



Australian Government

Australian Government response to the
Senate Foreign Affairs, Defence and Trade
References Committee report:

Korea-Australia Free Trade Agreement

Australian Government response to the Senate Foreign Affairs, Defence and Trade References Committee report:

Korea-Australia Free Trade Agreement

This is the Australian Government's response to the Senate Foreign Affairs, Defence and Trade References Committee's report on the Korea-Australia Free Trade Agreement (KAFTA), tabled on 1 October 2014.

The Government welcomes the Committee's final recommendation and also the additional recommendation of Coalition senators that prompt binding treaty action be taken in relation to KAFTA. Australia has completed its domestic treaty-making processes and following an exchange of notes with the Republic of Korea on 3 December, KAFTA entered into force on 12 December 2014.

The issues raised in the Committee's other recommendations were addressed extensively in the appearance before the Committee of senior officials on 9 September 2014, as well as in responses to questions on notice. The following responses to the various recommendations by Committee members have been prepared on a whole-of-government basis:

Recommendation 1 (paragraph 5.8)

The committee recommends that the Australian Government initiate discussions with Korea to omit or, in the absence of agreement, narrow the scope of the investor state dispute settlement provisions within the treaty, to be formalised by a subsequent side letter. Discussions on narrowing the provisions should include consideration of:

- **a narrower definition of 'expropriation';**
- **a non-exhaustive list of public policy areas covered by the term 'legitimate public welfare objective';**
- **limitations as suggested by French CJ, or as subsequently formally recommended by the Council of Chief Justices; and**
- **that the parties promptly establish a bilateral appellate mechanism as envisaged in Annex 11-E of the agreement.**

Response

The Government does not accept this recommendation.

The investor-State dispute settlement (ISDS) provisions in KAFTA include appropriate carve-outs and safeguards for public welfare regulation including with regard to health and the environment. These modern safeguards have been developed in response to concerns raised by ISDS claims under earlier agreements. There are considerably more explicit protections for public welfare regulation in KAFTA than the vast majority of Australia's agreements which contain ISDS. In comparison to other agreements containing ISDS, KAFTA is among the most protective treaties in existence worldwide in terms of its protections for legitimate regulation. It is

important to note that Australian investors in Korea will also be able to use the ISDS mechanism, under the same conditions, to protect their investments.

The Government notes the specific recommendations made by the Committee but does not agree that it is necessary or desirable to seek to renegotiate these provisions with Korea.

With regard to the recommendation to promptly adopt a bilateral appellate mechanism the Government notes that Australia and Korea recognise in KAFTA that an appellate mechanism to review ISDS awards may be desirable. However there are a number of issues to consider including how any such appellate mechanism should be designed and how it would impact on the existing ISDS mechanism. The timeframe for consultations in Annex 11-E gives the Parties time to consider these issues further.

Recommendation 2 (paragraph 5.15)

The committee recommends that the Australian Government should not agree to include investor state dispute settlement mechanism in future trade agreements.

Response

The Government does not accept this recommendation. The Government's policy is to consider the inclusion of ISDS mechanisms in trade agreements on a case-by-case basis.

Recommendation 3 (paragraph 5.23)

The committee recommends that the Australian Government:

- **provide clarity on proposed changes to copyright and assurance that any proposed changes as a result of the Korea-Australia Free Trade Agreement will not create adverse impacts for intellectual property owners or users;**

Response

On 10 December 2014, the Government announced new measures to address online copyright infringement. These measures include the development of an industry code which, consistent with the obligation in 13.9.29 of KAFTA, would provide for notifying consumers when a copyright breach has occurred. The Government will also amend the Copyright Act, to enable rights holders to apply for a court order requiring ISPs to block access to a website, operated outside of Australia, which provides access to infringing content.

The Government has sought the least burdensome and most flexible way of responding to concerns about online copyright infringement, while protecting the legitimate interests of the rights holders in the protection of their intellectual property.

The Government has consulted key copyright stakeholders, internet service providers, consumers and the public in the development of these measures.

The Government has therefore not introduced specific measures to implement KAFTA, however all copyright reform takes account of Australia's international obligations.

- **retain harmony in future trade agreements by limiting intellectual property provisions to Australia's obligations under specific intellectual property related multilateral agreements only and retain policy space to make changes to Australia's domestic intellectual property laws in the future;**

Response

The Government recognises the importance of retaining policy flexibility to make changes to Australia's domestic intellectual property (IP) laws in the future. In some circumstances the Government may have an interest in entering into new obligations. This may be to address problems faced by Australian business in particular markets or to further harmonise the international system. However, the Government does not seek IP provisions that inappropriately reduce flexibility to amend or change Australia's legislation or practices; that require legislative changes; or that add additional complexity to the international IP system.

The international IP system is framed by the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and 26 other multilateral treaties covering the different subject matter and aspects of IP law and practice. These treaties set basic standards for national IP systems and a framework for laws that provide certainty and protection for rights holders, users and the general public in the global trading environment.

Bilateral free trade agreements such as KAFTA often reaffirm commitments in multilateral agreements, but in some circumstances, may differ from those commitments as part of a negotiated outcome. However, any extension of existing obligations (e.g. to provide an additional term of protection for a particular right) will be assessed during the negotiation process and considered in light of domestic policy and legislation, and against Australia's overall interests, weighing up all factors across the entire Agreement, not just on IP.

- **ensures that the potential impact of intellectual property provisions in trade agreements is properly assessed and, in particular, give consideration to the recommendations of the Productivity Commission.**

Response

The potential impact of IP provisions in trade agreements is considered carefully throughout negotiations, with close attention paid to the need to balance the interests of IP rights holders (including the protection of Australian-owned IP in foreign markets), users (including intermediaries, and consumers) and the public interest. A range of stakeholder and community views are sought and taken into account during negotiations. In this context, the Government is also aware of the Productivity Commission's recommendations. The final result invariably reflects a negotiated outcome considered by Government to be in Australia's interests, weighing up all factors across the entire agreement.

Recommendation 4 (paragraph 5.26)

The committee recommends the Australian Government:

- **seeks to renegotiate with Korea to preserve the right to labour market testing, noting that Korea retains this right;**

Response

The Government does not accept this recommendation. The Government does not intend to seek the renegotiation of the relevant provisions of KAFTA. The final outcomes represent a negotiated outcome which reflected a balancing of various interests on both sides.

- **put in place measures to more accurately track visa entrants based on free trade agreement provisions, including to monitor and record the levels of contractual service providers granted 457 visas without labour market testing;**

Response

The Government does not accept this recommendation. The Department of Immigration and Border Protection does not require visa applicants to identify if they are using a free trade agreement commitment to enter the country. Following entry into force of KAFTA, the Department will be able compare the number of 457 visa applications by ROK nationals, and the number of visas granted, with the numbers prior to the agreement entering into force.

- **reserves policy space in future free trade agreements to regulate labour market entry and better promote labour standards;**

Response

The Government notes the Committee's recommendation. In regards to commitments on temporary entry, the Government approaches negotiating trade agreements on a case-by-case basis. In regards to regulating labour standards, this is not normally an area which is covered in free trade agreements.

- **actively monitors Korea's adherence to the general principles and labour standards outlined in Chapter 17 of the KAFTA, particularly with reference to goods exported from the special processing zones on the Korean Peninsula pursuant to Annex 3-B of Chapter 3; and actively upholds these standards in various committees and consultation with Korea under the agreement.**

Response

The Government notes the Committee's recommendation. Australia will implement its commitments as outlined in Chapter 17 of KAFTA on labour, including through consultations or the convening of ad hoc committees to consider any implementation issues.

KAFTA contains a provision whereby goods that are processed on the Korean Peninsula from materials from the Republic of Korea may potentially be designated in future as Korean originating goods. However, such goods would have to come from designated 'outward processing zones' and no such zones have been agreed at this time. After entry into force of KAFTA a committee will be established under Annex 3-B to review the conditions on the Korean Peninsula and possibly identify areas which may be designated as outward processing zones and no such identification or designation could be made without Australia's agreement.

Recommendation 5 (paragraph 5.28)

The committee recommends that the Australian Government addresses business concerns regarding complex rules of origin processes in KAFTA, and the lack of harmonisation with other preferential trade agreements.

Response

The Government notes the recommendation and it also notes concerns expressed by some business groups during the Committee's inquiry regarding the rules of origin processes in KAFTA.

The approach to rules of origin in KAFTA is consistent with the approach taken in Australia's other preferential trade agreements. A key criterion used to determine origin is the change of tariff classification approach, which is based on the World

Customs Organization (WCO) harmonised system (HS). How these rules are presented in the Product Specific Rules schedules differs from one FTA to another. Some agreements are more complex than others.

In terms of origin documentation, KAFTA provides two options for Australian traders: a certificate of origin issued by an authorised body (currently the Australian Chamber of Commerce and Industry (ACCI) or the Australian Industry Group (AiGroup)), or a certificate of origin (self-declaration) completed by the exporter or the producer. There is a strong international trend towards self-declaration of origin in FTAs. Self-declaration is supported by a broad range of Australian industry sectors including agriculture. It is particularly beneficial to small and medium-sized enterprises seeking to cut red tape and costs.

DFAT is working closely with ACCI and AiGroup to ensure the smooth implementation of processes relating to certificates of origin issued by Australian authorised bodies. The Government does not expect any serious problems with implementation under KAFTA. Both Korean and Australian customs authorities are familiar with implementing preferential origin requirements under existing FTAs.

Recommendation 6 (paragraph 5.30)

The committee recommends that the Australian Government provide additional resources to Austrade and peak export organisations to monitor and improve the awareness within the Australian export industry of the opportunities provided under trade agreements, as well as assistance to new exporters on how to efficiently navigate Australia's complex network of free trade agreements.

Response

The Government notes the Committee's recommendation. The allocation of resources to relevant agencies and industry organisations is a decision for the Government.

The Department of Foreign Affairs and Trade (DFAT) and Austrade work closely together to inform and prepare industry for the implementation of new free trade agreements, including KAFTA.

DFAT has developed detailed explanatory material on KAFTA, which is provided in addition to the full legal text of the agreement and the tariff schedules. These are all publicly available on the DFAT website: www.dfat.gov.au/fta/kafta. This material is also available from Austrade's website and distributed via Austrade's other promotional channels.

DFAT is working closely with Austrade on a program of activities to encourage utilisation of KAFTA by business once the agreement has entered into force. Austrade plays a significant role in assisting businesses to enter overseas markets and take full advantage of the opportunities made available by Australia's FTAs. An example of this is a six city seminar series on 'Korea and the FTA' held in November 2014 with

keynote speakers being the Australian Ambassador to Korea and the Austrade Senior Trade Commissioner, Seoul.

Businesses and their representative organisations also have a role in ensuring that they are aware of the opportunities offered by FTAs and are able to take advantage of them in a way that best suits their particular operations, or the operations of their members, in the relevant foreign market. Allocating resources to these activities is a matter for the businesses or representative organisations themselves.

DFAT and Austrade have also fully briefed State and Territory officials on KAFTA and opportunities in the Korean market.

Recommendation 7 (paragraph 5.32)

The committee recommends that the Australian Government makes an interpretive declaration along the following lines in order to clarify its practice under article 21.4(4) and elsewhere in KAFTA:

This declaration is made to clarify Australia's interpretation that Committee reports will be made public under article 21.4(4). This is made also as an undertaking to the Australian public of Australia's interpretation of KAFTA as an open agreement. As a general approach at points of ambiguity in the text or where the text is silent on the matter, as in article 21.4(4), Australia will favour an interpretation that supports open and public provision of information.

Response

The Government does not accept this recommendation. It would not be appropriate for Australia to unilaterally make an interpretive declaration along the lines described.

Within one year of the entry into force of KAFTA, and thereafter as set out in the Agreement, a Joint Committee will meet to discuss a number of issues in relation to the operation of KAFTA. The Government expects that the Joint Committee will discuss the question of transparency of its work and that of the other committees established under KAFTA, at an early stage.

The Government recalls that article 21.5 of KAFTA provides that "All decisions of the Joint Committee and all committees, working groups and other bodies established under this Agreement shall be made by mutual consent of the Parties." This would apply to the release of Joint Committee reports and other documentation in relation to the operation of KAFTA.

DFAT conducts regular outreach to businesses and non-government organisations regarding the operation of its FTAs and will continue to receive and consider such submissions and questions via the KAFTA contact point.

Recommendation 8 (paragraph 5.35)

The committee recommends that the Australian Government examine reforms to increase stakeholder consultation in the preparation of National Interest Analysis documents and that the viability of National Interest Analysis documents, or parts of these documents, being prepared by an independent body.

Response

The Government does not accept this recommendation.

The National Interest Analysis (NIA) tabled in Parliament with its accompanying agreement is an official Government document advising the Parliament among other things of the essential elements of the agreement, any costs and impacts, and why the Government believes it is in Australia's national interests for binding treaty action to be taken. For trade agreements the NIA is drafted by DFAT on a whole-of-government basis in consultation with other agencies that have taken part in the negotiations. Given the in-depth detailed knowledge required of various negotiating positions and options, it would not be appropriate for the NIA to be drafted by entities outside Government.

Through existing review processes JSCOT and other Parliamentary committees have the opportunity to consider and test the statements made in the NIA, as do external stakeholders in submissions and testimony to JSCOT and other committees.

Recommendation 9 (paragraph 5.40)

The committee recommends that prompt binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*.

Response

Australia and the Republic of Korea have completed its domestic treaty-making processes and KAFTA entered into force on 12 December 2014.

Additional comments of Coalition senators

Recommendation (paragraph 1.4)

Coalition senators recommend that prompt binding treaty action be taken in relation to the *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*.

Response

Australia and the Republic of Korea have completed its domestic treaty-making processes and KAFTA entered into force on 12 December 2014.

Dissenting report by the Australian Greens

Recommendation 1 (paragraph 1.29)

That the Senate refuse to pass KAFTA enabling legislation until Investor-State Dispute Resolution clauses are removed from the agreement.

Response

The Government notes that this is a matter for the Senate.

Recommendation 2 (paragraph 1.30)

That the Parliament refuses to pass KAFTA enabling legislation until an independent cost-benefit analysis of the intellectual property provisions in KAFTA has been carried out and has been appropriately assessed by the Parliament.

Response

The Government notes that this is a matter for the Parliament.