

TRANS-PACIFIC PARTNERSHIP AGREEMENT

CHAPTER SUMMARY: ELECTRONIC COMMERCE

The internet is an essential tool for Australian companies doing business in the global economy and a dynamic marketplace for Australian consumers. Global e-commerce sales (the buying and selling of goods or services over the internet) were projected to grow by 23.7 per cent in 2016, reaching \$US1.9 trillion. Australian online retail spending increased to \$20.1 billion for the year to June 2016, growing by 13.5%.

The Electronic Commerce ('e-commerce') chapter ensures that trade conducted electronically between TPP countries takes place efficiently and with appropriate consumer protections. The chapter also contains new rules which support the expanding role of the internet in international trade. For the first time, businesses will have certainty about their ability to move data across borders and investment decisions about data storage facilities. These new commitments will not prevent the Australian Government from regulating to address public policy objectives, such as privacy and health.

The e-commerce chapter will not alter Australia's broadcasting regime or the ability of governments to provide support for Australian cultural industries.

MORE INFORMATION ON THE CHAPTER

The obligations in the e-commerce chapter operate in conjunction with the rules set out in the Cross-Border Trade in Services, Investment and Financial Services chapters, including any exceptions ('non-conforming measures') maintained by TPP Parties under those chapters. Government Procurement and government information are outside the scope of the e-commerce chapter.

Facilitating trade

The Chapter contains a number of obligations to ensure trade-related practices that take place electronically are done efficiently and fairly, including in relation to:

- electronic signatures, which should not be denied or rejected solely on the basis that the signature is in electronic form;
- authentication of electronic transactions, including an opportunity to demonstrate compliance with legal requirements;
- a Party's legal framework for electronic transactions, which must be consistent with specific principles of the United Nations in relation to electronic commerce, and
- encouraging the online availability of import and export documentation and electronic submission of those documents.



Cross-border transfer of information

The ability to move information across borders is essential to business of sizes – from an Australian hotel which relies on an online reservation system, to an Australian telecommunications company seeking to provide data management services to businesses across a number of TPP markets.

For the first time in a trade agreement, TPP Parties have committed to allow a ‘covered person’ (service suppliers and investors, other than financial institutions and cross-border financial service suppliers) to transfer information across borders by electronic means where it is part of their business activity. The provision recognises that each government will have its own regulatory requirements for the transfer of information. Governments may impose conditions or restrictions on the cross-border transfer of information that are required to achieve public policy objectives, provided those measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

Australia’s open and robust regulatory framework, including the *Privacy Act* and e-health record system (*Personally Controlled Electronic Health Record Act 2012*), will not be affected by this new commitment.

A footnote clarifies that obligations relating to the movement and storage of data do not apply to Australian credit reporting bodies.

Addressing localisation barriers

TPP Parties have agreed not to impose requirements on a covered person to use or build a local data centre in order to conduct business in a TPP Party’s territory. This provides certainty to businesses when making substantial investment decisions about the placement of data centres in TPP markets.

TPP Parties are able to introduce localization requirements required to achieve public policy objectives, in the same manner as the transfer of information article.

No customs duties on electronic content

TPP Parties have committed never to impose customs duties on electronic transmissions or content delivered by the Internet. This commitment builds on a long-standing moratorium in the World Trade Organization (WTO).

Equal treatment of digital content

TPP Parties have agreed that they will treat digital content from TPP markets in the same way as they treat their own digital content (or ‘digital products’). Australian games and software exporters will enjoy fair and equal treatment when participating in TPP markets.

This commitment will not alter Australia’s broadcasting regime, and Australia will retain flexibility to ensure Australian content is reasonably available to Australian audiences, now and into the future.

Source code

Source code is integral to the value of software. TPP Parties will not require the transfer of (or access to) source code of mass-market software owned by a person of another Party as a condition of importation, sale or distribution of such software. As a result, Australian software suppliers will not be required to hand

over valuable source code when seeking to import or distribute software in a TPP country. This provision will not impact Australia's patent regime.

Privacy, consumer protection and tackling 'spam'

TPP Parties have agreed to an enhanced range of protections for consumers in the online environment, with specific provisions addressing personal information protection, consumer protection and unsolicited commercial electronic messages ('spam'). These include commitments to:

- adopt transparent and effective laws to protect consumers from fraudulent and deceptive conduct, and cooperation between national consumer protection agencies;
- adopt a legal framework to protect the personal information of e-commerce users, and publish information on those protections. As TPP Parties may take different approaches to protecting personal information, TPP Parties will work cooperatively to promote compatibility between different regimes;
- adopt measures to address 'spam' (unsolicited commercial electronic messages), such as requiring that senders of spam ensure recipients can opt-out of receiving these messages. TPP Parties have further agreed to provide recourse against senders of spam who do not comply with efforts to minimise spam messages.

A side letter from the United States to Australia on privacy protections ensures that Australia will receive the benefit of any additional commitments by the United States in future FTAs. In addition, Australians are at the front of the queue to receive extensions in privacy protections for personal information of foreign nationals held by the United States Government.

Improving access to products and services

Australians are concerned about the cost and availability of items they buy over the internet, including music and software. Under the TPP, Australia will have a forum to exchange views with other TPP Parties about the experiences of Australian consumers when accessing products and services offered online.

Recognising the importance of cyber security

In order to make the most of opportunities in the online environment, consumers and business require a secure and well-functioning Internet. TPP Parties recognise the importance of cooperation on cyber security through the work of national computer emergency response teams, such as CERT Australia.

Principles on access to and use of the internet

Within the framework of each TPP Party's policies, law and regulations, the E-commerce Chapter recognises the benefits to consumers from open access to and use of the internet. These include the ability to choose internet services and applications, to connect end-user devices to the internet, and to have access to information about the network management practices of their Internet access service supplier.

International internet connections

Establishing international internet connections is a matter of commercial negotiation between suppliers. The agreement notes that such commercial negotiations may include negotiations for the establishment and maintenance of suppliers' facilities.

Cooperation

Recognising the global nature of e-commerce, the chapter identifies a comprehensive range of areas for cooperation, including:

- working together to assist small and medium enterprises (SMEs) overcome obstacles in the use of e-commerce;
- sharing information and experiences on e-commerce regulations and policies and the enforcement and compliance of these measures;
- participating actively in regional and multilateral fora to promote the development of e-commerce; and
- encouraging the private sector to develop self-regulation that fosters e-commerce.

Dispute settlement

TPP Parties have agreed that Malaysia will not be subject to dispute settlement in relation to certain obligations (non-discriminatory treatment of digital products and transfer of information) for any existing measures for two years after the date of entry into force of the agreement.

TPP Parties have also agreed that Vietnam will not be subject to dispute settlement in relation to certain obligations (non-discriminatory treatment of digital products, transfer of information, and location of computing facilities) for any existing measures for three years after the date of entry into force of the agreement.