Submission

International Law Briefing Committee and Commercial Law Section

To: China FTA Study Taskforce, Department of Foreign Affairs and Trade

Submission for the Australia–China Trade and Economic Feasibility Study

A submission from: International Law Briefing Committee and Commercial Law Section of the Law Institute of Victoria

Date: 30 June 2004

Queries regarding this submission should be directed to:

Contact *Jo Kummrow*
Phone *03 9607 9385*
Email *jkummrow@liv.asn.au*

1. PRELIMINARY COMMENTS

The Law Institute of Victoria (*LIV*) is pleased to make this submission to the China FTA Study Taskforce of the Department of Foreign Affairs and Trade (*DFAT*) as part of the Australia-China Trade and Economic Feasibility Study on a proposed Australia-China Free Trade Agreement (*Proposed FTA*).

The International Law Briefing Committee and the Commercial Law Section of the LIV have prepared this submission.

2 SUMMARY

The LIV appreciates that the Trade and Economic Framework (*Framework*) between Australia and the People's Republic of China (*China*) sets out the process to be adopted by the countries to bring their economies closer together and the criteria to be considered when making a decision whether to proceed to a free trade agreement.

As the China FTA Study Taskforce would appreciate, a 'basic' free trade agreement only covers the removal of tariffs on the import and export of goods between countries that are the parties to the agreement. However, the LIV supports broader-based free trade agreements that aimed at removing other non-tariff barriers to trade.[1]

Notwithstanding that the LIV embraces the notion of broad free trade agreements, it also recognises there is no such thing as 'perfect' international 'free trade'. Any consideration of the Proposed FTA must be treated in the context of recognised tensions such as legitimate national interest (eg border security issues and quarantine) and recognised standards for human rights, labour and environment protection laws. It is fundamental that the Proposed FTA takes account of these tensions and contains processes to resolve them.

In summary, this submission provides comments on specific legal issues, including:

(a) legal services;

(b) dispute resolution mechanism;

(c) court enforcement of foreign judgments;

(d) cross-jurisdictional court access;

(e) Customs duties;

(f) Customs administration;

(g) import and export permits and quotas;

(h) corruption;

(i) future of Free Trade Zones and Special Economic Areas;

(j) Rules of Origin;

(k) anti-dumping and countervailing measures;

(l) safeguards;

(m) corporate regulation, investment and capital raising;

(n) corruption; and

(o) application and enforcement of law.

This submission also raises a number of tensions and restrictions that may exist between Australia and China under the Proposed FTA including:

(a) legitimate national interests;

(b) other international obligations and treaties;

(c) environmental protection;

(d) protection of human rights; and

(e) preservation of Australia's public interest.

3. GENERAL ENDORSEMENT OF THE PROPOSED FTA

As a general proposition, the LIV endorses the process described in the Framework and believes that having observed that process, the interests of both nations would be served by the Proposed FTA. The LIV believes that China has made significant strides in moving away from a centrally planned economy, through its status under the World Trade Organisation (*WTO*) as an 'economy in transition' towards a Full Market Economy (*FME*). While the LIV is not expert in assessing the status of an economy (or what constitutes a FME in economic terms), we believe that China satisfies a majority of normal criteria for acceptance as a FME as generally accepted under the WTO arrangements and, to the extent that it may not yet satisfy all those criteria, it is implementing procedures to reach that status.

This submission does not consider all aspects of a Proposed FTA as it concentrates on specific areas of interest and concern to the legal profession.

The LIV believes that a Proposed FTA should not be at the expense of Australia's ongoing initiatives to secure multilateral freedom of trade through other international free trade forums, such as the WTO and APEC. Accordingly, the LIV submits that the current focus of a Proposed FTA with China should not detract from those endeavours.

Finally, the LIV welcomes the opportunity to be involved in making further submissions regarding the Proposed FTA and in the drafting and negotiation of the Proposed FTA.

4. ACCEPTANCE OF CURRENT STATUS AND THEN A PHASED APPROACH TO FURTHER REFORM FOR CHINA

In making any determination as to whether China has achieved the status of an FME to support the Proposed FTA, the Australian Government should take into account the specific and unique characteristics of China's economy and social structure. The LIV notes that the Framework (Article 8) obliges Australia to recognise China as a FME as a precursor to negotiating the Proposed FTA. The Australian Government should acknowledge the current

efforts of the Chinese Government to reform its economy and be sympathetic and realistic in any demands to be placed upon the Chinese Government on entering into the Proposed FTA. This type of approach can be justified on the following bases:

4.1 Not apply unrealistic economic criteria of an FME

The LIV recommends that in making any decisions regarding future free trade negotiations with China, the Australian Government should not confine itself to any test or economic model which requires China to have achieved a perfect FME as a prerequisite to the Proposed FTA. No economy in any 'developed' nation has a 'perfect' FME. All have different levels of conditions, restraints and national interests. Similarly, free trade agreements do not require or guarantee complete free trade between contracting nations. In all cases there are reservations associated with accepted national and international interests. Many free trade agreements acknowledge that there will be improvements in various sectors over time. To this end, the Australian Government should recognise that any 'imperfections' in the Chinese economy should not preclude the Proposed FTA and should only require China to address those specific issues over time rather than by way of immediate and revolutionary reform.

4.2 China's efforts in economic transformation

As discussed above, the Chinese Government has effected significant economic and structural reform. The Australian Government should acknowledge the efforts of the Chinese Government to reform its economy and legal systems to satisfy the requirements of the WTO and its subsequent further move towards a FME. This would warrant some accommodation in expectations on China.

4.3 Future expectations based on China's current state

Any efforts by Australia to extract additional concessions or demands in the acceleration of further reform by the Chinese Government should be tempered by the particular state of the Chinese economy. China is in many respects a collection of a variety of economies in different geographical regions governed by different local products and levels of development. China has a massive population including a significant social strata which has yet to be directly involved in economic reform. For example, there are still many people operating on older socialist models of land use and exploitation. It would create significant disadvantage (and possibly significant social unrest) if Australia were to demand too many radical reforms or acceleration of reforms to the potential detriment of social structure. In any case, such demands are unlikely to be met.

4.4 China's WTO Accession Protocol

China joined the WTO by entering into the Accession Protocol on 23 November 2001. China should not to be obliged to act in a way inconsistent to that Accession Protocol.

For the reasons set out above, the LIV endorses an approach to the Proposed FTA which recognises and accepts the particular position of China as sufficient basis for the Proposed FTA and then permits a phased reform process of increasing liberalisation in a manner sympathetic to the status of Chinese society. Any expectations should also be at least consistent with China's WTO Accession

Protocol and where in Australia's national interest, more onerous than provided for in the WTO Accession Protocol.

Finally, consistent with other free trade agreements, the Proposed FTA with China should incorporate committees and working groups to assist with the further liberalisation of the Chinese economy. The LIV believes that there is precedent for this approach in other free trade agreements (including, for example, the way in which quotas and tariff rates are only to be reduced over time in the Proposed FTA with Thailand).

5. CONSIDERATION OF SPECIFIC ISSUES

Without limiting the generality of our endorsement of the Proposed FTA, the LIV sets out below some commentary on specific issues that need to be addressed in any negotiations for the Proposed FTA with China. These issues reflect the LIV's practice areas and the interests of its member's clients. The majority of these issues relate to the liberalisation of the means of access to the Chinese economy and the way in which Australian entities are permitted to operate within that economy.

5.1 Legal services

Australia's legal sector trade involves not only legal and related services, but also the cross-border movement of Australian lawyers, judicial and other dispute resolution services, and law and legislative models.[2] It is worth noting that Australia has a positive trade balance in respect of legal service exports, and that China is one of our largest export markets for legal services.[3]

In Australia, a regulatory path for creating a substantially uniform path for foreign lawyers practising in Australia is in place, and we have made a binding, non-reciprocal offer under the General Agreement on Trade in Services to provide foreign lawyers with access to the Australian legal services market.[4] However, the position in relation to provision of legal services in China has traditionally been that while foreign registered firms can provide legal services in China, they are not able to practise Chinese law, appear before Chinese courts or employ Chinese registered lawyers in China.

Accordingly, the LIV believes that any negotiation of the Proposed FTA should seek to minimise market access barriers to the practice of law, and that regulation should simply seek to promote professionalism and consumer protection rather than operating as a barrier to entry. In particular, where voluntary commercial association is desired between Australian and Chinese lawyers or law firms, "domestic regulation should not unreasonably obstruct such commercial association nor integrated forms of trans-national practice"[5].

Again, while it is noted that, as a result of China's accession to the WTO and its own economic reform program, the Chinese Government is working towards additional access in the legal services sector,[6] continued vigilance is required to ensure the Australian legal services market can compete on a level playing field to that provided to China.

Therefore, the LIV proposes the need to improve market access to China's legal markets through the following initiatives to be incorporated into a Proposed FTA:

(a) ease restrictions on Australian lawyers who wish to work as lawyers in China;

(b) increase the number of licences for Australian law firms wishing to open up a law office in China;

(c) ease restrictions on visa requirements for Australian lawyers to work for extended periods in China; and

(d) provide more opportunities for mutual exchange of law students and practising lawyers between Australia and China.

5.2 Dispute resolution mechanism

There needs to be a workable relationship between Australia and China for the Proposed FTA to achieve its objectives. However, disputes between the countries may arise from time to time. It is, therefore, crucial that an appropriate and effective dispute resolution mechanism is developed to deal with disputes and bring efficient and effective resolutions without the need for protracted litigation.

The Proposed FTA must provide a transparent, balanced and open dispute resolution process at all levels to ensure that the aims of the Proposed FTA will not be undermined. The LIV proposes that most disputes should be dealt with by an independent international arbitral body that can adjudicate expeditiously and provide full public access to its proceedings and decisions.[7] Establishing such a dispute resolution mechanism in the context of the aims of the Proposed FTA will ensure that certain issues are addressed including:

(a) the jurisdiction of such a dispute resolution mechanism;

(b) the requirement that such a dispute resolution mechanism operates effectively to address disputes on either private or public levels which may arise under the Proposed FTA; and

(c) the provision for *amicus curiae* submissions (where necessary).

Each of these issues is discussed in more detail below.

5.2.1 Jurisdiction

A dispute resolution mechanism under the Proposed FTA should deal with:

(a) standing;

(b) the interpretation of the Proposed FTA;

(c) how to deal with any breaches of the Proposed FTA; and

(d) the application of appropriate remedies.

5.2.2 Addressing different levels of disputes

The Proposed FTA should further substantiate the existing bilateral relationship between Australia and China and result in the development of a variety of commercial relationships between:

(a) individual nationals, or groups of nationals, of the one state on the one hand and the other signatory state on the other (*national-state disputes*); and

(b) different individual nationals or groups of nationals in the separate states (*national-national disputes*).

It is strongly recommended that a dispute resolution mechanism allow accessibility to both public authorities and private entities whose interests will be subject to its provisions.

It is submitted that the Proposed FTA should be consistent with all existing and future multilateral obligations of both Australia and China, and ensure that its dispute resolution mechanism does not provide an avenue for by-passing or circumventing multilateral commitments.

The LIV considers that any dispute resolution mechanism should also deal with possible national-state (including corporations) disputes. Accordingly, a national should be allowed to file a claim against a Proposed FTA party before an international arbitral body.

The LIV suggests that the drafters of the Proposed FTA should be wary not to establish a dispute resolution mechanism that could result in the creation of tensions between a State's bilateral obligations and the right, at international law, of a sovereign state to regulate matters arising within its own nation. The dispute resolution mechanism will need to carefully protect the rights of the Proposed FTA party to legislate for legitimate national interests.

5.2.3 *Amicus curiae* submissions

It is submitted the Proposed FTA should provide for *amicus curiae* submissions, in the context of all disputes.

Essentially, *amicus curiae* submissions permit interested non-parties who believe they can make a contribution to a dispute hearing body to assist in the understanding of a particular problem or issue before such a hearing body. In so doing, *amicus curiae* submissions serve to:

(a) inform an adjudicating body about the interest of a particular issue to the wider community;

(b) facilitate creative, technical and legal solutions by providing ideas and information which may not be available through normal bureaucratic channels; and

(c) bring factual legal and specific technical information or expertise to the attention of the adjudicating body, which may not have been addressed by the parties to the dispute.

5.3 Court enforcement of foreign judgments

In a recent address to the International Legal Services Advisory Council, The Hon JJ Spigelman AC recently stated of the Chinese legal system:

> *A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures are inconsistent with each of these objectives. …*
>
> *Improper influence, whether political pressure or bias or corruption, distorts all of these objectives. So, of course, does incompetence and inefficiency.*
>
> *Furthermore, judgements of the courts are not self executing. Orders must be backed up by sanction, including fines or imprisonment for contempt of court. The enforcement of court orders requires robust law enforcement institutions which have the requisite level of authority and are themselves not characterised by corruption, bias or inefficiency.*
>
> *Building such institutions takes time, as well as commitment. To give only one example, on a recent calculation, there is currently 2.5 billion renminbi of unenforced court rulings in the People's Republic of China*
>
> *The significance of enforcement cannot be underestimated. Studies undertaken for the World Bank indicate that amongst global investors, the predictability of judicial enforcement is the most robust predictor of economic growth.*[8]

In Australia, the primary means of recognition and enforcing foreign judgments is under the *Foreign Judgments Act 1991* (Cth). Generally, judgments from foreign courts will only be recognised and enforced in China if an international treaty has been concluded between China and the foreign country or China and the foreign country have established a reciprocal relationship in respect of the enforcement of judgments. As a consequence, if a dispute cannot be resolved the foreign party will usually be forced to seek relief against the Chinese party in the Chinese courts. However, China is a signatory to the 1958 *New York Convention on the Recognition and Enforcement of Arbitration Awards*. This means that arbitration awards made by recognised arbitration institutes of other signatory countries will be recognised and enforced in the China. Australia is a signatory to the New York Convention. This has led to the wide use of arbitration clauses in contracts involving a Chinese party and arbitration as the most popular means of dispute resolution in China.

The LIV recommends that the Proposed FTA provide for the enforcement of foreign judgments by a process of registration and be based upon the principles of reciprocity. The question of enforcement should not be decided on a case by case basis. Instead, the Proposed FTA must ensure the principles of reciprocity, in respect of enforcement of foreign judgments, are codified.

Accordingly, a repository should be established in which judgments or court orders may be registered in the respective jurisdictions and in the proper courts. A judgment or order entitled to recognition in one jurisdiction will be enforceable in the same manner as the judgment of a court in the other jurisdiction. The enforceability of a judgment in the respective jurisdictions should be determined by the following principles:

(a) the foreign court which grants (or delivers) a judgment must have appropriately exercised its jurisdiction to try the case in accordance to its own rules; and

(b) in trying the case, the court must have acted in accordance with due process.

Further, to be enforceable, a foreign judgement must be final in the originating jurisdiction. That is, the originating court has no further power to rescind or vary.[9]

It is submitted that reciprocal recognition and registration of judgments or court orders will:

(a) eliminate delay;

(b) eliminate expensive disputes over jurisdiction;

(c) provide certainty and ensure uniformity of application and interpretation of the law in respect of jurisdiction;

(d) speed up dispute settlement;

(e) eliminate forum shopping;

(f) avoid duplication of proceedings; and

(g) allocate risks and potential litigation costs efficiently.

5.4 Cross-jurisdictional court access

In the LIV's view, the Proposed FTA should:

(a) allow for greater allowance of cross-jurisdictional court access;[10] and

(b) develop an agreed position for a standard conflict of law clause for inclusion in general commercial contracts between companies in Australia and China.[11]

5.5 Customs duties

The traditional emphasis on the removal of tariff barriers in any discussions on free trade agreements (bilateral or multilateral) necessarily confers primary emphasis on Customs matters.

One of the basic requirements for the Proposed FTA is the elimination (or reduction) of Customs duties. The LIV appreciates that not all tariffs can be eliminated immediately and that the particular position of sections of the Chinese economy may dictate that certain tariffs only be reduced over time. Similar considerations may dictate phased reduction in Australian tariffs. However, the

primary consideration is to reduce tariffs as early as is possible and our view is that slow reductions serve the interests of neither country. To support these reductions, both countries will presumably take some comfort from the fact that there will be protection in Anti-Dumping legislation and the availability of safeguards for certain industries as discussed below at 5.10 below.

In addition to the agreed tariff reduction rates, both countries should have the right to ask for faster reduction from the other country or to reduce their rates unilaterally.

For the purposes of the Proposed FTA, specific Customs related matters to be addressed include[12] (but should not be limited to):

(a) removal of tariffs on all Australian and Chinese goods passing between the nations;

(b) removal of other non-tariff barriers including quotas and subsidy arrangements;[13]

(c) consistency in the approach to anti-dumping and countervailing inquiries and procedures for imposing penalties;

(d) consistency in the way in which administrative penalties are imposed on parties who do not comply with legislative reporting or other requirements;

(e) consistency to the grant of powers to Customs services and the manner of exercise of those powers: Different regimes create confusion to new entrants, which is a non-tariff barrier to trade. This aspect could also include harmonising 'border security' approaches to cargo handling and other clearance issues such as, biometric technology initiatives and the ready exchange of information between authorities regarding cargo and passengers;

(f) proper consideration of the origin of traded goods, if tariffs are to be removed for trade in goods between Australian and China: The countries will need to adopt consistent approaches to determine the origin of the goods starting with the WTO Committee on Rules of Origins;

(g) consistency to approaches to classifications of goods: While tariffs are removed, the classification of goods is still important for national reporting and other requirements; and

(h) consistency in reporting requirements on goods being imported and exported between countries.

Both countries should embrace the notion of the use of e-commerce to ensure the accurate and timely reporting on the import and export of goods. This will also aid in border security issues and the harmonisation of the practices of Customs authorities. To this effect, consideration should be given to the provisions of the Revised Kyoto Convention on the Simplification and Harmonisation of Customs Procedures as a background document. For these purposes, Australia will adopt a new 'Cargo Management Re-Engineering' process (*CMR Process*). Australia is also developing new software and procedures for industry to report and deal with the

Australian Customs Service through the 'Cargo Connect Facility' and the 'Integrated Cargo System'. These initiatives may serve as an appropriate basis for the adoption of a single window for reporting of goods being imported and exported between countries.

Many of these matters are discussed in more detail in paragraph 5.6 below.

5.6 Customs administration

As a general proposition, the LIV sees significant merit in the Proposed FTA containing provisions similar to those in the Australia-US Free Trade Agreement regarding Customs administration. Australia and China have already worked together on these issues. Without limitation, this should include the following.

5.6.1 *Administrative fees and formalities*

Other than fees and charges permitted under Article III of the GATT (Customs duties and internal charges) and anti-dumping and countervailing duties, any fees and charges must be limited to the approximate cost of those services and not represent indirect protection. In part, the Chinese practice of imposing inspection fees at ports of entry should be significantly curtailed.

5.6.2 *Transparency*

Both countries should commit to clear and transparent administration of Customs laws. These are vital in aiding trade. This should include the publication (in hard copy and electronic form) of relevant legislation and the issue of advisory opinions and binding rulings (both public and private). All commentary should be available in both languages.

5.6.3 *Clearance of cargo*

The significant amount of cargo between the two countries requires agreement that there should be minimal delays to the clearance of cargo. The specific criteria for normal and express cargo clearance in the AUSFTA should be adopted as a benchmark.

5.6.4 *Exchange of information*

It is in the interests of both nations that Customs authorities are able to exchange information on the arrival and departure of goods. This assists cargo management, border control, national statistics and identification of criminal activity and revenue collection. Standards of information exchange and cooperation as set out in the AUSFTA are recommended. This can provide for more extensive disclosure in the context of perceived illegal activities.

5.6.5 *Customs broking*

The existence of a properly trained and licensed Customs broking industry assists in the timely and accurate reporting of the passage of cargo. We would recommend the establishment of a national, licensed, Customs broking regime similar to the Australian model.

5.6.6 *Valuation*

Valuation should adopt WTO practices and those dictated by the World Customs Organisation (*WCO*). As indicated above there should be provision for binding private and public rulings.

5.6.7 *Classification*

Classification should also reflect practices of the WTO and WCO together with the availability of rulings.

5.6.8 *Use of information technology and modernisation*

As discussed above, increased use of information technology in the reporting of the transport of goods aids trade and also aids the task of the Customs administrations. For these purposes, both nations should continue to work to implement the provisions of the Revised Kyoto Convention. Work should also be undertaken to enable reporting parties in both countries to report electronically and directly into the systems operated by the Customs administrations of both countries. For example, parties in Australia should be able to also report the import of those goods directly into China's customs systems. For these purposes, it will require exporters and importers to hold digital certificates to verify identities, which are to be recognised, by both countries.

5.6.9 *Registration of exporters and provision of certificates of origin*

LIV appreciates that there are different approaches to whether it is an importer or exporter who must verify the qualifying ('originating') status of goods. Our view that the preferable approach is that set out in the Thai and Australia Free Trade Agreement (*TAFTA*) which obliges an exporter to be registered as producing 'originating goods' and for certificates of origin to be provided with each shipment. Such approach permits verification of status of exporters. Although this is more rigorous than in the AUSFTA, we believe that it assists certainty and compliance more than in the AUSFTA.

5.6.10 *Administrative penalties and prosecutions*

There should be consistency in the application of administrative penalties and types of prosecutions. Traders in both countries should have some comfort that they are subject to similar legislation and trading requirements in both countries.

5.7 Import and export permits and quotas

The Chinese Government has an extensive regime for import and export permits which is perceived to be more than the regime implemented by the Australian Government. The Chinese Government also maintains many quota restrictions that exceed Australia's quota restrictions. Permit and quota restrictions constitute significant non-tariff barriers and work will need to be undertaken to determine which of these restrictions represent legitimate national interest. Quotas need to be reduced and phased out over a reasonable period. Both countries cooperate in developing agreed procedures for administration of quotas and to minimise the anti-competitive effect of quotas. Protections to specific industries can be found in 'provisions for safeguards' set out below.

5.8 Future of Free Trade Zones and Special Economic Areas

The Chinese Government has encouraged overseas investment and development through different treatment of entities operating in Free Trade Zones (*FTZs*). and Special Economic Areas (*SEZs*). However, the underlying concept of a free trade agreement is that one contracting nation will not afford treatment to the entities of other countries which is more advantageous than the treatment afforded to the other contracting nation. The treatment afforded to entities in the FTZs and SEZs will need to be reviewed carefully to ensure that entities from countries other than Australia operating in those areas are not afforded treatment which is more advantageous than that provided to Australian entities. The Australian Government will need to consider carefully how it will treat any requests to permit the continuation of FTZs and SEZs.

5.9 Rules of Origin

Although 'Rules of Origin' (*ROO*) are technically part of the Customs administration, the ROO deserve separate consideration as they represent the criteria for favourable tariff treatment.

Recent Australian practice has led to two separate approaches to ROO, being the approach in the Australia-Singapore Free Trade Agreement (*SAFTA*) and the different approach in the AUSFTA. The AUSFTA approach appears to be very similar to that of the TAFTA, subject to some different treatment in requirements for 'regional value content' in the Textile Clothing and Footwear (*TCF*) and motor vehicle areas. The AUSFTA affords protection to goods wholly obtained or produced in a contracting party using products of that country. Goods from 'third countries' are allowed as inputs if those goods undergo a change in Tariff Classification.

In general, it is our view that the approach to ROO in the AUSFTA should be adopted as a means of determining the products of either nation that attracts preferential treatment. However, specific consideration should be given to whether the specific ROO (and associated regional value content for TCF goods or motor vehicle components) should be adopted in their entirety in the Proposed FTA. It is the LIV's view that the specific 'regional value content' requirements for motor vehicle components may be warranted, but the specific rules for TCF goods in the AUSFTA should not be adopted in the same form. They appear to be unnecessarily complex and contrary to the notion that all ROO need to be clear and easy to administer.

5.10 Anti-dumping and countervailing measures

Both countries should reaffirm their commitment to the WTO Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures. Particular interest will be whether Australia is prepared to commit formally (and finally) that China is not an 'economy in transition' for the purposes of the WTO agreements. The Framework specifically suspends the application of those provisions in the Accession Protocol. This would be a significant concession as pursuant to the Accession Protocol, China is treated as an 'economy in transition' for the purposes of the WTO agreements.

5.11 Safeguards

The LIV endorses general safeguard provisions consistent with other WTO agreements and free trade agreements. This will specifically arise for Australia in relation to TCF imports from China. There should be careful attention to the ability of a country to adopt transitional safeguards, requiring thorough investigation and consultation with the other country. Further, there should be reservations against adopting extensive 'special' safeguard measures such as under the TAFTA.

5.12 Intellectual property rights

As acknowledged in the Framework, Australia and China recognise intellectual property rights as a key component of "business activity, research and development, and their protection is key to success in higher technology sectors and services".

The LIV welcomes the cooperative approach to intellectual property protection agreed to by the two countries and believes that the establishment of systems to ensure mutual recognition of intellectual property rights established in both countries could be enhanced through any FTA negotiated between Australia and China.

However, such mutual recognition cannot be viewed in isolation from the wider issue of enforcement where breaches of such intellectual property rights occur. Notwithstanding that China has undertaken a wide-ranging process of developing its legal infrastructure, particularly its judiciary, over recent years, concerns in relation to the nature of the Chinese legal system and enforcement issues generally remain.

The LIV is concerned that in negotiating any Proposed FTA, Australia should remain mindful of the need to improve the institutional autonomy of administrative systems within China and strengthen the rule of law and enforcement mechanisms generally. Further, it is vital that Australia continues to assist China in this regard through the expanded provision of legal and legal education services, departmental and judicial legal cooperation links, and training seminars generally.

Whilst it is likely that changes to the Chinese legal system will occur as a result of "commitments made [as part of China's accession commitments] to open up and liberalise its regime to better integrate in the world economy and offer a more predictable environment for trade and foreign investment in accordance with WTO Rules"[14], continued vigilance in this regard is required to ensure that Australian companies and business can operate within China and share valuable intellectual property in an environment where the risk of that intellectual property being unreasonably exploited is minimised, and where such exploitation does occur, effective protection and enforcement mechanisms exist to minimise potential losses.

5.13 Corporate regulation, investment and capital raising

Given the interaction of international capital markets, significant problems can be created by different levels of regulation. Both countries have also recently suffered

from failures of corporate regulation and business ethics. Accordingly, both countries can benefit from working together to improve these aspects of business.

The LIV recommends that the Proposed FTA should include:

(a) options for direct mutual national treatment for investors or some form of mutual acceptance of accounting, corporate governance and prosecution requirements;[15]

(b) requirements to be satisfied for stock exchange listings;

(c) similar disclosure requirements for listed companies, but on a continuous basis;

(d) similar 'conflict of interest' rules for officers of companies and their advisers, including proper disclosures of related-party transactions;

(e) requirements for licensing of those offering securities and financial advice;

(f) similar rights to shareholders against companies; and

(g) consistent treatment for the taxation and repatriation of investment profits.

The Proposed FTA should incorporate provisions that bind all levels of government in China to these new 'rules', including at the national, provincial and levels of government.

Australia should be seeking to receive favourable treatment for its investors in China. That treatment should address practical issues such as excessive regulation, the inflexibility of some investment structures for foreign investors and recognition that many practical difficulties in foreign investment arise at the provincial/local level rather than the national level.

It needs to be recognised that a significant concern to potential investors is expeditious and cost effective resolution of investment disputes. Australia needs to investigate the feasibility of establishing a bilateral investment (and trade) dispute resolution mechanism which would enjoy the confidence of business in both countries which could be incorporated into a Proposed FTA.

5.14 Corruption

Corruption poses a significant threat to trade and human rights between and within nations. Inconsistencies in laws relating to corruption may afford offenders protection in one nation for offences within another nation. Accordingly, the Proposed FTA should reflect an agreed position on corruption, penalties applying for breaches and the ability to enforce penalties in the nation where the breach occurs.

5.15 Application and enforcement of law

A key concern that underpins a number of the issues raised above is the inconsistent application and enforcement of local laws and regulations in China. This includes the inconsistent application of law in different cities and towns and by different courts and judges. Foreign companies operating in and doing business

with China commonly complain about the inconsistent application and enforcement of law at China's national, municipal and provincial levels of government. There are 23 provincial governments in China. Each level of government oversees the implementation and enforcement of national and local law within its local boundaries. Consequently, municipal and provincial governments control significant political and economic power, which has generally led to a perceived culture of local protection and nepotism.

It is also necessary for China's trading partners, such as Australia to understand the transition of China's legal system and the challenges that it faces in modernising its legal system and institutions. There has been significant discussion about the rule of law (and rule by law) in China, which sets out the complex issues underpinning the development and reform of China's legal system within the political framework and tensions between external pressures to reform and the historical role of law.[16]

Possible solutions to improve the application and enforcement of law in China include:

(a) The LIV notes that the signing of the Proposed FTA would be at a national level. While Australia can guarantee the adoption and implementation of the Proposed FTA through its established legal and political system, it is questionable whether a national document would apply to China's municipal and provincial governments, which have the most contact with foreign companies and investors through their various administrative agencies. The LIV recommends that the Proposed FTA include a mechanism that requires the Chinese National Government to obtain the formal adoption of the Proposed FTA by its municipal and provincial governments to ensure a uniform approach to the mutually agreed trade and economic framework.

(b) The mutual secondment of senior public servants from each country to participate in direct knowledge transfer of best practice and training in their respective fields of expertise. For example, an Australian Customs officer could work in China with its Customs department or related agencies. Alternatively, Chinese Customs officers could undertake a work placement in Australia. The LIV suggests that such an initiative could significantly contribute to improved cooperation between the two countries on a number of levels: border protection, enforcement of law, legislative drafting and interpretation.

(c) The LIV recommends that the Proposed FTA include reporting requirements on the implementation, supervision and progress of municipal and provincial governments to adopt the economic and trade framework set out in the Proposed FTA. Such reports should also highlight enforcement initiatives.

(d) The development of an appropriate and effective dispute resolution mechanism as discussed in paragraph 5.2 above.

6. RECOGNITION OF TENSIONS AND RESTRICUTIONS

6.1 Legitimate national interests

The LIV recognises that legitimate national interest will act to qualify the free trade process. These restrictions include:

(a) political restrictions;

(b) national security;

(c) border protection;

(d) consumer protection;

(e) health; and

(f) quarantine.

Clearly, much work will be required to identify legitimate national interests as opposed to specific sectional requirements. The LIV recognises there may be difficulties in determining what are legitimate national interests and what are non-tariff barriers pretending to be legitimate national interests. This places a premium on an efficient mechanism to resolve disputes on these issues.

6.2 Other international obligations and treaties

Both Australia and China are parties to other international free trade or preferential trade agreements beyond the WTO. For example, China has formally launched talks with India to study the feasibility of signing a bilateral free trade agreement as well as a Comprehensive Economic Cooperation Agreement.[17] We also note that a joint free trade agreement feasibility study is being undertaken by China and New Zealand.[18] Australia has negotiated the TAFTA and is in preliminary discussions regarding entry to the ASEAN Group. These potential free trade agreements will place further obligations on the negotiation of the Proposed FTA. The LIV recommends that the Australian Government ensure that existing (and prospective) arrangements are not unnecessarily compromised by the Proposed FTA.

6.3 Environmental protection

The LIV recognises that laws dealing with environmental issues may have an impact on free trade agreements. In the particular context of China, environmental issues could be of significant importance because of the scale of China's environmental problems, and despite the commitment of China's State Council to control pollution (as reflected in the Law on Pollution Prevention and Control), China requires services and technology to meaningfully address those problems. Australia is well placed to provide these services and technology. Accordingly, the LIV believes that environmental protection should be a key issue when negotiating the Proposed FTA.

For these reasons, the LIV believes that Australia needs to undertake a detailed analysis of the potential environmental benefits and costs of the Proposed FTA before any negotiations begin. Accordingly, the LIV supports the adoption of a formal environmental review process such as that conducted by the United States in accordance with subsection (2102)(c)(4) of the US Trade Act.

Such a requirement, if properly implemented, could achieve the twin aims of integrating environmental considerations into Australia's trade policy, and facilitating significant public involvement in the negotiation process.

Finally, it is also noted that Australia has not yet acceded to the Kyoto Protocol to the UN Convention on Climate Change (*Kyoto Protocol*) (which has attracted significant criticism domestically and internationally). China has approved the Kyoto Protocol, and accordingly this may be a significant hurdle in negotiations between the two countries in relation to the environment. For example, China may refuse to negotiate on the basis that Australia has not acceded to the Kyoto Protocol. Alternatively, if China does agree to negotiate, it may be constrained in what it can agree to because of Kyoto Protocol limitations.

6.4 Protection of human rights

The LIV acknowledges the annual China-Australia Human Rights Dialogue, which was established in 1997 "to strengthen mutual understanding, discuss human rights issues and identify practical means of cooperation".[19] In a joint statement, the countries reported that they had exchanged dialogue on issues of common interest, including women's and children's rights, judicial administration, civil and political rights as well as economic, social and cultural rights and cooperation with the UN human rights mechanism. The LIV also notes the significance of China's constitutional amendment to Article 33(3) of the Chinese Constitution to provide for "The State respects and protects human rights".[20]

However, regardless of the above dialogue and protections, the LIV submits that the Proposed FTA must advance, rather than detract from, Australia's rights and obligations to develop laws and policies to promote the recognition and protection of human and labour rights and the environment

Trade liberalisation through free trade agreements offers opportunities for increased economic growth and development. It has been noted that the unprecedented removal of barriers to trade in the last half century has been accompanied by higher standards of living in participating countries.[21] However, trade liberalisation presents challenges to the enjoyment of human rights.[22]

The LIV submits human rights, labour and environment protection laws should not be subjugated to the economic objectives of trade agreements. The LIV believes the Proposed FTA should be negotiated and drafted on the basis that trade liberalisation is not an end in itself. The Proposed FTA must advance the public interest, especially in respect of human rights (including labour laws) and the environment.

In order to support human rights commitments by Australia the Proposed FTA should contain express and effective provisions to preserve Australia's right and obligation (under UN Treaties) to develop laws and policies to promote recognition and observance of human rights (including labour rights) and to protect the environment.

6.5 Preservation of Australia's public interest

The Proposed FTA should contain express preservation of the right and obligation (under UN Treaties) of the Australian governments – Federal, State and Local - to regulate in the public interest by passing and enforcing laws and regulations to recognise and advance human and labour rights and environmental protections. In the event of any inconsistency between such regulation and the Proposed FTA, the regulation should prevail and no rights to compensation should arise under the Proposed FTA. Any claims for compensation should be determined in the courts under section 51(xxxi) of the Australian Constitution. Similar rights and obligations on the part of China should be recognised.

It is impossible to anticipate what public interest regulation will arise in future years. The parties to the Proposed FTA should therefore have unfettered rights to legislate *bona fide* in the public interest without liability to pay compensation to foreign investors, absent expropriation, which would be compensable as provided in section 51(xxxi) of the Australian Constitution.

In addition, obligations by Australia and China under UN Treaties that they have ratified, or may ratify in the future, should be recognised as basic human rights standards incorporated into the Proposed FTA, breach of which would be actionable. As an example, Article 32 of the Convention on the Rights of the Child prohibits the employment of children in work that is likely to be hazardous or harmful to their health. Australia and China have both ratified this Convention and consequently are obliged to take steps to prevent such employment. Therefore, trade in Australia in goods produced in contravention of Article 32 should be prohibited under the Proposed FTA.

It will require considerable negotiating skills and vision by Australian negotiators to ensure that the protection of human rights (including labour rights) and the environment is not subjugated to narrow trade considerations. As discussed above, the need to provide for legitimate national or public interests as a limitation to the Proposed FTA places a premium on an efficient mechanism to resolve disputes as to which restrictions are legitimately in the national interests.

7. CONCLUSION

The establishment of the Proposed FTA has some significant advantages and the LIV endorses its possible establishment. The LIV endorses the notion of a broad-based FTA with China generally on the terms and conditions set out in this submission. The LIV welcomes the opportunity to be involved in the future steps to be taken to implement the Proposed FTA and looks forward to the opportunity of making further submissions and being involved through other consultation processes.

ENDNOTES

1 One recent example of a more broadly based free trade agreement, which will doubtlessly assist the China FTA Study Taskforce, is the general agreement for a Free Trade Agreement between Australia and Singapore.

2 For example, Australian intellectual property and patent law, and the commercial law of New South Wales have been adapted for local purposes and enacted by Singapore and Malaysia respectively.

3 Ian Govey, General Manager – Civil Justice and Legal Services, Attorney General's Department in an address to the International Legal Services Advisory Council Conference, Sydney (20 March 2003).

4 Govey, above, at 4.

5 Govey, above, at 4.

6 See <www.tradewatch.dfat.gov.au/TradeWatch/Tradewatch.nsf/vExportWeb/China>.

7 However, certain matters may need to be dealt with by the superior Court in the respective jurisdictions due to the constitutional or other legislative requirements, public interest issues or to ensure the equitable treatment of person such as exporters from non-FTA countries.

8 The Honourable JJ Spigelman AC, Chief Justice of New South Wales, in his address to the International Legal Services Advisory Council Conference, Sydney, Australia, 20 March 2003.

9 It is likely that where a foreign judgement is under appeal in the originating jurisdiction, a court in Australia will usually choose to stay its decision regarding enforceability, pending the decision of the foreign appellate court.

10 If an agreed position could be obtained for cross-jurisdictional court access this will decrease 'forum shopping'.

11 This will be very useful for Internet commercial contracts between persons in Australia and China.

12 This list should not be construed as a comprehensive list merely an indicative one with the intention that all relevant items are separately reviewed and covered.

13 This may pose significant difficulty in that it strikes at protections long afforded to particular interest groups such as primary producers.

14 See <www.dfat.gov.au/geo/china>.

15 For example, a prospectus issued in Australia complying with Australian requirements should be sufficient for US investors.

16 See Professor Randy Peerenboom, University of California Los Angeles Law School, Statement to the Congressional-Executive Commission on China Roundtable, 'What's a Liberal to Do? The Pursuit of Non-liberal Rule of Law in China' (1 April 2003) <http://www.cecc.gov/pages/roundtables/040103/peerenboom.pdf>; Professor Randy Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, 2002); Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press, 2000).

17 See press report at <http://www.expressindia.com/fullstory.php?newsid=29663>.

18 See New Zealand Ministry of Foreign Affairs and Trade website at <http://www.mfat.govt.nz/foreign/regions/northasia/nzchinafta/informationpaper.html>.

19 See full text of joint statement issued by China and Australia after the Seventh China Australia Human Rights Dialogue held in Beijing on 28 July 2003 at <http://english.peopledaily.com.cn/200307/29/eng20030729_121108.shtml>

20 See media release issued by Chinese Embassy in Australia (Canberra) on 9 March 2004 at <http://www.chinaembassy.org.au/eng/zt/topics/t72141.htm>.

21 *An Australia-USA Free Trade Agreement: Issues and Implications*, Report for the Department of Foreign Affairs and Trade by the Australian APEC Study Centre, Monash University, August 2001, page viii.

22 *Liberalisation of trade in services and human rights*, Report of the High Commissioner for Human Rights to the Economic and Social Council of the United Nations, 25 June 2002.