

The Senate

Legal and Constitutional Affairs
Legislation Committee

Customs Amendment (Korea-Australia
Free Trade Agreement Implementation)
Bill 2014 [Provisions] and a related bill

September 2014

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Recommendations

Recommendation 1

3.7 The committee recommends that the Bills be passed at the earliest possible opportunity.

Recommendation 2

3.16 The committee recommends that:

- as suggested by CBFCA and ECA, the Australian Customs and Border Protection Service makes publicly available a table which refers to each of the specific provisions of Chapters 3 and 4 of KAFTA and which also identifies where those provisions have been adopted or are proposed to be adopted whether in the Bills, otherwise in legislation or regulations or by procedure; and**
- more generally, the Commonwealth government ensure that the provisions of KAFTA have been properly accommodated in Australian law and practice.**

Chapter 1

Introduction

The referral

1.1 On 4 September 2014, the following bills were introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Scott Morrison MP:¹

- the Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (the Customs Bill); and
- the Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (the Tariff Bill).

1.2 Together, these will be referred to as 'the Bills'.

1.3 On the same day and on the recommendation of the Selection of Bills Committee,² the Senate referred the provisions of the Bills to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 2 October 2014.³

The Korea-Australia Free Trade Agreement and related parliamentary inquiries

1.4 Negotiations for a free trade agreement between Australia and the Republic of Korea, which commenced in 2009,⁴ were concluded in early December 2013.⁵ The full text of the Korea-Australia Free Trade Agreement (KAFTA) was publicly released on 17 February 2014⁶ and the agreement was signed on 8 April 2014.⁷ KAFTA was tabled in Parliament on 13 May 2014.⁸

1 House of Representatives, *Votes and Proceedings*, No. 65, 4 September 2014, p. 810.

2 *Journals of the Senate*, No. 52—4 September 2014, p 1421.

3 *Journals of the Senate*, No. 52—4 September 2014, p 1423.

4 Explanatory Memorandum to the Customs Bill (Customs Bill EM), p. 2.

5 The Hon Tony Abbott MP, Prime Minister of the Commonwealth of Australia and the Hon Andrew Robb AO MP, Minister for Trade and Investment of the Commonwealth of Australia, 'Australia concludes FTA negotiations with the Republic of Korea', Joint Media Release, 5 December 2013.

6 The Hon Andrew Robb AO MP, Minister for Trade and Investment of the Commonwealth of Australia, 'Public release of Korea-Australia FTA text', Media Release, 17 February 2013.

7 The Hon Andrew Robb AO MP, Minister for Trade and Investment of the Commonwealth of Australia, 'Korea-Australia FTA signed in Seoul', Media Release, 8 April 2013.

8 Joint Standing Committee on Treaties, *Report 142: Treaty tabled on 13 May 2014: Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)*, September 2014.

1.5 This is the third parliamentary inquiry that has related to the final text of KAFTA. The other two were as follows:

- An inquiry by the Joint Standing Committee on Treaties (JSCoT), which received written submissions from 78 individuals and organisations, and heard from 37 witnesses during the course of four days of public hearings in Canberra, Sydney and Brisbane. The report of JSCoT,⁹ which ran to 93 pages, was tabled on 4 September 2014.¹⁰
- An inquiry by the Senate Foreign Affairs, Defence and Trade References Committee, which is due to table its report one month after the tabling of the report of JSCoT (that is, on 4 October 2014).¹¹

1.6 Both the report of JSCoT and the two days of public hearings conducted by the Senate Foreign Affairs, Defence and Trade References Committee¹² examined—in some detail—(a) the negotiating process by which the agreement was brought about and the consultation that occurred during that process, (b) the specific provisions of the agreement, (c) issues arising from those provisions, and (d) the anticipated impact of the agreement, particularly on the Australian economy and individual industries within it.

1.7 This committee's inquiry is of a somewhat different nature. The committee has been asked to report, not on KAFTA itself, but rather on the two Bills that have been introduced to give domestic effect to certain customs-related provisions of it.

1.8 Given that the merits of KAFTA have been considered extensively by two other committees, this committee does not propose to traverse that ground again. Instead, this report will examine the more focused question of whether the Bills faithfully implement the relevant obligations that Australia has assumed under KAFTA.

Overview of the Bills

The Customs Bill

1.9 The Customs Bill, if passed, would amend the *Customs Act 1901* with the aim of implementing Australia's obligations under Chapter 3 of KAFTA.¹³ That chapter, which is entitled 'Rules of Origin and Origin Procedures', sets out the definitions and procedures that are to be used to determine whether a particular good originated in Australia or Korea. This matters because the parties to KAFTA have agreed that such

9 Joint Standing Committee on Treaties, *Report 142: Treaty tabled on 13 May 2014: Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea (Seoul, 8 April 2014)*, September 2014.

10 *Journals of the Senate*, No. 52—4 September 2014, p. 1439; House of Representatives, *Votes and Proceedings*, No. 65, 4 September 2014, p. 810.

11 *Journals of the Senate*, No. 26—27 March 2014, p. 744.

12 See *Committee Hansard*, 8 September 2014 and *Committee Hansard*, 9 September 2014.

13 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 4 September 2014, p. 8.

goods shall receive preferential rates of customs duty. The actual changes to the rates are contained in the Tariff Bill.

1.10 The exact provisions of the Customs Bill and the relevant articles in Chapter 3 of KAFTA will be considered in chapter 2 of this report.

The Tariff Bill

1.11 The Tariff Bill seeks to amend the *Customs Tariff Act 1995* to amend the duties payable on goods that originate in Korea in accordance with Annex 2-A of KAFTA. The exact provisions of the Tariff Bill and the relevant provisions of KAFTA will also be considered in chapter 2 of this report.

Conduct of this inquiry

1.12 As per the usual practice, the committee advertised the inquiry on its website and wrote to a number of stakeholders inviting submissions by 15 September 2014. Details of the inquiry were also placed on the committee's website (http://www.aph.gov.au/senate_legalcon).

1.13 The committee received seven written submissions, which have been listed at Appendix 1. All of these were published on the committee's website.

1.14 In light of the inquiries by JSCoT and the Senate Foreign Affairs, Defence and Trade References Committee, the committee did not hold a public hearing.

Acknowledgement

1.15 The committee acknowledges the short period of time available to provide a submission and the effort required to do so. The committee thanks those organisations that participated in the inquiry.

Chapter 2

Key provisions of the Bills

2.1 This chapter examines the provisions of the Customs Bill and the Tariff Bill and compares them with the corresponding articles of KAFTA. The committee recognises that the Bills are not intended to give full effect to all of Australia's obligations under KAFTA, but rather certain obligations contained in Chapter 3 and Annex 2-A of KAFTA.

2.2 The committee also recognises that two other parliamentary committees have already inquired into KAFTA as a whole.

2.3 As the Bills considered in this inquiry relate only to a small part of the agreement, the committee has limited its examination of KAFTA to those articles to which the Bills seek to give domestic effect. Unfortunately, the explanatory memoranda do not clearly set out which provisions of the Bills are intended to give effect to which provisions of KAFTA; it would have greatly assisted the committee if they had.

Note on terminology

2.4 KAFTA imposes obligations on both Korea and Australia, but the Bills would give effect only to Australia's obligations. For this reason, the language used in the Bills is often markedly different to that which appears in KAFTA. For example, article 3.1 of KAFTA defines when a good shall be regarded as originating in Korea or Australia, but proposed Division 1J in the Customs Bill defines only when a good shall be regarded as originating in Korea. This is because Australia's tariff reduction obligations under KAFTA only apply to goods that originate in Korea (and not to goods that originate in Australia). Furthermore, the terminology used in KAFTA and the Bills also differs because of the stylistic differences between a treaty and Commonwealth legislation. Where these are the only differences between the corresponding provisions of KAFTA and one of the Bills, the latter will be described in this chapter as replicating the former 'with the appropriate adjustments'.

The Customs Bill

2.5 As noted in the previous chapter, the main purpose of the Customs Bill is to amend the *Customs Act* to give domestic effect to parts of Chapter 3 of KAFTA. The amendments made by the Customs Bill to the *Customs Act* are contained in Schedule 1 to the Customs Bill, which is in three parts:

- Part 1 would insert a new Division 1J into Part VIII of the *Customs Act*, the main purpose of which is to define the phrase 'Korean originating goods';
- Part 2, which is entitled 'Verification powers', would insert a new Division 4G into Part VI. It provides for obligations to be imposed on persons who export goods to Korea (or who produce goods that are exported to Korea) that are claimed to be 'Australian originating goods' for the purposes of obtaining tariff reductions in Korea; and

- Part 3, which provides for the application of Parts 1 and 2.

2.6 Chapter 3 of KAFTA is entitled 'Rules of Origin and Origin Procedures'. It is divided into two sections: Section A is entitled 'Rules of Origin' and Section B is entitled 'Origin Procedures'. Each section is divided into a number of articles.

Rules of Origin

2.7 Part 1 of Schedule 1 of the Customs Bill (proposed Division 1J) aims to give domestic effect to parts of Section A of Chapter 3 of KAFTA. The central provision of Section A is article 3.1, which provides that 'a good shall be regarded as originating in a Party [to the agreement (that is, Korea or Australia)] where:

- (a) the good is wholly obtained in the territory of one or both of the Parties within the meaning of Article 3.2;
- (b) the good is produced entirely in the territory of one or both of the Parties, exclusively from originating materials;
- (c) the good satisfies all applicable requirements of Annex 3-A, as a result of processes performed entirely in the territory of one or both of the Parties by one or more producers; or
- (d) the good otherwise qualifies as an originating good in accordance with this Chapter.

2.8 Article 3.1 has no directly corresponding provision in the Customs Bill, but proposed section 153ZMA (the 'Simplified outline' of Division 1J) makes it clear that proposed Division 1J is intended to give effect to article 3.1. It provides as follows:

- This Division defines Korean originating goods. Preferential rates of customs duty under the Customs Tariff Act 1995 apply to Korean originating goods that are imported into Australia.
- Subdivision B provides that goods are Korean originating goods if they are wholly obtained in Korea or in Korea and Australia.
- Subdivision C provides that goods are Korean originating goods if they are produced entirely in Korea, or in Korea and Australia, from originating materials only.
- Subdivision D sets out when goods are Korean originating goods because they are produced entirely in Korea, or in Korea and Australia, from non-originating materials only or from non-originating materials and originating materials.
- Subdivision E provides that goods are not Korean originating goods under this Division merely because of certain operations.
- Subdivision F deals with other matters, such as how the consignment of goods affects whether the goods are Korean originating goods.

Definitions

2.9 Proposed section 153ZMB sets out the definitions that would apply to proposed Division 1J (in addition to the definitions in section 4 that apply to the whole of the *Customs Act*). The definitions that apply to Chapter 3 of KAFTA are to be

found in article 3.30 of the agreement (in addition to the 'General Definitions' set out in article 1.4).

2.10 Proposed section 153ZMB defines 'produce' to mean 'grow, mine, harvest, fish, breed, raise, trap, hunt, manufacture, process, assemble or disassemble'. Article 3.30 defines 'production' to mean 'any kind of working or processing, including growing, mining, harvesting, fishing, breeding, raising, trapping, hunting, manufacturing, assembling or disassembling a good'. The definition in the Customs Bill appears to be narrower than the definition in KAFTA because the former does not include the general words 'any kind of working or processing'. This could lead to inconsistent interpretations of the Customs Bill and KAFTA, since the concept of production is relied upon in the Customs Bill's explanation of the three key ways in which goods can be considered 'Korean originating goods' and therefore eligible for tariff concessions.

Subdivision B: wholly-obtained goods

2.11 According to the simplified outline in proposed section 153ZMA, 'Subdivision B provides that goods are Korean originating goods if they are wholly obtained in Korea or in Korea and Australia'.

2.12 Proposed subsection 153ZMC(1) provides that goods are 'Korean originating goods' if they are 'wholly obtained in Korea or in Korea and Australia' and if the relevant certification requirements have been complied with. Proposed subsection 153ZMC(2) sets out twelve circumstances in which goods would be considered to be 'wholly obtained in Korea or in Korea and Australia'.

2.13 This section aims to give effect to article 3.1(a) in KAFTA, which refers to article 3.2 and the list of twelve circumstances therein in which goods shall be considered to be 'wholly obtained in the territory of one or both of the Parties'.

Subdivision C: goods produced in Korea, or in Korea and Australia, from originating materials

2.14 According to the simplified outline, 'Subdivision C provides that goods are Korean originating goods if they are produced entirely in Korea, or in Korea and Australia, from originating materials only'.

2.15 Proposed section 153ZMD provides that goods are 'Korean originating goods' if 'they are produced entirely in the territory of Korea, or entirely in the territory of Korea and the territory of Australia, from originating materials only' and if the relevant certification requirements have been complied with. Proposed section 153ZMB defines 'originating materials' to mean:

- (a) Korean originating goods that are used in the production of other goods;
or
- (b) Australian originating goods that are used in the production of other goods; or
- (c) indirect materials.

2.16 The definition of 'Korean originating goods' is the subject of proposed Division 1J (see paragraph 2.7). 'Australian originating goods' and 'indirect materials' are defined in proposed section 153ZMB.

2.17 Proposed section 153ZMD is intended to implement article 3.1(b) of KAFTA, which provides that 'a good shall be regarded as originating in a Party where...the good is produced entirely in the territory of one or both of the Parties, exclusively from originating materials'. The definition of 'produced' has been considered above. As for the phrase 'originating materials': article 1.4 defines 'originating' to mean 'qualifying under the rules of origin set out in Chapter 3 (Rules of Origin and Origin Procedures)'; 'material' is defined in article 3.30.

2.18 Article 3.11 of KAFTA requires that indirect materials be treated as originating. The definition of 'indirect materials' in the Customs Bill appears to be equivalent, but not identical, to the definition in KAFTA.

Subdivision D: goods produced in Korea, or in Korea and Australia, from non-originating materials

2.19 According to the simplified outline, 'Subdivision D sets out when goods are Korean originating goods because they are produced entirely in Korea, or in Korea and Australia, from non-originating materials only or from non-originating materials and originating materials'.

2.20 Proposed subdivision D and the associated regulations would give domestic effect to article 3.1(c) of KAFTA, which provides that 'a good shall be regarded as originating in a Party where...the good satisfies all applicable requirements of Annex 3-A, as a result of processes performed entirely in the territory of one or both of the Parties by one or more producers'. Annex 3-A sets out the specific rules that would apply to specific products. There are six product-specific rules, of which:

- Three are 'change in tariff classification' rules. These require materials that do not originate in Korea or Australia to undergo a specified degree of change in their tariff classification as a result of processes undertaken in Korea or Australia in order for the final product to be considered to have originated in Korea or Australia. There is a 'de minimis' exception for materials that make up less than 10% of the 'adjusted value' of the final product;¹
- Two are 'regional value content' rules. They provide that domestic materials and processes must make up a certain percentage of the value of the final product in order for the product to be considered as originating in the country in which the materials were sourced or the processes took place; and
- One requires the good to be wholly obtained within the territory of one or both parties.

1 Article 3.6 of KAFTA provides that, if less than 10% of the 'adjusted value' of a good is attributable to non-originating materials that do not go through enough of a tariff classification change, the product will nonetheless be considered an originating product. The calculations for 'adjusted value' are provided for in article 3.3.1.

2.21 Proposed subsection 153ZME(1) provides that goods are of Korean origin if: (a) they are classified in the schedule to the Customs (Korean Rules of Origin) Regulation 2014 (which will incorporate the product-specific rules in KAFTA)²; (b) they are produced entirely in Korea or entirely in Korea and Australia; (c) the requirements contained in the regulations are satisfied; and (d) the certification procedures are complied with.

2.22 Proposed subsections 153ZME(2) to 153ZME(6) set out the requirements that would apply to goods that undergo a change in tariff classification by reason of some production process. By proposed subsections 153ZME(2) and 153ZME(3), the detail of these requirements is largely left to the regulations.

2.23 Proposed subsection 153ZME(4) aims to give effect to the 'de minimis' exception to the change in tariff classification rules. This rule, in the Customs Bill, operates on the 'customs value' of the goods (which is defined in proposed subsection 153ZMB(1) as having the meaning given by section 159 of the *Customs Act*). The manner of calculating the 'customs value' in section 159 differs from the formula used in KAFTA in relation to the de minimis rule.³ Given that proposed subsection 153ZMB(3) specifies that the 'value' (not 'customs value') of goods is to be calculated in accordance with the regulations and the Customs Bill EM states that '[t]he value of non-originating materials for the purposes of [section 153ZME] is to be worked out in accordance with the method that will be included in the Korean Regulations',⁴ it would appear that proposed subsection 153ZME(4) should operate on the 'value' of the goods, rather than the 'customs value'.

2.24 Proposed subsections 153ZME(5) and 153ZME(6) aim to give effect to the exceptions to the de minimis rule, as set out in article 3.6.

2.25 Proposed subsections 153ZME(7) and 153ZME(8) aim to give effect to the regional value content rules. Again, this appears to be left largely to the regulations, but subsection (8) gives effect to article 3.8 insofar as it applies to calculations of the regional content value of goods.

2.26 Proposed section 153ZMF, which concerns the position of packaging materials and containers, gives effect to article 3.9 of KAFTA, with the appropriate adjustments.

Subdivision E: non-qualifying operations

2.27 According to the simplified outline, 'Subdivision E provides that goods are not Korean originating goods under this Division merely because of certain operations'.

2 Customs Bill EM, p. 34.

3 Article 3.6 of KAFTA sets out the de minimis rule, and specifies that it is to be calculated according to 'adjusted value'. According to article 3.30, 'adjusted value' is to be calculated in accordance with article 3.3.1. Article 3.3.1 is different to section 159 of the *Customs Act*.

4 Customs Bill EM, p. 36.

2.28 Proposed section 153ZMG provides a list of nine 'operations or processes' that are not sufficient, on their own, to turn a good into a 'Korean originating good'. The list includes, for example, changing packaging, washing and sharpening.

2.29 Proposed section 153ZMG would give full effect, with the appropriate adjustments, to article 3.12 of KAFTA.

Subdivision F: consignment and outward processing zones

2.30 According to the simplified outline, 'Subdivision F deals with other matters, such as how the consignment of goods affects whether the goods are Korean originating goods'. It deals with that matter and one other; namely, the question of outward processing zones on the Korean Peninsula.

2.31 Proposed section 153ZMH is designed to allow goods to retain their status as 'Korean originating goods' if they pass through countries other than Korea or Australia, so long as certain conditions are met. It provides that a Korean originating good that is transported through the territory of a country other than Korea and Australia will lose its status as an originating good if it undergoes subsequent production other than processes that are specifically excluded and/or if it does not remain under customs control whilst in the territory of the other country. The processes that would not lead to a loss of status include unloading, reloading and storing.

2.32 Proposed section 153ZMH gives full effect to article 3.14 of KAFTA with the exception that article 3.14 defines 'relabelling' and 'repacking' (two of the excluded processes) quite restrictively⁵ and the Customs Bill does not define them at all.

2.33 Proposed section 153ZMI provides that:

Goods are not prevented from being Korean originating goods under this Division if they contain materials that:

- (a) have been exported from Korea; and
- (b) have undergone processing in an area designated as an outward processing zone in accordance with Annex 3-B to Chapter 3 of the Agreement; and
- (c) have been re-imported to Korea after that processing.

2.34 This section is intended to give effect to article 3.13 of KAFTA, which provides that 'certain goods shall be considered to be originating even if they have undergone working or processing outside Korea, on materials exported from Korea and subsequently re-imported there, provided that the working or processing is done in the areas designated by the Parties pursuant to Annex 3-B'. Annex 3-B provides that a committee shall be established to identify possible geographic areas to be so designated. It also provides that 'the Gaesung Industrial Complex located in North

5 The footnote to article 3.14(2)(a) of KAFTA provides as follows:

For the purposes of this paragraph, "relabelling" means the affixing of labels necessary to meet the requirements of the importing Party; "repacking" means a packing operation necessary to transport the good to the territory of the importing Party.

Korea shall be identified by the committee as one of the geographic areas that may be designated as outward processing zones' [sic].

Verification powers

2.35 As noted above, section B of Chapter 3 of KAFTA is entitled 'Origin Procedures'. It provides a scheme for certifying originating goods so that such goods are entitled to a tariff reduction. Part 2 of Schedule 1 to the Customs Bill is entitled 'verification powers'. It aims to give domestic effect to two aspects of this scheme (namely the obligation to keep records relating to Certificates of Origin and the obligation to give relevant officers power to require the production thereof) by inserting a new Division 4G into Part VI of the *Customs Act*. As explained in the Customs Bill EM, Certificates of Origin 'are issued by industry groups such as the Australian Chamber of Commerce and Industry and the Australian Industry Group'.⁶

2.36 It should be noted that the provisions of proposed Division 1J (discussed earlier in this chapter) relate to goods being imported into Australia from Korea, while this division applies to goods being exported from Australia to Korea.

Record-keeping

2.37 Proposed section 126AMB is entitled 'Record keeping obligations' and aims to give effect to article 3.22 of KAFTA. It provides for the making of regulations to impose record-keeping obligations in relation to goods that are exported to Korea and that 'are claimed to be Australian originating goods for the purpose of obtaining a preferential tariff in Korea'. These obligations may be imposed on exporters or producers.

2.38 Proposed sections 126AMC and 126AMD supplement the record-keeping obligations. The former would allow an authorised officer⁷ to require the production of such records (as required by article 3.21(1) of KAFTA) and the latter would allow an authorised officer to ask questions to verify the origin of the goods. Both proposed sections allow the authorised officer to disclose the records or answers to a Korean customs official.

Application

2.39 Part 3 of Schedule 1 to the Customs Bill specifies the goods to which the amendments brought about by the Customs Bill apply.

The Tariff Bill

2.40 The Tariff Bill, if passed, would amend the *Customs Tariff Act 1995* (the Tariff Act) with the aim of implementing some of Australia's commitments under KAFTA, namely:

6 Customs Bill EM, p. 25.

7 Subsection 4(1) of the *Customs Act* provides, in part, as follows:

"authorised officer", in relation to a section of this Act, means an officer of Customs authorised in writing by the CEO to exercise the powers or perform the functions of an authorised officer under that section.

- providing duty-free access for certain goods and preferential rates of customs duty for other goods that are Korean originating goods;
- phasing these preferential rates to zero by 2021;
- amending Schedule 4 [to the Tariff Act] to maintain customs duty rates for certain Korean originating goods in accordance with the applicable concessional item; and
- creating a new schedule 10 [to the Tariff Act] to specify excise-equivalent duties on certain alcohol, tobacco, and petroleum products and to provide for phasing rates of duty on certain goods as specified in the agreement.⁸

2.41 The amendments to the Tariff Act are contained in Schedule 1 to the Tariff Bill, which contains 32 items. The central item is item 26, which adds a new Schedule 10 to the Tariff Act, which would be entitled 'Korean originating goods'. This item sets out the tariff rates that would apply to particular classes of good. For many of the items in proposed Schedule 10, there are a number of rates that are specified to apply from a certain date (1 January of a specified year). This allows for the decrease of the rate over time.

2.42 As the Tariff Bill EM clarifies, the Tariff Bill aims to implement Annex 2-A of KAFTA.⁹ Annex 2-A contains two schedules, one applicable to Australia and the other to Korea.

The Tariff Act contains a number of other schedules that perform a similar function to the proposed Schedule 10. Schedule 5, for example, specifies the rates of duty applicable to 'US originating goods' and Schedule 6 does the same for 'Thai originating goods'. To be given effect, those Schedules are referred to elsewhere in the Tariff Act, most notably section 16, which sets out how the rate of duty is to be calculated and which specifies, for example, that the duty on US originating goods is to be calculated in accordance with Schedule 5. Items 10-12 amend section 16 to make the equivalent provision for Korean originating goods. Item 9 inserts a new section 13G, which defines 'Korean originating goods' by reference to the proposed Division 1J of Part VIII of the *Customs Act* (which is to be inserted by the Customs Bill). Items 1 to 8 and 13 to 18 insert references to the proposed Schedule 10 into other sections of the Tariff Act where appropriate. Items 19 to 25 make amendments to Schedule 4, which provides for concessional rates of duty that apply to certain goods. Items 27 to 31 make amendments to the 'User's guide' to the Tariff Act and item 32 specifies the goods to which the amendments apply.

8 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 4 September 2014, p. 8.

9 Tariff Bill EM, p. 5.

Chapter 3

Key issues

3.1 As noted in chapter 1, the committee received seven submissions. All submissions to the inquiry were generally supportive of the Bills and advocated for their expeditious passage through the Parliament.¹ This chapter will address the most common issue raised in submissions—the necessity for the Bills to be enacted in time for KAFTA to enter into force before the end of 2014—before turning to some issues raised in two of the submissions that go to the actual text of the Bills.

Swift passage

3.2 Five of the seven submissions stressed the need for KAFTA to enter into force before the end of 2014.² This is because the Korean tariffs on a number of Australian originating goods would drop immediately upon entry into force of KAFTA and thereafter on 1 January each year. If KAFTA enters into force before the end of 2014, the tariffs would drop on entry into force and again on 1 January 2015. If KAFTA does not enter into force until 2015, the tariff reductions would effectively be delayed by a year for the life of the tariff reduction period. This could have significant impacts on Australian industry, as described by the Australian Red Meat Industry Korea FTA Taskforce:

Of acute importance, however, is the need to ensure that KAFTA enters into force (EIF) in calendar year 2014. This timeframe will bring the current 8% beef tariff differential (Australian vs US beef) back to a more commercially viable 5.3% - and subsequently guarantee that this tariff differential is not greater than 5.4% for the remainder of the 15 year KAFTA tariff elimination period.

If EIF is not secured in calendar 2014, the current 8% competitive disadvantage vs US beef under [the Korea-United States Free Trade Agreement] will be evident for each of the next 15 years – with ongoing detrimental impacts on Australian beef's market share in Korea. The current tariff differential has already seen Australia lose 2% of its share of the imported chilled beef segment in Korea so far this calendar year.³

1 Teys Australia Pty Ltd, *Submission 1*; Australian Red Meat Industry Korea FTA Taskforce, *Submission 2*; Australia-Korea Business Council, *Submission 3*; Customs Brokers and Forwarders Council of Australia Inc, *Submission 4*; Australian Sugar Industry Alliance Limited, *Submission 5*; Export Council of Australia, *Submission 6*; CANEGROWERS, *Submission 7*.

2 *Submission 1*, p. 2; *Submission 2*, p. 1; *Submission 3*, attachment 1; *Submission 4*, p. 2; *Submission 6*, p. 2.

3 *Submission 2*, p. 1.

3.3 Article 23.2 of KAFTA provides that:

This Agreement shall enter into force 30 days after the date the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures or on such other date as the parties may agree.

3.4 This means that, unless the parties otherwise agree, Australia and Korea must complete the relevant 'legal requirements and procedures' and notify each other of that fact in writing by 1 December 2014 in order for KAFTA to enter into force before the end of 2014.

Committee comment

3.5 The committee strongly agrees that it is in national interest that KAFTA come into force before the end of 2014. To delay would serve only to expose key industries of the Australian economy—and, importantly, the communities that rely on those industries—to disadvantages brought about by the fact that their major overseas competitors have preferential access to the Korean market.

3.6 The committee therefore endorses calls for the Bills to be passed at the earliest possible opportunity so that KAFTA can enter into force before the end of 2014.

Recommendation 1

3.7 The committee recommends that the Bills be passed at the earliest possible opportunity.

Textual issues

3.8 Some submitters raised a number of issues in relation to the text of the Bills. For example, the Customs Brokers and Forwarders Council of Australia (CBFCA) and the Export Council of Australia (ECA) were concerned that 'the Bills may not specifically address many of the actual provisions of the KAFTA'.⁴

3.9 The CBFCA and ECA identified, '[b]y way of example', seven instances in which, they claim, the Bills fail to give full effect to Chapter 3 of KAFTA.⁵ These instances are of three types, namely where:

- there is no proposed section that corresponds with an identified article in Chapter 3 that would appear to require legislative implementation (the submissions identify articles 3.18 and 3.20);
- proposed sections incompletely or incorrectly give effect to some articles (the submissions identify articles 3.23(2) and 3.24); and

4 *Submission 4*, p. 3; *Submission 6*, p. 3.

5 *Submission 4*, pp. 3-4; *Submission 6*, pp. 3-4.

- existing provisions of the *Customs Act* would appear to create a legal situation that differs from the one contemplated in KAFTA (the submissions identify articles 3.17(2), 3.21(3) and 3.25).

3.10 The CBFCA and ECA also observed that many of the provisions of KAFTA are to be given domestic effect through regulations that are not before the present inquiry, so it is difficult to know at this stage whether those regulations will give full effect to the relevant articles of KAFTA.⁶

3.11 The CBFCA and ECA recommended that:

the Committee request Customs to provide a table which refers to each of the specific provisions of Chapters 3 and 4 of the KAFTA and which also identifies where those provisions have been adopted or are proposed to be adopted whether by the Bills, otherwise in the Act or the Regulations or by procedure to ensure that the Committee is satisfied that the provisions of the KAFTA have been properly accommodated in Australian law and practice. This should explain any inconsistencies between the KAFTA and the Bills as set out above.⁷

3.12 The submissions also recommended that the regulations should be 'subject to review prior to introduction'.⁸

3.13 A number of other issues were raised by the CBFCA and ECA that lie outside the scope of the present inquiry. These concerned issues such as:

- the need to communicate the terms of KAFTA and the implementing legislation to the 'trading community';⁹
- the need to administer KAFTA and the implementing legislation in a manner that is 'sympathetic to its complexities especially in relation to the compliance with the complex rules of origin';¹⁰
- the operational mechanisms that will be used to implement a number of legislative and non-legislative provisions of KAFTA, and the adequacy of the resources available to implement them;¹¹ and
- possible KAFTA-specific amendments to the 'Guide to the Infringement Notices Scheme' (which is contained in existing Division 5 of Part XIII of the *Customs Act*).¹²

6 *Submission 4*, p. 3; *Submission 6*, p. 3.

7 *Submission 4*, p. 4; *Submission 6*, p. 4.

8 *Submission 4*, p. 3; *Submission 6*, p. 3.

9 *Submission 4*, p. 2; *Submission 6*, p. 2.

10 *Submission 4*, pp. 2, 5; *Submission 6*, pp. 2, 5.

11 *Submission 4*, pp. 4-5; *Submission 6*, pp. 4-5.

12 *Submission 4*, pp. 5-6; *Submission 6*, pp. 5-6.

Committee comment

3.14 The committee acknowledges the issues raised by the CBFCA and ECA in relation to the text of the Bills. The committee suggests that the Commonwealth government consider their concerns and ensure that the current Bills implement Chapter 3 and Annex 2-A of KAFTA to the extent intended. Noting that other legislation beyond the Customs Bill and Tariff Bill may be required to implement other aspects of KAFTA, the government should similarly ensure that all relevant legislation and / or regulations fully implement Australia's obligations under the agreement.

3.15 To this end, the committee recommends that Customs makes publicly available a table as suggested by CBFCA and ECA, referred to in paragraph 3.11 above.

Recommendation 2

3.16 The committee recommends that:

- **as suggested by CBFCA and ECA, the Australian Customs and Border Protection Service makes publicly available a table which refers to each of the specific provisions of Chapters 3 and 4 of KAFTA and which also identifies where those provisions have been adopted or are proposed to be adopted whether in the Bills, otherwise in legislation or regulations or by procedure; and**
- **more generally, the Commonwealth government ensure that the provisions of KAFTA have been properly accommodated in Australian law and practice.**

**Senator the Hon Ian Macdonald
Chair**

Dissenting report by the Australian Greens

1.1 While acknowledging this inquiry did not look at the broader issues in the Korea-Australian Free Trade Agreement (KAFTA) it is because of these broader issues that the Australian Greens recommend that these bills not be passed. These bills implement Australia's domestic obligations under KAFTA and therefore they enable the trade agreement with Korea to come into effect.

1.2 The Australian Greens' position on these broader issues is explored in detail in the Joint Standing Committee on Treaties (JSCOT) dissenting report. There are many elements of KAFTA the Australian Greens support such as the increased market access for beef, cheese and wine products. Elements of the agreement we oppose include Investor State Dispute Settlement Clauses, flawed intellectual property provisions and a continuing flawed process in the consultation and negotiation phase of trade agreements.

1.3 On balance the Australian Greens are opposed to this agreement as we don't believe it is in the National Interest.

1.4 Therefore the Australian Greens are opposed to the passing of these bills until the broader issues with KAFTA can be resolved.

Senator Penny Wright

Australian Greens

Appendix 1

Public submissions

- 1 Teys Australia Pty Ltd
- 2 Australian Red Meat Industry Korea FTA Taskforce
- 3 Australia-Korea Business Council (AKBC)
- 4 Customs Brokers and Forwarders Council of Australia Inc.
- 5 Australian Sugar Industry Alliance
- 6 Export Council of Australia
- 7 CANEGROWERS