Union may be placed on the market in another member state without the need to be re-approved or to fulfil additional requirements in that member state. This generally provides certainty to a business that any products sold in the country of origin, can be exported and sold in another EU country. The introduction of this provision led to a significant increase in intra-EU trade over the following years, as businesses (including SMEs) found openings for their products in other markets.

Two examples illustrate this. German beer has been traditionally manufactured according to the Reinheitsgebot (*German purity law for beer*) and until 1992 only beer made under these principles could be freely sold on the German market. In practice one of the few beers available was the Irish Guinness stout beer which, more by coincidence than by design, was manufactured according to these principles. No Australian lagers were available until the early 1990s. Since then it has been possible to buy, for example, Fosters or Castlemaine lagers in Germany. In the case of Fosters, this became available for sale in Germany as it was brewed under the Reinheitsgebot by Holsten Breweries in Hamburg, and later by French/Belgium breweries (at some stage as part of Heineken).

There are a few restrictions to the principle of mutual recognition of standards for products. For example, there are packaging regulations which insist that consumer-facing products must have local language instructions and governments may use health and safety regulations to block sale of products[2].

We have been made aware that differences in the regulation of packaging size for products in Australia as compared with the European Union appears to give rise to increased costs for export-oriented businesses when exporting Australian products to Europe. This is by virtue of Directive 2007/45/EC of the European Parliament and of the Council of 5 September 2007[3], which sets out regulations regarding nominal quantities for prepacked products. An example of such differences relates to sparkling wines. The existing 250mL cans used for sparkling wines in Australia cannot be used for sparkling wines in the EU (limited to 200mL).

As with the mutual recognition of professions, it may be pertinent that this round of Australia-EU FTA negotiations also consider mutual recognition of standards in the event that the UK withdraws from the European Union without transition arrangements being in place.

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2 Disputes on these matters can be raised at the supranational Court of Justice of the European Union (CJEU). The CJEU, for example, decided in the case of Red Bull energy drink that whilst it was generally legitimate to cite health concerns to prevent importation of a product from one member state to another member state, such concerns did not apply in the case of Red Bull.

3 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007L0045.

### (ii) Common Rulebook

Anecdotal evidence from our members suggests that opportunities to export products without additional approval requirements, and with a common rule book in place, would facilitate trade and provide a major incentive to encouraging exports.

It is suggested that the establishment of a common rule book with mutually agreed standards and the acceptance of approvals from other Member States - thus creating regulatory equivalence – would be a major incentive to encouraging businesses, including SMEs, to take advantage of a free trade agreement. SMEs in particular do not have the connections in other countries to monitor new regulations and to arrange for approvals. It is considered that a common rule book will simplify the export of products.

In relation to mutual recognition of approvals, It is considered important that standards and certification processes are not used to create unwarranted barriers to trade (as defined by the WTO Technical Barriers to Trade Agreement), for any sector.

## 4. Social and cultural barriers to trade

There is a perception within some Australian companies that the English language is sufficient for doing business in Europe. This is not the case and demonstrates a certain Anglo-centrism which does not facilitate good trade opportunities in Europe. It is clear that to succeed in Europe, Australian companies would benefit from support which goes beyond the framework of a typical free trade agreement. ABIE recommends both 'tried and true' and new ways of supporting exporters.

Given the complexity and diverse characteristics of the European market, both large and small Australian companies need opportunities to be visible and guidance to appreciate the cultural, and business context in Europe. This is considered to be as critical to their success as favourable trade terms. Aspects of this support may be done within the parameters of the agreement, in partnership with EU Member States.

## 5. Intellectual Property

Following the repeal of section 51(3) of the *Competition and Consumer Act 2010* (Cth), relating to the application of competition law provisions to intellectual property, it appears timely that Australia explore with the European Union the approach to be taken in terms of applicable competition law guidelines and parity with the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal co-operation agreements, and Guidance on Article 102 TFEU, given that each of Australia and the European Union have key objectives relating to high technology society for the advancement of government, industry and society, and there appears to be growing cooperation between technology-based businesses from Australia and European Member States.

## 6. Energy and Raw Materials

It is considered that there are significant areas of common interest in relation to the supply of rare earths, which are used in the manufacture of high technology products. Australia appears to be coming better positioned for trade relating to rare earths.

Important to any activity, including in the area relating to energy and raw materials, is Europe's and Australia's commitment to the Paris Agreement of Climate Change. In this regard, the ABIE organisations note the Vision Statement on the Australia-France Relationship signed 2 May 2018 which notes that a free trade agreement would "promote high environmental, social and health standards in recognition of our shared multilateral commitments, including the effective implementation of the Paris Agreement." The two countries further confirmed their strong commitment to addressing climate change and environmental degradation. The ABIE organisations support these statements and consider it

appropriate to include these issues in the negotiation, with the aim of having tangible provisions in an agreement giving effect to these commitments.

**Moving Forward**

The ABIE organisations welcome the opportunity to engage with the Department of Foreign Affairs and Trade (DFAT), Australia on this monumental Free Trade Agreement which is anticipated to operate for the benefit of companies and citizens of Australia and Europe.

We remain available for any questions that you might have, for this and future negotiation rounds of the Australia – European Union Free Trade Agreement.

Yours sincerely,

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**on behalf of the Australian Business In Europe organisations**