

**A KNOWLEDGE ECONOMY FOR AUSTRALIA
THROUGH A TRADE AND INVESTMENT AGREEMENT
WITH THE EUROPEAN UNION:
FOR THE BILATERAL LIBERALIZATION OF
TRADE IN SERVICES AND
FOREIGN INVESTMENT IN SERVICES SUPPLY**

AUSTRALIA – EUROPEAN UNION FREE TRADE AGREEMENT
SUBMISSION TO THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
AUSTRALIAN GOVERNMENT

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**A Knowledge Economy for Australia through a
Trade and Investment Agreement with the European Union:
For the Bilateral Liberalization of
Trade in Services and Foreign Investment in Services Supply**

Australia – European Union Free Trade Agreement
Submission to the Department of Foreign Affairs and Trade, Australian Government

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I submit that a trade and investment agreement between Australia and the European Union (EU) is necessary.¹

Australia and the EU need to trade with each other. Australia needs the EU for its capital goods and professional services in order to develop into a knowledge economy: the EU is Australia's largest partner for services trade. The EU needs Australia as an energy supplier (Australia is the EU's third largest supplier of coal) and as a commercial base in Asia (China is the EU's second largest trading partner). The inward and outward flows of investment, specifically, Foreign Direct Investment (FDI), are equally important for both partners.

Yet, Australia and the EU have been reluctant to regulate their economic relationship even though the World Trade Organization (WTO) does not adequately support it.² For Australia, trade with the EU still is trade with the United Kingdom (UK) and, for the EU, Australia is not a large trading partner. Sectoral agreements between Australia and the EU – such as the Mutual Recognition Agreement³ and the Wine Agreement⁴

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¹ See, generally, Gonzalo Villalta Puig, *Economic Relations between Australia and the European Union: Law and Policy* (Kluwer Law International, 2014). See also Gonzalo Villalta Puig, 'Trade and Investment Relations between the European Union and Australia: For a Bilateral Economic Integration Agreement' (2012) 17(2) *European Foreign Affairs Review* 213.

² World Trade Organization, Trade Policy Review of Australia, 'Minutes of the Meeting' (WTO Doc WT/TPR/M/312/Add.1, 21 and 23 April 2015), Answers to Questions from the European Union; World Trade Organization, Trade Policy Review of the European Union, 'Minutes of the Meeting' (WTO Doc WT/TPR/M/317/Add.1, 6 and 8 July 2015), Answers to Questions from Australia.

³ *Agreement between Australia and the European Union Amending the Agreement on Mutual Recognition in relation to Conformity Assessment, Certificates and Markings between Australia and the European Community* (Brussels, 23 February 2012) [2012] OJ L359/2.

⁴ *Agreement between Australia and the European Community on Trade in Wine* (Brussels, 1 December 2008) [2009] OJ L28/4.

– do not make a trade and investment agreement. A Framework Agreement between Australia and the EU, which will shortly be ready for signature,⁵ would not make a trade and investment agreement either.

A trade and investment agreement between Australia and the EU is, therefore, necessary. It is necessary to remove the agricultural tariffs and quarantine requirements and to harmonize the regulatory divergences that bar bilateral trade in goods and services. It is further necessary to facilitate and guarantee two-way investment.

For the EU, the Market Access Database, which the European Commission maintains,⁶ lists nine key barriers in Australia.⁷ Mostly, since Australian tariffs are relatively low at an average applied Most Favoured Nation (MFN) rate of 3.0 per cent in 2014,⁸ they are in the form of sanitary and phytosanitary measures – either quarantine requirements or food safety standards:

1. import restrictions to bovine meat and derivatives on the basis of ‘mad-cow disease’;
2. import restrictions to chicken meat and derivatives on the basis of ‘gumboro disease’;
3. import restrictions to pork meat and derivatives for animal health reasons;
4. raw milk cheese standards in relation to micro-organisms for public health reasons;
5. compliance and enforcement concerns over counterfeit products, such as counterfeit Scotch Whisky;
6. insufficient protection of Geographical Indications for spirits and food products;
7. government procurement, especially at the sub-federal – State – level;
8. the Luxury Car Tax and car tariffs; and
9. the operation of the Wine Equalization Tax producer rebate.⁹

For the Market Access Database, other trade barriers in Australia include rigid technical requirements in the chemical sector (note registration, documentation, customs procedures), quantitative restrictions in the vehicle sector, state trading enterprises in the agriculture and fisheries sector competition issues to do with export subsidies in the textiles and leather sector, and export facilitation in the automotive sector.

⁵ European Commission and Australian Government, ‘Towards a Closer EU-Australia Partnership: Joint Declaration of the EU’s High Representative for Foreign and Security Policy/Vice President of the Commission and the Australian Foreign Minister’ (Brussels, 22 April 2015).

⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Global Europe: A Stronger Partnership to Deliver Market Access (COM(2007)183, Brussels, 18 April 2007).

⁷ European Commission, Directorate-General for Trade, ‘Market Access Database’, <madb.europa.eu/madb_barriers/barriers_result.htm?sectors=none&countries=AU&measures=none&keyBarrier=T>, 26 January 2016.

⁸ World Trade Organization, Trade Policy Review of Australia, ‘Report by the Secretariat: Australia: Revision’ (WTO Doc WT/TPR/S/312/Rev.1, 21 July 2015), 8 [7]. See James Rollo, ‘The Potential for Deep Integration between Australia and the European Union: What do the Trade Statistics Tell Us?’ (2011) 65(4) *Australian Journal of International Affairs* 394, 396, 400.

⁹ *A New Tax System (Wine Equalization Tax) Act 1999* (Cth); *A New Tax System (Wine Equalization Tax) Regulations 2000* (Cth).

In relation to services, distance is still a major trade barrier.¹⁰ In that respect, the choice of mode of entry under the General Agreement on Trade in Services (GATS) is a most important consideration for service suppliers.¹¹ Moreover, the EU sees Australia as a fragmented ‘common’ market.¹² Despite over a century of federation, Australia does not yet have a seamless national services economy.¹³ The EU would, therefore, call for sub-federal regulatory reform of the service economy and expect the same kind of commitment from the Australian States and Territories that the Canadian Provinces and Territories have made to the EU in its Comprehensive Economic and Trade Agreement with Canada.¹⁴

As for investment, Australia has, under the *Foreign Acquisitions and Takeovers Act 2015 (Cth)* and through its Foreign Investment Review Board, significant foreign investment restrictions and conditions – monetary thresholds – in the real estate and mining industries.¹⁵

¹⁰ Jenny Corbett and Kazunobu Hayakawa, ‘Australia – EU Services Trade: Identifying the Barriers’, paper given at the Australian National University Centre for European Studies Conference: ‘Trade & Investment Issues for the 21st Century: Building an Agenda for Australia/EU Cooperation’ (Canberra, 17 November 2009).

¹¹ Christopher Findlay, ‘The Business Services Market in Australia and the EU: Opportunities for Growth’, paper given at the Australian National University Centre for European Studies Conference: ‘Trade & Investment Issues for the 21st Century: Building an Agenda for Australia/EU Cooperation’, (Canberra, 17 November 2009).

¹² Directive 2006/123/EC of the European Parliament and Council of 12 December 2006 on Services in the Internal Market [2006] OJ L376/36. See Anne McNaughton, ‘Integrating Services Markets: A Comparison of European Union and Australian Experiences’ (2011) 65(4) *Australian Journal of International Affairs* 454, 466.

¹³ See, generally, Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (Thomson Lawbook Co, 2008). See also The Hon Justice Susan Kiefel AC, a Justice of the High Court of Australia, and Gonzalo Villalta Puig, ‘The Constitutionalisation of Free Trade by the High Court of Australia and the Court of Justice of the European Union’ (2014) 3(1) *Global Journal of Comparative Law* 34; Gonzalo Villalta Puig, ‘*Befair and Sportsbet*: The Remains of the Federal Purpose of s 92 of the Australian Constitution’ (2013) 87(3) *Australian Law Journal* 178; Gonzalo Villalta Puig, ‘Free Movement of Goods: The European Experience in the Australian Context’ (2001) 75(10) *Australian Law Journal* 639. See further Anthony Gray, ‘State-Based Business Licensing in Australia: The Constitution, Economics and International Perspectives’ (2009) 14(2) *Deakin Law Review* 165. Note that, further to an Intergovernmental Agreement on Federal Financial Relations, the Council of Australian Governments through its Ministerial Council for Federal Financial Relations implemented an agreement (National Partnership Agreement to Deliver a Seamless National Economy) between Australia and its States and Territories to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions and, thereby, assist in the creation of a seamless national economy and reduce the compliance costs to business. For background, see Business Council of Australia, ‘Towards a Seamless Economy: Modernizing the Regulation of Australian Business’, <www.bca.com.au/DisplayFile.aspx?FileID=332>, 25 July 2013, 10; Business Council of Australia, ‘Reshaping Australia’s Federalism: A New Contract for Federal-State Relations’, <www.bca.com.au/Content/100802.aspx>, 2006, 25; Business Council of Australia, ‘A Charter for New Federalism’, <www.bca.com.au/Content/101308.aspx>, 2007.

¹⁴ *Comprehensive Economic and Trade Agreement, Canada - European Union* (not yet in force) (subject to legal revision). See Alastair Walton, ‘Moving Beyond “Common Values and a Shared History” – Negotiating a Comprehensive Free Trade Agreement between Australia and Europe’ (Lecture presented at the Australian National University Centre for European Studies, Canberra, 15 May 2013), 7.

¹⁵ Australian Government, Treasurer, ‘Australia’s Foreign Investment Policy’, <http://firb.tspace.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf>, 2015. For the full Foreign Investment Review Framework, see also the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth)*.

Correspondingly, even if the EU is relatively open to the importation of industrial products (its average applied Most-Favoured-Nation (MFN) rate for industrial products was 4.3 per cent in 2014 almost on a par with the Australian average of 3.3 per cent),¹⁶ Australia still finds significant barriers in its common external tariff and trade policy. Overall, the average applied MFN rate for the EU in 2014 was 6.4 per cent, which more than doubles the Australian average of 3 per cent.¹⁷ Market access for Australian agricultural products (sugar, meat, dairy, cereals, fruit and vegetables come under prohibitive tariff-rate quotas)¹⁸ and government procurement tenders is almost impossible as is for service suppliers through the many recognition difficulties that non-EU professions and trades face.

A trade and investment agreement, therefore, between Australia and the EU would seem to be a mutually beneficial strategy.¹⁹

Oddly then, the EU remains the only major trading and investment partner with which Australia does not have a trade and investment agreement. And yet, between trade and investment flows, the EU is Australia's largest economic partner.²⁰ It has been so for more than twenty-five years.²¹

After all these years, finally, there is governmental consensus on the need to conclude a trade and investment agreement. The former Prime Minister, Tony Abbott, proposed a trade and investment agreement to the EU through his UK counterpart, David Cameron, at the 2014 G20 Brisbane summit. A year later, at the 2015 G20 Antalya summit, Australia and the EU agreed 'to commence work toward the launch of negotiations for a Free Trade Agreement'.²²

¹⁶ World Trade Organization, Trade Policy Review, 'Report by the Secretariat: The European Union', (WTO Doc WT/TPR/S/317/Rev.1, 21 October 2015), 42 [3.40]; World Trade Organization, Trade Policy Review of Australia, 'Report by the Secretariat: Australia: Revision' (WTO Doc WT/TPR/S/312/Rev.1, 21 July 2015), 9 [14].

¹⁷ World Trade Organization, Trade Policy Review, 'Report by the Secretariat: The European Union', (WTO Doc WT/TPR/S/317/Rev.1, 21 October 2015), 42 [3.40]; World Trade Organization, Trade Policy Review of Australia, 'Report by the Secretariat: Australia: Revision' (WTO Doc WT/TPR/S/312/Rev.1, 21 July 2015), 8 [7].

¹⁸ The EU average applied MFN rate for agricultural goods was 14.4 per cent in 2014, which does not compare at all well with Australia's tariff rate of 1.4 per cent: World Trade Organization, Trade Policy Review, 'Report by the Secretariat: The European Union', (WTO Doc WT/TPR/S/317/Rev.1, 21 October 2015), 42 [3.40]; World Trade Organization, Trade Policy Review of Australia, 'Report by the Secretariat: Australia: Revision' (WTO Doc WT/TPR/S/312/Rev.1, 21 July 2015), 9 [14].

¹⁹ Donald Kenyon, 'Australia and the European Union: A Relationship Driven by Trade' in *No Eutopia: The European Union Today* (Policy Commentary No 12, Australian Institute for International Affairs, 2012), 33-42, 40-41. See also Alastair Walton, 'New Alliances: Australia and Europe in a G20 World' (Briefing Paper Series 3 No 6, Australian National University Centre for European Studies, 2012) 1, 15; Alastair Walton, 'New Alliances: Australia and Europe in a G20 World' (Robert Schuman Lecture presented at the Australian National University Centre for European Studies, Canberra, 23 May 2012).

²⁰ Australian Government, Department of Foreign Affairs and Trade, *Composition of Trade Australia 2014-15* (Department of Foreign Affairs and Trade, 2015), 117.

²¹ See European Commission, European External Action Service, Delegation of the European Union to Australia, *Celebrating 50 Years: EU – Australia* (Stroudgate Publishers, 2013).

²² European Commission/European Council and Australian Government, Statement of the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Australia Malcolm Turnbull (Antalya, 15 November 2015). Interestingly, the European Commission's new trade and investment strategy, *Trade for All*, calls for the start of negotiations for a trade and investment agreement between Australia and the EU: European Commission, Communication from the Commission to the European Parliament, the Council, the

A prospective agreement should concentrate on services trade and FDI, which are not sensitive areas for either jurisdiction. An agreement to facilitate them would acknowledge the fact that the EU is Australia’s largest partner for trade in services and its largest source and destination of FDI.

A pause for reflection is advisable.

The Australian economy is overly dependent on its primary sector: mining and agriculture. Not surprisingly, Australia’s major exports to the EU are coal, zinc and lead ores and concentrates, (non-monetary) gold, and alcoholic beverages (notably wine)²³ – all primary products. It is not the kind of economic profile that is typical of an industrial country.²⁴

Thus, to maintain its future competitiveness, Australia should, transform itself into a knowledge economy, perhaps even a regional centre for financial services.²⁵ If it is to withstand the economic contraction and currency depreciation that, together with unemployment and inflation, are sure to follow the end of the resources boom, Australia needs to further develop its tertiary sector: the bilateral liberalization of trade in services and foreign investment in services supply with its largest services trading and investment partner would seem to be an appropriate strategy.²⁶ The EU would benefit too from greater access to the Australian services and investment market. The trade creation potential, the significance of global value chains to both economies (intra-industry trade between Australia and the EU is on the rise – especially in the pharmaceutical and manufacturing areas – which confirms its potential for deep integration into production networks),²⁷ and the collapse of the Doha Round would be a further rationale.

A prospective trade and investment agreement should concentrate its liberalisation efforts on trade in services and FDI. The agreement should adopt a negative list approach to investment liberalization and extend MFN and national treatment to investors of the other. In this respect, it should provide guarantees of investor protection and introduce a investor–state dispute settlement mechanism, access to which would definitely improve investor confidence. These are the kind of investment provisions and guarantees that would be of value to global value chains relevant to Australia and the EU. It should also protect firm-specific assets such as infrastructural capital and intellectual property against expropriation, which would promote more production sharing assets in the interest of greater competitiveness. It should remove

European Economic and Social Committee and the Committee of the Regions, ‘Trade for All: Towards a More Responsible Trade and Investment Policy’ (COM(2015)497, Brussels, 14 October 2015) 24.

²³ Australian Government, Department of Foreign Affairs and Trade, ‘European Union Fact Sheet’ (December 2015).

²⁴ Alan Oxley, ‘Australia and the European Union – Trade and Environment – Diverging Perspectives’ in Cheryl Saunders and Gillian Triggs (eds), *Trade and Cooperation with the European Union in the New Millennium* (Kluwer Law International, 2002) 107-112, 108.

²⁵ Jenny Corbett, ‘Trade in Financial Services: Are there Natural Regional Partners’ (Paper presented at the Australian National University Centre for European Studies Symposium: ‘The European Union: Australia’s New Business Horizon’, Canberra, 14 March 2008).

²⁶ Alastair Walton, ‘Moving Beyond “Common Values and a Shared History” – Negotiating a Comprehensive Free Trade Agreement between Australia and Europe’ (Lecture presented at the Australian National University Centre for European Studies, Canberra, 15 May 2013), 6.

²⁷ James Rollo, ‘The Potential for Deep Integration between Australia and the European Union: What do the Trade Statistics Tell Us?’ (2011) 65(4) *Australian Journal of International Affairs* 394, 407.

foreign equity caps. It should allow freer movement of corporate personnel too, which would bring into the scope of the agreement complementary trade in services provisions. The introduction of a non-discriminatory treatment principle should be non-negotiable as should be the provision of a guarantee of mutual market access to service suppliers through a negative list approach to rule out specific service sectors and modes of supply. A framework to promote mutual recognition²⁸ of professional services and qualifications²⁹ would seem equally necessary much in the style of the Working Group on Professional Services within the Australia – United States Free Trade Agreement. Apart from professional services, it should specifically target financial services, telecommunications, education, mining related services, and environmental services.³⁰ Disciplines on domestic regulation would be of value too particularly in relation to the many sub-federal regulatory differences that fragment the Australian market for trade in services.

In conclusion, I submit that a trade and investment agreement between Australia and the EU is necessary to address the regulatory divergences that arise out of the policy discord over agriculture and biosecurity. And so, to conclude, Australia and the EU should sign a trade and investment agreement in the hope that the economies and peoples of Australia and the EU can continue to grow closer together.

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²⁸ Karen Hussey and Donald Kenyon, ‘Regulatory Divergence: A Barrier to Trade and a Potential Source of Trade Disputes’ (2011) 65(4) *Australian Journal of International Affairs* 381, 381-382.

²⁹ Pascal Kerneis and Joshua Prentice, ‘The European Union as a Market for Professional Services’, (2011) 65(4) *Australian Journal of International Affairs* 436.

³⁰ Australian Government, Department of Foreign Affairs and Trade, *Trade at a Glance 2014* (Canberra: Department of Foreign Affairs and Trade, 2014), 50. See also James Rollo, ‘The Potential for Deep Integration between Australia and the European Union: What do the Trade Statistics Tell Us?’ (2011) 65(4) *Australian Journal of International Affairs* 394, 407.