

# Customs and Global Trade Update

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## CHINA FREE TRADE AGREEMENT – ISSUES FOR **IN-HOUSE COUNSEL**

When the China Australia Free Trade Agreement (ChAFTA) is implemented, well over 50% of Australia's trade in goods will be potentially covered by free trade agreements. However, free trade does not mean risk free trade. A company's ability to utilise ChAFTA in a compliant manner may heavily depend on the involvement of in-house counsel. This represents a great opportunity for the legal team to facilitate both lower trade costs and supply chain efficiencies.

Ownership of FTAs by in-house counsel is a key to increasing FTA utilisation. Too often FTAs are not used because of their complexity, other times they are incorrectly used. Logistics teams need legal support to fully utilise FTAs. Below are some tips for the role in-house counsel can play in increasing the correct use of FTAs, providing your business with a globally competitive advantage.

### WHO OWNS CUSTOMS IN YOUR ORGANISATION?

The import and export of goods has legal, taxation and logistics implications. It is not unusual for each of these areas to take responsibility for a portion of the customs function, but no one take overall responsibility. Effective FTA utilisation requires strategy and management. High levels of FTA utilisation are unlikely to be achieved unless a single person

within the organisation takes ownership of the issue. Given the main reasons for underutilisation relate to complexity and compliance, we believe there is significant merit in the legal team driving FTA use and compliance. If customs or, specifically, FTAs do not fall within your responsibilities, it is worth asking who in your organisation is reviewing the claiming of FTA benefits.

**In-house counsel take note:** Usually the decision to claim FTAs will be made by a third party customs broker without any external review. In our view, FTA use should be proactively managed by in-house counsel to ensure the benefits for your organisation are realised.

## FTAS DO NOT APPLY AUTOMATICALLY

The benefits available under FTAs do not apply automatically. The preferential duty rate under an FTA has to be claimed by the importer and this is done when lodging the import documentation. The benefit of an FTA can only be claimed if the relevant goods meet the rules of origin and the required paperwork is held.

Assessing whether goods meet the relevant rule of origin is one of the key challenges of utilising FTAs. This is relatively easy where the goods are of 100% Australia origin, such as primary goods. However, where goods are manufactured and contain imported content, the specific rule of origin for that product needs to be determined and satisfied. These are set out in legislation and can be complex.

Where the rule of origin is met, ChAFTA can only be claimed if a third party issued certificate of origin (CoO), or in certain limited circumstances, a self-certified declaration of origin, is held.

**In-house counsel take note:** While you may be provided with a CoO it is important to appreciate that these certificates are based on information provided by the manufacturer/exporter to the third party CoO issuer. There is little independent review of this information and, as such, CoOs do not prove origin.

## WHO IS LIABLE FOR CUSTOMS DUTY IF THE FTA IS WRONGLY CLAIMED?

It is the importer that claims the benefit of the FTA and it will be that party that is generally liable to the Government for any underpaid customs duty. The difficulty is that the importer is not in a position to assess whether the goods actually meet the relevant rule of origin. This assessment will be based on the importer's inputs into manufacture and the level of Australian or Chinese content.

**In-house counsel take note:** If the Australian Border Force suspect goods are not of Chinese origin it is open to them to audit the origin of the goods within four years of import and demand underpaid duty from the importer if Chinese origin is not proved.

## WHAT SHOULD YOUR CONTRACTS SAY ABOUT FTAS?

If you are an importer you should consider the following:

- » Requiring that the Chinese supplier provide you with CoO;
- » Seek a warranty that the goods meet the rules of origin under ChAFTA;
- » Impose an obligation on the supplier to cooperate with any audit by the Australian Border Force or Chinese Customs;
- » Seek a right for third party verification of the supplier's origin claims; and
- » Seek an indemnity for any duty or penalties payable if Chinese origin is denied by the Australian Border Force.

**In-house counsel take note:** An indemnity for customs duty payable if origin is denied is important as damages may not be awarded where the claimed loss is purely the requirement to pay customs duty.

As an exporter you need to consider who will carry the risk of Chinese Customs unreasonably denying that the goods are of Australian origin.

## INCREASING CERTAINTY

The risks of FTA use can be managed by obtaining origin rulings from the customs authority of the importing country. These rulings will bind the customs authority for 5 years in respect of the goods and facts set out in the ruling. The following should be considered in respect of origin rulings:

- » They are useless if the assumptions on which they are based are wrong. For instance, if your Chinese supplier tells you packaging of the goods happens in mainland China, but it actually happens in Hong Kong, the customs authority will not be bound by the ruling.
- » Rulings are unique to the particular supplier and importer. If a different entity within your corporate group imports the same good they will not be covered by the ruling.
- » Any time the product, or inputs into the product, change, a new ruling will be required.
- » If a valid ruling is obtained, a self-certified declaration of origin can be used in the place of the third party CoO, saving time and money.

If it is your company's goal to take full advantage of ChAFTA from day 1, you need to be taking steps now. We are advising our clients on contractual amendments to account of the additional risks and obligations presented by ChAFTA. We are also advising clients on rules of origin and how to ensure compliance within their organisation. If you would like to discuss these matters please do not hesitate to contact us.

Please contact a member of our team if you would like to discuss any of the above issues.



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