

Chapter 2

Background

Context to the agreement

2.1 The Republic of Korea (Korea or South Korea) is Asia's fourth-largest economy with a population of around 50 million people. Australia and Korea are economic, political and strategic partners with a number of shared values and interests. Korea is a key market for Australian minerals, energy, agricultural products, travel and education services, while Australia is a major market for Korean cars, petroleum, electronic goods and parts. Korea is Australia's third-largest export market and fourth-largest overall trading partner, with total two-way trade exceeding \$30 billion in 2012-13.

2.2 Australia is also seeking trade agreements with other major trade partners in Asia. On 7 April 2014, Australia signed the Japan-Australia Economic Partnership Agreement (JA-EPA). Negotiations for a free trade agreement (FTA) with China are also continuing. The 20th round of negotiations were held in Canberra on 5-8 May 2014. Both sides indicated a wish to conclude negotiations by the end of the year.¹ Together China, Japan and Korea represent over 50 per cent of Australia's exports.

2.3 Australia is also currently negotiating bilateral free trade agreements with India and Indonesia and engaging in four multilateral negotiations: the Trans-Pacific Partnership Agreement (TPP), the Gulf Cooperation Council (GCC), the Pacific Trade and Economic Agreement (PACER Plus), and the Regional Comprehensive Economic Partnership Agreement (RCEP).²

2.4 Australia is not alone in negotiating numerous FTAs. Many other countries are also seeking to negotiate and finalise preferential trade agreements with partner countries. In the absence of genuine momentum on the Doha Round at the World Trade Organisation (WTO), Australia must compete for preferences in bilateral agreements, or risk losing market share and competitiveness to others. KAFTA is a good example of such a 'competitive bilateral' or 'catch up' agreement. Implementation of KAFTA will help to retain and expand Australia's export markets to Korea rather than losing market share to key competitors such as the US, EU, Chile and soon Canada, all of whom have preferential trade agreements with Korea.

1 DFAT, 'Twentieth round of negotiations', May 2014, available at https://www.dfat.gov.au/fta/acfta/140515_subscriber_update.html (accessed 20 August 2014).

2 DFAT, 'Australia's Trade Agreements', available at: <http://www.dfat.gov.au/fta/> (accessed 24 September 2014).

Implementation of agreement

2.5 The agreement was signed by the Minister for Trade and Investment, the Hon Andrew Robb MP and his South Korean counterpart the Minister for Trade, Industry and Energy, Mr Yoon Sang-jick in Seoul on 8 April 2014.

2.6 Australia and Korea are aiming to complete their domestic treaty processes, including passage of necessary legislation, towards the end of 2014. After these processes are complete, both countries will exchange diplomatic notes to certify they are ready to commence the agreement. Thirty (30) days after this exchange of notes, KAFTA will enter into force.

2.7 Following JSCOT consideration, legislation was introduced into the Parliament to amend the *Customs Act 1901* and *Customs Tariff Act 1995* as required to give effect to customs duty changes and procedures as agreed to in KAFTA. Korea will undertake its own domestic treaty-making processes during this period, including approval by Korea's National Assembly.

Key aspects of text

2.8 KAFTA is a free trade agreement broadly similar to Australia's other comprehensive agreements, such as with the United States and Singapore. The full agreement comprises 23 chapters with associated annexes, schedules and side letters. Other key documents include the National Interest Analysis, the Regulation Impact Statement and an introduction to the text of agreement (summarised below).

2.9 Chapter 1 establishes KAFTA, consistent with World Trade Organization (WTO) rules, sets out KAFTA's relationship to other international agreements and provides general definitions to guide interpretation of the Agreement.

2.10 Chapter 2, the Trade in Goods, prohibits the Parties from raising any tariff, and obliges the Parties to progressively reduce and/or eliminate tariffs in accordance with each Party's applicable schedule contained in two Schedules of Tariff Commitments (one for Australia and one for Korea). It establishes the framework of rules for trade in goods between the Parties. It affirms a number of WTO provisions that already govern trade in goods among the Parties designed to promote transparency.

2.11 Chapter 3, the Rules of Origin (ROO) chapter and the accompanying Schedule of Product Specific Rules establish the criteria for determining whether goods will qualify for preferential tariff treatment under KAFTA (whether a good 'originates' in Australia or Korea). In general, a good can qualify as 'originating' under KAFTA if: it is wholly obtained or produced entirely in the country; it is produced entirely in either or both Korea and Australia, from materials that conform to the provisions of the ROO Chapter; or the product is manufactured in either or both Korea and Australia using inputs from other countries, and meets the Product Specific Rules and requirements specified in the ROO Chapter.

2.12 Chapter 4 on Customs Administration and Trade Facilitation establishes arrangements for expeditious, predictable, transparent and simplified customs administration aimed at facilitating trade between Korea and Australia. In particular, the Chapter encourages procedures that facilitate the clearance of low-risk goods, and provides for the use of advance rulings to give greater certainty to business, and ensure the availability of review and appeal mechanisms to address disputes.

2.13 Chapter 5 on Technical Barriers to Trade and Sanitary and Phytosanitary Measures affirms the Parties rights and obligations under the relevant WTO agreements and commits them to ensure that technical regulations, including mandatory marking or labelling of products, do not create unnecessary obstacles to international trade.

2.14 Chapter 6 on Trade Remedies affirms Australia and Korea's rights and obligations under the WTO with regard to the application of safeguards, anti-dumping and countervailing measures. It establishes arrangements for a KAFTA specific safeguard measure which may be applied during the transitional period while tariffs are being reduced and/or eliminated.

2.15 Chapter 7 on Cross-Border Trade in Services requires each Party to provide market access, national treatment, and most-favoured-nation (MFN) treatment to service suppliers of the other Party. The chapter also includes the obligation not to impose local presence requirements. Measures which do not conform with these obligations are listed in 'negative lists' contained in schedules of non-conforming measures (NCM Schedules).

2.16 Chapter 8 on Financial Services applies to measures affecting financial institutions of both Parties as well as to investments in financial institutions and cross-border trade in financial services. Core obligations in the chapter require each Party to provide market access, national treatment and MFN treatment to financial institutions and cross-border financial service suppliers of the other Party, unless otherwise listed in the NCM Schedules. The Chapter also requires each Party not to impose nationality requirements on senior management and boards of directors, unless listed in the NCM Schedules.

2.17 Chapter 9 on Telecommunications governs areas including resale, submarine cable access and the allocation of telecommunications spectrum. Chapter 9 requires both Parties to prevent anti-competitive conduct and ensure that major suppliers provide interconnection, leased circuit services and co-location of equipment on reasonable, non-discriminatory terms and conditions. Other key outcomes include commitments on technology neutrality, number portability and network unbundling. There are strong provisions on transparency and review for regulatory decisions.

2.18 Chapter 10 on Movement of Natural Persons provides for coverage of temporary entry of service suppliers and investors. Australia and Korea have made commitments to liberalise access for skilled service suppliers, investors and business

visitors to enter and stay in the territory of the other Party. Australia has agreed not to apply labour market testing.

2.19 Chapter 11 on Investment is in two sections. Section A covers market access and protections for investors of both Parties. The key commitments include:

- non-discrimination through national treatment and most-favoured-nation (MFN) provisions;
- minimum standard of treatment: the foreign investor/investment to be treated in accordance with customary international law, including fair and equitable treatment and full protection and security;
- expropriation and compensation: commitment not to expropriate or nationalise a covered investment unless it is undertaken in a non-discriminatory manner, for a public purpose and on payment of prompt, adequate, and effective compensation;
- transfers: commitment to allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory;
- performance requirements: lists the types of requirements which each Party agrees not to impose as a condition of establishment or operation of an investment in the other Party; and
- senior management and board of directors: prohibition on requiring the appointment of particular nationalities to senior management positions in businesses that are covered investments.

2.20 Chapter 11, Section B includes an Investor-State Dispute Settlement (ISDS) mechanism which allows investors to directly enforce investment obligations. Where an investor from one Party to KAFTA alleges loss or damage as a consequence of the other Party breaching a commitment in the Investment Chapter, the investor can commence arbitration against that Party in a tribunal.

2.21 Chapter 12 on Government Procurement provides that entities of one Party (at the central level of government and, in Australia's case, States and Territories, and, in Korea's case, certain regional governments) are required to afford the suppliers, goods and services of the other Party the same treatment that applies to its domestic suppliers, goods and services.

2.22 Chapter 13 on Intellectual Property Rights reinforces the commitments Australia and Korea have made under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It builds on TRIPS with provisions for the protection and enforcement of Intellectual Property (IP) equivalent to that provided under Australia's free trade agreement with the United States.

2.23 Chapter 14 on Competition Policy provides that the trade and investment liberalisation intended to be achieved through KAFTA is not undermined by anti-competitive practices. Australia and Korea have committed to:

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- address anti-competitive practices, including cartel behaviour, abuse of dominant position and anticompetitive mergers, by maintaining and enforcing competition laws in their respective jurisdictions;
 - ensure that competition laws are applied to all businesses and to only permit exemptions where they are transparent and in the public interest; and
 - ensure that the enforcement of their respective competition laws are consistent with the principles of transparency, timeliness, non-discrimination, comprehensiveness and procedural fairness.

2.24 Chapter 15 on Electronic Commerce includes a number of commitments to support businesses of both countries in harnessing the efficiencies of electronic commerce, while ensuring the protection of consumers engaging online.

2.25 Chapter 16 on Cooperation supports increased bilateral cooperation in the fields of agriculture, fisheries, aquaculture, forestry, energy and mineral resources. Coverage includes cooperation on innovation, research and development in areas such as sustainable resource management, climate change adaptation and mitigation, animal husbandry practices, productivity enhancement, biotechnology, food safety and the exploration, extraction, processing, transportation and use of energy and mineral resources.

2.26 Chapter 17 on Labour provides for the enhancement of cooperation between Korea and Australia on trade-related aspects of labour issues, while preserving the policy space for each to establish and maintain national laws, policies and priorities. It requires each Party to respect the other Party's right to establish its own labour policies and priorities and to adopt and administer its labour laws, regulations and practices in accordance with those policies and priorities.

2.27 Chapter 18 on Environment also provides for enhanced cooperation between Korea and Australia on trade-related aspects of environment issues. The Parties state their respect for the other's right to establish its own environmental policies and priorities and to adopt and administer its environmental laws, regulations and practices in accordance with those policies and priorities.

2.28 Chapter 19 on Transparency requires the prompt publication of all laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by KAFTA, allowing interested persons and either Party to be aware of them.

2.29 Chapter 20 on Dispute Settlement includes a binding State-to-State dispute settlement mechanism modelled on previous free trade agreements and the WTO system. Most substantive obligations in KAFTA will be subject to this mechanism, except those found in the Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Competition Policy, Labour, Environment and some aspects of the Movement of Natural Persons chapters.

2.30 Chapter 21 on Institutional Provisions establishes a Contact Point to facilitate communications between the Parties. The chapter also establishes a Joint Committee, consisting of representatives of the Parties and co-chaired by each country's Minister of Trade which will oversee implementation and operation of KAFTA and supervise and coordinate the work of all subsidiary bodies. Chapter 21 also establishes a variety of committees and working groups under the auspices of the Joint Committee. The committees and working groups shall inform the Joint Committee of their schedules and agendas and report to the Joint Committee on their activities.

2.31 Chapter 22 on General Provisions and Exceptions sets out exceptions which apply to a number of chapters. These exceptions are intended to ensure that FTA obligations do not unreasonably restrict government action in key policy areas, including to protect essential security interests, the environment and health. There are also exceptions to the Investment Chapter (including that ability to make an ISDS claim) which are aimed to ensure governments can adopt or enforce legitimate measures necessary to protect human, animal or plant life or health, including environmental measures; to protect national treasures; to conserve natural resources; and other matters.

2.32 Chapter 23 on Final Provisions governs the way in which KAFTA operates as a treaty. It establishes the processes by which the Agreement will enter into force, how it may be amended and the conditions under which it may be terminated.

2.33 The four side letters between Australia and Korea cover the areas of:

- gambling and betting services;
- services and investment;
- telecommunications; and
- United Nations Commission on International Trade Law (UNCITRAL) transparency rules.

Joint Standing Committee on Treaties (JSCOT)

2.34 JSCOT tabled its report into KAFTA on 4 September 2014.³ The majority report described KAFTA to be 'controversial' and discussed several issues in relation to the agreement. These issues included: investor-state dispute settlement (ISDS) mechanisms; intellectual property rights; certificates of origin processes; economic modelling; the utilisation of free trade agreements; treaty making processes; monitoring; and implementation. The majority report supported ratification of the treaty and made only one recommendation - that binding treaty action be taken.

2.35 A dissenting report was made by the Hon Kelvin Thompson MP and the Hon Melissa Parke MP who made a number of recommendations on some of the

3 Joint Standing Committee on Treaties, *Report 142 – Treaty tabled on 13 May 2014*, September 2014 (JSCOT report).

above issues.⁴ A dissenting report for the Australian Greens was also made by Senator Peter Whish-Wilson. The Australian Greens did not support the recommendation of the majority report or KAFTA 'in its current form'.⁵

Proposed legislation

2.36 Following the tabling of the JSCOT report, the Hon Scott Morrison MP, the Minister for Immigration and Border Protection, introduced the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (Customs bill) and the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 into the House of Representatives. The Explanatory Memorandum for the Customs bill stated:

The purpose of this Bill is to amend the *Customs Act 1901* (the Customs Act) to introduce new rules of origin for goods that are imported into Australia from Korea to give effect to the Korea-Australia Free Trade Agreement (the Agreement). The Customs Act amendments will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

Complementary amendments will also be made to the *Customs Tariff Act 1995* (the Customs Tariff Act) by the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 to give effect to the Agreement.⁶

2.37 Also on 4 September 2014, the provisions of the bills were referred by the Senate to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 2 October 2014.⁷ The committee tabled its report on 24 September 2014. The committee strongly agreed with submissions to its inquiry that it was in the national interest for KAFTA to come into force before the end of 2014 and recommended the bills be passed 'at the earliest possible opportunity'.⁸

4 JSCOT report, pp 49-61.

5 JSCOT report, pp 63-69.

6 Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014, Explanatory Memorandum, p. 2.

7 *Journals of the Senate*, 4 September 2014, p. 1442.

8 Senate Legal and Constitutional Affairs Legislation Committee, *Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 [Provisions] and a related bill*, September 2014, p. 14.

