

Chapter 1

Background and issues raised

1.1 On 23 August 2018, the Senate referred the provisions of the Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018 [*Provisions*] (Customs bill), and the Customs Tariff Amendment (Comprehensive Agreement for Trans-Pacific Implementation) Bill 2018 [*Provisions*] (Customs Tariff bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 10 October 2018.¹

1.2 The Senate Selection of Bills committee recommended that these bills be referred for inquiry to allow '[f]urther scrutiny by non-government Senators'.²

Background to the bill

1.3 The bills would amend the *Customs Act 1901* (Customs Act) to implement Australia's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). The TPP-11 is an international free trade agreement (FTA) that was signed by 11 countries, including Australia, on 8 March 2018 in Santiago, Chile. On introducing the bill, the then Minister for Trade, Tourism and Investment, the Hon. Steven Ciobo MP, outlined the benefits of the agreement:

The TPP-11 is one of the most comprehensive trade deals ever concluded and will eliminate more than 98 per cent of tariffs in a trade zone spanning the Americas and Asia, with a combined GDP worth \$13.7 trillion. Australian farmers, manufacturers and services exporters will benefit from new market access opportunities in economies with nearly 500 million consumers.

It will provide better access for farm exporters including beef and sheep meat producers, dairy producers, canegrowers and sugar millers, as well as cereal and grains exporters. There will be new opportunities for our rice growers, cotton and woolgrowers, horticultural producers and our wine exporters...

Our manufacturers will benefit from the elimination of tariffs on industrial goods. Our services exporters will have access to liberalised and improved regulatory regimes for investment, notably in mining and resources, telecommunications and financial services.

The TPP-11 is truly a next-generation trade agreement.

And for the first time in a trade agreement, TPP-11 countries will guarantee the free flow of data across borders for services suppliers and investors as part of their business activity. This 'movement of information' or 'data flow' is relevant to all kinds of Australian businesses—from a hotel which relies

1 *Journals of the Senate [Proof]*, No. 113, 23 August 2018, pp. 3606–3608.

2 Selection of Bills Committee, *Report No. 9 of 2018*, 23 August 2018, p. [3] and Appendix 1.

on an international online reservation system to a telecommunications company providing data management services to businesses across a number of the TPP-11 markets. It's important to note that TPP-11 governments have retained the ability to maintain and amend regulations related to data flows, but have undertaken to do so in a way that does not create barriers to trade.³

1.4 According to the Department of Foreign Affairs and Trade, the TPP-11 is:

...[an FTA] between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam...

This Agreement is a separate treaty that incorporates, by reference, the provisions of the Trans-Pacific Partnership (TPP) Agreement (signed but not yet in force), with the exception of a limited set of provisions to be suspended. The 11 countries have a shared vision of the Agreement as a platform that is open to others to join if they are able to meet its high standards.⁴

1.5 Essentially, the TPP-11 replicates many of the provisions of the earlier TPP FTA (now sometimes called TPP-12, to distinguish it from the later TPP-11). There are, however, significant differences. Most importantly, the TPP-11 does not include the United States as a member state. Consequentially, it omits some of the original agreement's provisions, as outlined in the Customs Bill Explanatory Memorandum.⁵

1.6 Regarding the opportunities for Australia in being a party to the TPP, DFAT has stated:

The TPP is a regional free trade agreement of unprecedented scope and ambition with great potential to drive job-creating growth across the Australian economy.

TPP outcomes include new market access opportunities for Australian exporters of goods and services, as well as investors, that are additional to Australia's existing free trade agreements. For investment, the TPP will create new opportunities and provide a more predictable and transparent regulatory environment.

The TPP will also establish a more seamless trade and investment environment across 12 countries by setting commonly-agreed rules and promoting transparency of laws and regulations. The TPP will provide

3 The Hon. Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Proof House of Representatives Hansard*, 23 August 2018, p.6.

4 Department of Foreign Affairs and Trade, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed 27 September 2018).

5 Department of Foreign Affairs and Trade, 'TPP-11 Myth busters' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 27 September 2018). Note the Customs Bill Explanatory Memorandum includes a chart outlining all the provisions of the TPP-12 that have been suspended in the TPP-11 agreement at Attachment B, pp. [28–33].

greater certainty for businesses, reduce costs and red tape and facilitate participation in regional supply chains.

The TPP addresses contemporary trade challenges in ways that have not previously been addressed in Australian FTAs, such as commitments on state-owned enterprises, which will promote competition, trade and investment and enable Australian exporters to compete on a more level playing field.⁶

Provisions of the bills

1.7 The bills would make amendments to the Customs Act to implement Australia's commitments as a signatory to the TPP-11.

1.8 The Customs bill would introduce new rules of origin for goods imported into Australia from nations that have entered into the TPP, as well as make provision for Australian authorities to ensure that Australian exporters meet relevant country-of-origin rules under the TPP. According to the bill's Explanatory Memorandum:

The TPP-11 amendments contained in the Bill will enable eligible goods that satisfy the new rules of origin to be entered into Australia at preferential rates of customs duty. The amendments will also impose obligations on exporters of eligible goods to a Party to the TPP-11 for which a preferential rate of customs duty is claimed, and on manufacturers who produce such goods.⁷

1.9 The amendments made by the Customs bill would be complemented by the Customs Tariff bill, including its provisions:

- providing preferential rates of customs duty, on entry into force of the TPP-11, for all goods, excluding excise-equivalent goods, that are Trans-Pacific Partnership originating goods determined in accordance with new Division 1GB of Part VIII of the [Customs Act]...;
- inserting new Schedule 8B to provide for excise-equivalent rates of duty on certain alcohol, tobacco and fuel products and for phasing rates of customs duty in accordance with the TPP-11; and
- amending certain concessional items in Schedule 4 to the Customs Tariff Act to maintain customs duty rates in line with the applicable concessional item and in accordance with the TPP-11.⁸

6 Department of Foreign Affairs and Trade, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed 27 September 2018).

7 Customs Bill Explanatory Memorandum, p. 2.

8 Customs Tariff Bill Explanatory Memorandum, p. 2.

Parliamentary scrutiny of the Trans-Pacific Partnership

1.10 In introducing the bills, the Minister stated that:

Here in Australia, this agreement has undergone a level of scrutiny perhaps unprecedented by any other free trade agreement. It has been subject to four parliamentary committee inquiries.⁹

1.11 These parliamentary inquiries have included work undertaken by:

- the Joint Standing Committee on Treaties, in its inquiry into the Treaty tabled on 9 February 2016 (which lapsed with the dissolution of the Senate and the House of Representatives on 9 May 2016 and so did not produce a final report);¹⁰
- the Joint Standing Committee on Treaties, in its *Report 165: Trans-Pacific Partnership Agreement* (tabled 30 November 2016);¹¹
- the Senate Foreign Affairs, Defence and Trade References Committee, in its inquiry into the *Proposed Trans-Pacific Partnership (TPP) Agreement* (tabled 7 February 2017);¹² and
- the Joint Standing Committee on Treaties, in its *Report 181: Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (tabled 22 August 2018).¹³

Financial implications

1.12 The Explanatory Memoranda for both bills contain the same Financial Impact Statement, which estimates that implementing the TPP would reduce customs duty collections by \$195 million over the forward estimates, as forecast by the 2016–17 Commonwealth Budget.¹⁴

1.13 According to the Explanatory Memoranda these estimates are still current, with the 2018–19 Budget noting that there 'would be no additional costs of implementing the TPP-11'.¹⁵

9 The Hon. Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Proof House of Representatives Hansard*, 23 August 2018, p. 7.

10 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016 (accessed 27 September 2018).

11 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership (accessed 27 September 2018).

12 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP (accessed 27 September 2018).

13 See the inquiry webpage at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11 (accessed 27 September 2018).

14 See the Customs Bill Explanatory Memorandum and the Customs Tariff Bill Explanatory Memorandum, both at p. 2.

15 See the Customs Bill Explanatory Memorandum and the Customs Tariff Bill Explanatory Memorandum, both at p. 2.

1.14 The Customs Bill Explanatory Memorandum includes a Regulatory Burden and Cost Estimate, which suggests that the TPP is expected to reduce compliance costs for Australian exporters to TPP-11 Parties. This would come from two sources:

First, the ability of exporters to use one set of documentary procedures to export to 10 other markets instead of under eight separate FTAs plus two non-FTA partners. Second, the possibility that some businesses that previously sought and obtained non-preferential certificates of origin (COOs) may now be able to self-certify the origin of their goods for exports to Brunei Darussalam, Canada, New Zealand, Mexico, and Vietnam. Existing agreements allow businesses to self-certify the origin of their goods for exports to Chile, Japan, Malaysia, Peru and Singapore.¹⁶

Compatibility with human rights

1.15 According to the Explanatory Memoranda, the bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.16 The Explanatory Memorandum for the Customs bill recognises that it engages the Right to not be subjected to arbitrary or unlawful interference with privacy in Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*.¹⁷ It concludes that the bill is compatible with human rights, as 'to the extent that it may engage the right to privacy, [its provisions] will not constitute an unlawful or arbitrary interference with privacy'.¹⁸

1.17 Regarding the Customs Tariff bill, the relevant Explanatory Memorandum states that its provisions do not raise any human rights issues.¹⁹

1.18 The Senate Scrutiny of Bills Committee stated that it had no comment in relation to the bills.²⁰

Regulatory impact

1.19 The Explanatory Memorandum for the Customs bill contains a Regulation Impact Statement covering both bills. This outlines the potential risks of Australia not becoming party to the TPP, should it choose to do so following the withdrawal of the United States from the agreement on 23 January 2017.²¹ These risks would primarily be missing out on the forecast benefits of the agreement, including that it is expected to:

16 Customs Bill Explanatory Memorandum, Attachment C, p. [1].

17 Customs Bill Explanatory Memorandum p. 24.

18 Customs Bill Explanatory Memorandum, p. 25.

19 Customs Tariff Bill Explanatory Memorandum, p. 12

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 10.

21 The original agreement cannot come into force without the participation of the United States, which signalled its intention to withdraw on 30 January 2017, a decision confirmed and formalised by Presidential Memorandum. See Customs Bill Explanatory Memorandum, Attachment B, p. [2].

- deliver commercially meaningful market access gains that will benefit Australian agriculture, resources, energy and manufacturing exporters, service providers, consumers and investors;
- secure Australian exporters' competitive position in the Asia-Pacific;
- deliver faster and deeper market access gains than are possible through multilateral [World Trade Organisation] negotiations;
- be consistent with WTO requirements for FTAs, and
- complement Australia's efforts to seek additional trade liberalisation from other TPP-11 parties through the WTO and regional mechanisms.²²

Conduct of the inquiry

1.20 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 10 September 2018. The committee also wrote directly to a number of individuals and organisations inviting them to make submissions.

1.21 The committee received 15 submissions, which are listed at Appendix 1. All submissions are available in full on the committee's website.²³

Structure of this report

1.22 This report consists of two chapters:

- This chapter sets out the background and provisions of the bill, as well as the administrative details of the inquiry; and
- Chapter 2 outlines the principal issues raised by participants in the inquiry, and sets out the committee's views and recommendations.

Acknowledgements

1.23 The committee thanks all organisations and individuals that made submissions to this inquiry.

22 Customs Bill Explanatory Memorandum, Attachment B, p. [38].

23 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs