4.1.2 Services trade and investment

4.1.2.1 Services trade

Overview

Australia's services sector has undergone decades of autonomous regulatory reform, which is reflected in the high proportion of services sectors covered by bound commitments under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS).

Australia's GATS schedule forms the basis of its current market access and national treatment obligations across twelve services sectors and four modes of supply. Across all services sectors, Australia maintains 'horizontal' market access and national treatment limitations in respect to foreign investment (outlined in 4.1.2.2) and the movement of natural persons.

This section identifies services activities where Australia has not taken specific commitments in the GATS, or has listed certain limitations to its GATS market access and national treatment obligations.

Movement of Natural Persons (Mode 4)

Australia reserves the right to adopt or maintain any measure with respect to the supply of a service by the presence of natural persons, or other movement of natural persons, including immigration, entry or temporary stay.

Australia's temporary business entry arrangements are streamlined to ensure entry procedures are efficient, expeditious and transparent. Business is able to sponsor skilled overseas staff to work in Australia for specified periods as executives, managers and specialists. There is provision for further periods of stay on application. Sponsorship is a simple process that establishes the link between businesses and overseas workers and is designed to protect overseas workers brought to Australia by ensuring that they are employed in accordance with Australian laws.

Temporary Entry

Temporary Business Entry (short stay)

The Electronic Travel Authority (ETA) system is the most advanced and streamlined travel authorisation system in the world. The ETA is a pre-clearance system that enrols travellers in Australian migration systems to enable faster on-arrival processing. It enables most visitors to Australia to obtain authority to enter at the same time as they book their travel arrangements with their travel agent. There is no need for the traveller to complete an application form for a visa or, in the case of tourists and business people seeking a single entry only, pay any Australian Government fee or charge. The ETA is issued within seconds by computer links between the Australian Government, travel agents, airlines and specialist service providers around the world.

There are two types of Business ETA :

- a single entry, three month stay Business ETA (977) which is valid for one year. The 977 ETA is free of Government charges; and
- a multiple entry, three month stay on each occasion Business ETA (956) which is valid for 5 years or life of passport to a maximum of 10 years. A fee of $65 is payable by credit card.

APEC Business Travel Card

The APEC Business Travel Card gives accredited people streamlined entry to participating APEC economies. This occurs through a simple, pre-clearance system that allows business people, through a single application, to obtain multiple entry, short stay in participating economies. The cards provide holders with:

- pre-cleared entry, multiple entry for at least two months stay;
- cards are valid for three years; and
- special APEC lanes on arrival and departure at major airports in participating economies ensure faster immigration processing.

Eligible business people must be passport holders of participating economies, travel frequently within the APEC region for business purposes and have no convictions for criminal offences.

Temporary Business Entry (long stay)

Australia's temporary business entry visa arrangements (Subclass 457) have been streamlined to provide efficient, expeditious and transparent entry and stay provisions. Companies are able to sponsor personnel to establish an operation in Australia. Companies are able to sponsor professional and skilled personnel as needed in their business. This applies to both foreign and Australian based sponsoring companies. Australia has put in place streamlining measures for skilled temporary entrants including:

- electronic lodgement of applications for long term temporary business entry;
- increased assistance and access to comprehensive information on regulations and procedures relevant to entry and stay. Measures include the establishment of business centres in each region, the development of website and printed information packages, including industry-specific information.

Approved applicants are generally granted entry for up to 4 years' initial stay. Further periods of stay are available. The temporary residence (long stay) visa provides *automatic work rights* to spouses on approval of the primary applicant's visa application. Applicants for temporary residence visas can apply for and be granted a visa offshore. Applicants can, generally, also apply onshore and be granted a visa onshore. Australia's visa processing standard is 30 days for temporary business (long stay). The current average visa processing times are 18 days in Australia and 11 days in Tokyo.

Other means for temporary entry

In addition to Australia's GATS commitments (listed below) Australia provides two other avenues of entry for companies to hire staff from overseas for specific positions that cannot be filled from within the Australian labour market. Both are used extensively by the travel industry to assist them address local Japanese language skills shortages. Labour Agreements enable Australian employers to recruit a specified number of workers from overseas in response to identified or emerging labour shortages in the Australian labour market. Employees may come to Australia on either a temporary or a permanent basis. Persons nominated under Labour Agreements are expected to have the qualifications and experience suitable for the position/occupation for which they have been nominated. They cannot be low skilled or unskilled. For shorter term vacancies, the Working Holiday Scheme allows young travellers from a number of countries to stay up to 12 months in Australia, and allows them to do any kind of work of a temporary or casual nature, provided they do not work for more than three months with any one employer. Working Holiday travellers do not need to be skilled.

Australia does not impose numeric controls on these temporary entry categories.

Health processing guidelines

All visa applicants will be asked about their health and intentions in Australia. Anyone who will spend more than 12 months in Australia must have medical and x-ray examinations. Applicants who will be working in any health care environment or occupations require x-ray examinations and blood tests regardless of the period of stay proposed. A very few other applicants may be requested to undertake medical, x-ray or blood tests depending on their circumstances. Australia has achieved on-line health examinations enabling results and visa issue in a few hours in an experimental location, and is working to expand this to Japan over 2005.

Australia's current temporary entry (Mode 4) commitments

Australia's commitments for Mode 4 apply to all services sectors. Australia's commitments relate to the following categories of international service providers:

Intra-company transferees:

Australia grants an initial stay of up to four years with no labour market testing to intra-corporate transferees (as defined) who are Executives and Senior Managers. Employer sponsorship is required, separate work permits are not required and no quotas apply.

Specialists

Australia will grant to specialists (as defined) up to two years initial stay with provision to extend to a total of fours years stay. Employer sponsorship is required, separate work permits are not required and no quotas apply.

Labour market testing is not required for persons who have specialised knowledge at an advanced level of a proprietary nature of the company's operations and have been employed by the company for a period of not less than two years if the position in question is within a labour agreement. A labour agreement is an agreement between the Australian Government, employers or industry organisations and unions for the entry of specialists from overseas. At present we do not require labour market testing for specialists in our GATS commitments if they are coming in under a labour agreement.

Specialists who are contractual service suppliers are eligible for entry under these categories:

- Specialists (Nurses)

Australia currently provides for priority processing to allow for the temporary entry of nurses who (i) meet minimum skill requirements for registration in the profession and (ii) their sponsor meets normal sponsorship and minimum salary level requirements. Nurse applications currently receive the highest priority in processing. Nursing professionals have been given this priority since February 2002.

- Specialists (Doctors)

The Australian Government provides priority processing to allow for the temporary entry of doctors along the lines of current arrangements in place for nurses.

- Service Sellers

Australia grants service sellers (as defined) an initial stay of six months and up to a maximum of 12 months with no labour market testing. Employer sponsorship is not required, labour market testing is not required, separate work permits are not required and no quotas apply.

- Independent Executives

Australia grants an initial stay of two years to Executives and Senior Managers. Applicants must be Executives and Senior Managers (as defined in Intra-corporate Transferee Provisions) of a business seeking temporary entry for the purpose of establishing a new business of a service supplier with its head of operations outside of Australia and which has no other representative, branch or subsidiary in Australia. Employer sponsorship is required, labour market testing is not required, work permits are not required and no quotas apply.

Other horizontal limitations

Limitations that affect all Australian services sectors are as follows:

- The *Corporations Act 2001* and *Corporations Regulations 2001* require at least two of the directors of a public company to be ordinarily resident in Australia.
- Australia reserves the right to adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation in relation to acquisition, establishment or operations of any commercial or industrial undertaking in the services sector. Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous persons or organisation or provides for the favourable treatment of any indigenous person or organisation (*Native Title Act 1993*).
- Australia reserves the right to adopt or maintain any measure with respect to a) the devolvement to the private sector of services provided in the exercise of government authority; and b) the privatisation of government-owned entities or assets.
- Australia reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following to the extent that they are social services established for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, child care, public utilities and public transport.
- For some of these activities, the Commonwealth, or State and Territory, Governments may impose restrictions on services trade, such as residency requirements. Areas where residency requirements may be imposed by some Governments include medical practioners, dispensing of pharmaceuticals, travel agency and real estate services.

Sectoral Overview

Professional services

In line with the WTO's classification guidelines (contained in document W/120), the professional services sector includes the following sub-sectors: legal services; accounting; auditing and book-keeping services; taxation services; architectural services; engineering services; integrated engineering services; urban planning and landscape architectural services; medical and dental services; services provided by midwives, nurses, physiotherapists and paramedical personnel; and other services.

Australia has taken GATS commitments for the following sub-sectors: legal services; accounting; taxation; architectural; engineering and integrated engineering; dental and veterinary services. With regard to all of the above sub-sectors, Australia has made full commitments for Modes 1-3 with the exception of legal and accounting services, where a number of limitations apply with respect to commercial presence.

All professional services listed in Australia's GATS schedule are subject to a number of requirements as contained in Australia's schedule of horizontal commitments affecting Mode 4.

Particular market access and national treatment limitations include:

- Patent Attorney Services: Under the *Patents Act 1990,* in order to practise in Australia, patent attorneys must: be ordinarily resident in Australia; have an address for service in Australia; and attend a place of business in Australia.

- Migration advice services: Under the *Migration Act 1958,* to practise as a migration agent in Australia a person must be an Australian citizen or permanent resident, or a citizen of New Zealand with a special category visa.

- Accounting, auditing and book-keeping services: Only natural persons may be registered as auditors and liquidators. At least one equity partner in a firm providing accounting, auditing and book-keeping services must be a permanent resident.

- Customs clearance (services supplied by customs brokers): To act as a customs broker in Australia, service providers must provide the service in and from Australia. Customs brokers may complete customs formalities required by the relevant customs legislation on behalf of the owners of goods prior to their import into or export from Australia. Such formalities include the requirement to complete the import or export entries whereby owners notify the goods being exported or imported, the duty and other taxes payable and to ensure the appropriate permits have been obtained.

- Medical services: Under the *Health Insurance Act 1973,* doctors who have obtained their training outside Australia and registered as medical practitioners in Australia since December 1996 may only bill Medicare for patient consultations in private medical practices if they are approved to work in a "district of workforce shortage".

- Health Services: Under the *Commonwealth Serum Laboratories Act 1961*, the votes attached to significant foreign shareholdings are prevented from being counted with respect to the appointment, replacement or removal of more than one third of CSL's directors who hold office at a particular time. The head office and principal facilities must remain in Australia. Two-thirds of the directors of the board of CSL and the chairperson of any meeting must be Australian citizens. CSL must not seek incorporation outside of Australia.

- Legal services: Further information about practising law in Australia, whether foreign or Australian law, is at Annex 4A.

Research and development services

Under the GATS, Australia has made commitments with respect to research and development services on social sciences and humanities only. Australia maintains discriminatory treatment with respect to subsidies for research and development services.

Real estate services

Foreign participation in Australia's real estate services industry requires a commercial presence (office or branch) within the appropriate jurisdiction. Commercial presence is also a requirement for domestic real estate service providers to ensure and enhance consumer protection.

Other business services

According to the GATS W/120 classification scheme, the 'other business services' sub-sector incorporates a range of business services including advertising; market research and polling; management consulting; technical testing and analysis; services incidental to agriculture, hunting and forestry; services incidental to fishing; services incidental to mining; services incidental to manufacturing; personnel services; investigation and security; scientific and technical consulting; maintenance and repair; building cleaning; photographic services; packaging; printing and publishing; convention services; telephone answering services; duplicating services; translation and interpretation; mailing services; and interior design.

Operational and licensing qualification requirements for each business service may vary between Australian States and Territories.

Relevant barriers in this sector include those contained in the *Fisheries Management Act 1991*, and the *Foreign Fishing Licences Levy Act 1991* which require foreign fishing vessels to be authorised to undertake fishing activity in the Australian Fishing Zone. Where foreign fishing vessels are authorised to undertake fishing activities, they may be subject to a levy.

Postal and courier services

Australia's postal and courier services industries are open to foreign competition, with the exception of services reserved for supply by Australia Post. The reserved service is set out in the *Australian Postal Corporation Act 1989* and currently includes delivery of letters weighing up to 250 grams and charged at less than four times the standard letter rate.

Telecommunication services

On 1 July 1997, Australia introduced full and open competition in the telecommunications sector. The major regulatory features of the new framework include no restrictions on the number of providers or installers of network infrastructure; ensured access rights for carriers and service providers; competitive safeguards; and the separation of regulatory and operational functions. Australia has fully implemented carrier pre-selection for long distance, international and fixed-to-mobile calls. It has fully implemented number portability for both fixed and mobile telephony services. Australia's GATS commitments include the telecommunications reference paper.

Australia has an open licensing regime for telecommunications with no distinction drawn on the basis of the technology used. Under Australian legislation, a carrier licence must be held by the owner of a network unit(s) used to supply carriage services to the public, unless there is a nominated carrier declaration in force in relation the unit(s) or an exemption applies. Service providers are not subject to any licensing requirements but are required to comply with a range of obligations including the standard service provider rules set out in Schedule 2 of the Telecommunications Act.

The number of broad band subscribers is 1,310,300, of which the number of cable modem subscribers is 375,900, and the number of ADSL subscribers is 921,400 (as at September 2004).

Participation in the market is dependent on a number of requirements being met. Australia maintains a universal service obligation, the cost of which is shared among carriers in proportion to their telecommunications revenue. Carriers are also required to meet minimum service standards such as timeframes for connection of services and repairs of faults and to maintain an approved Industry Development Plan.

Foreign ownership of Telstra (the former monopoly carrier) is limited to 35 per cent of the privately held share, and 5 per cent for individual or associated groups of foreign investors.

Australia reserves the right to adopt or maintain any measure with respect to the creative arts, cultural heritage and other cultural industries, including audiovisual services. Services covered by the *Broadcasting Services Act 1992* are excluded from Australia's GATS commitments for telecommunications.

Legislation relevant to Australia's telecommunications industry includes the *Telecommunications Act 1997,* Part XIC of the *Trade Practices Act 1974*, Part XIB of the *Trade Practices Act 1974*, and the *Telecommunications (Consumer Protection and Service Standards) Act 1999.*

Audiovisual and cultural services

Australia reserves the right to adopt or maintain any measure with respect to the creative arts, cultural heritage and other cultural industries, including broadcasting, film and other audiovisual services, entertainment services and libraries, archives, museums and other cultural services (*Broadcasting Services Act 1992, Radiocommunications Act 1992*). Specific measures currently in place include local content quotas for television, subsidies and favourable tax treatment for Australian films, and film co-production arrangements with selected countries. Australia has made no specific commitments, and has MFN exemptions, for audiovisual services in GATS.

Construction and related engineering

Under the GATS, Australia has made full commitments on all modes of supply that are technically feasible for five of the eight sub-sectors relating to construction and related engineering services. Australia's GATS commitments do not cover pre-erection work at construction sites, special trade construction work and renting services relating to equipment for construction or demolition of buildings or civil engineering works with operator.

Distribution services

In the WTO context, Australia has made comprehensive market access and national treatment commitments for commission agents' services, retailing, wholesaling and franchising services. Australia's GATS commitments do not cover the retailing of pharmaceuticals, or commission agents' and wholesale services for agricultural raw materials and live animals, food products, beverages or tobacco.

Within the distribution sector, Australia reserves the right to adopt or maintain any measure in respect to marketing boards. Australia also reserves the right to adopt or maintain any measure in respect to wholesale and retail trade services of tobacco products, alcoholic beverages and firearms. Under the *Wheat Marketing Act 1989*, a person other than the Australian Wheat Board may not export wheat unless the Wheat Export Authority has given its consent.

Under the *Therapeutic Goods Act 1989* and *Industrial Chemicals (Notification and Assessment) Act 1989*, a person who imports, exports, manufactures or supplies a therapeutic good in Australia must have that product included in the Australian Register of Therapeutic Goods (ARTG), unless the product is an

exempted good. The person who includes a product in the ARTG must be a resident of Australia, or carrying on business in Australia. A person who imports or manufactures industrial chemicals in Australia must hold the relevant permit. The person who holds a permit must be a resident of Australia, or carrying on business in Australia.

The principal regulatory instruments in this sector include the *Trade Practices Act 1974*; *Prices Surveillance Act 1983*; and relevant State and Territory regulation. Both the Australian Government and State and Territory Governments regulate the activities of the distribution sector. For particular product sectors where distributors are required to obtain a licence, these regulatory activities are undertaken by State and Territory licensing authorities.

Environmental services

In the WTO context, Australia has made no commitments in the 'other environmental services' sub-sector. There may be State Government regulations that impose restrictions on the licensing of environmental consultants and firms.

Educational services

In the WTO context, Australia has made full market access and partial national treatment commitments on secondary education, higher education and other education services, except for Mode 4 (Movement of Natural Persons) where Australia remains unbound. Australia has one of the most liberal education schedules amongst WTO Members.

Australia currently has no market access limitations under Mode 3 (Commercial Presence) but remains unbound on national treatment. The primary purpose of this is to ensure that foreign education service providers do not have automatic access to public funding and subsidies. Australia reserves the right to adopt or maintain any measure with respect to primary education.

Foreign education and training service providers are able to enter the market and supply services providing they comply with Australia's non-discriminatory regulatory requirements for establishment and operation. Relevant regulatory requirements for the provision of education services (which apply to both foreign and domestic providers) are as follows:

All providers of education and training services to overseas students studying in Australia on student visas must comply with the *Education Services for Overseas Students (ESOS) Act 2000 (including amendments 2002)*. The ESOS Act, and associated legislation, provides the regulatory framework under Australian Government legislation and includes the legislative requirements of Australia's State and Territory Governments. Education providers who provide education and training services to overseas students studying in Australia on student visas must be registered and approved by the relevant education and training authorities within each State or Territory of operation. Service providers are required to be licensees and hold appropriate qualifications as contained in the ESOS Act. They must also be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). The ESOS Act requires that providers be resident of Australia. This requirement does not preclude foreign ownership of a company, but it must be registered in Australia.

Higher Education

In Australia, universities are established by Acts of Parliament. The registration of other higher education providers and the accreditation of higher education courses are controlled by State and mainland Territory

Government legislation. Higher education providers seeking to operate in Australia's external Territories must be accredited by the Australian Government. The funding of higher education institutions within Australia is controlled by the Australian Government's *Commonwealth Higher Education Funding Act 1988*. The terms 'university' and 'degree' are protected by legislation of the Australian Government and State and mainland Territory governments. The relevant Australian Government legislation is the *Commonwealth Corporations Regulations 2001* and *The Corporations Law Body Corporate Names Guidelines*.

National Protocols for Higher Education Approval Processes provide the criteria and standards to assess applications for recognition of higher education institutions and courses. They are designed to ensure consistent criteria and standards for the assessment of applications for proposed universities and higher education courses, including for foreign universities and courses, and have been adopted by the Commonwealth, State and mainland Territory Governments of Australia. The Australian Universities Quality Agency (AUQA) has the role of monitoring, auditing and reporting on quality assurance in Australian higher education.

Further information on the rules for establishing a university in Australia is at Annex 4B.

Vocational Education and Training

Legislation for the provision of vocational education and training within Australia is maintained by State and Territory Governments. All accredited vocational education and training within Australia must also conform to the Australian Qualifications Framework and the Australian Quality Training Framework.

Schools

The establishment and funding of primary and secondary schools is controlled by legislation of the Australian Government and State and Territory Governments.

Foreign owned private schools and Vocational and Training Organisations can operate in Australia provided they meet Australian standards for registration.

Financial services

The Australian financial services sector has undergone substantial reforms and unilateral liberalisation since 1979. The reforms to the Australian financial services markets have been based on promoting greater efficiency through enhanced competition, removing unnecessary regulation and maintaining confidence and stability while preserving the ability to be responsive to innovation and market developments.

Australia's current financial services commitments under the GATS are framed in accordance with the Understanding in Financial Services. Consequently, Australia has a liberal financial sector, although some limitations remain in insurance and banking services and are as follows:

Insurance and Insurance-related services

Australia does not permit branches of non-resident life insurers to do business in Australia. Australia requires authorised general insurance companies operating in Australia as a non-incorporated entity, i.e. foreign insurers, to appoint an Australian resident as agent of the insurer. Most States and Territories maintain monopolies or licensing provisions and associated controls on premiums and other terms of policies on Compulsory Third Party Motor Vehicle Accident and Workers Compensation insurance.

However, some States and Territories allow private insurers to write these classes of business. Comcare is registered as a monopoly provider of workers' compensation insurance to Commonwealth Government employees. (*Life Insurance Act 1995, Insurance Act 1973, Safety, Rehabilitation and Compensation Act 1988*)

Banking and other Financial Services

Foreign bank branches are not permitted to collect retail deposits below A$250,000. Australia reserves the right to adopt or maintain any measure with respect to the guarantee by the Commonwealth government of Commonwealth-owned entities which may conduct financial operations. Australia reserves the right to adopt or maintain any measure with respect to cross-border supply or consumption abroad of insurance intermediation, such as brokerage and agent services. Australia also reserves the right to adopt or maintain any measure with respect to cross border supply or consumption abroad of direct life and non-life insurance, other insurance of risks relating to maritime shipping, commercial aviation, space launching, freight and goods in international transit. Other market access and national treatment provisions that relate to this sector and provision of financial services are incorporated in the *Banking Act 1959*; *Payment Systems (Regulation) Act 1998* ; the *Corporations Act 2001*, *Commonwealth Banks Act 1959*, *AIDC Sale Act 1997*; and the *Australian Industry Development Cooperation Act 1970*.

Wholesale foreign financial service providers, foreign market operators and foreign collective investment schemes may obtain relief from licensing requirements in Australia, where the Australian Securities and Investments Commission has effective cooperation arrangements with the home state regulator and its regulatory regime is considered sufficiently equivalent to Australia's.

Health services

Under the GATS, Australia has made extremely limited commitments on health services, relating to only podiatry and chiropody services.

Tourism and related services

Australia has an open and liberal tourism sector. Australia has made full commitments on all modes of supply that are technically feasible for hotels, restaurants, and tourist guide services. Under Australia's schedule of GATS commitments, the cross-border supply of travel agents and tour operator services is limited by the requirement for a commercial presence. There are no sector-specific operational requirements which differentiate between domestic and foreign services suppliers.

The regulation of the tourism industry is largely the responsibility of the State and Territory Governments who have primary carriage for the administration of matters relating to licensing and operation. Regulatory requirements that apply to both domestic and foreign suppliers of tourism services include:

- For travel agents, all State and Territory Governments with the exception of the Northern Territory participate in a national scheme for the regulation of travel agents. The scheme requires that agents meet licensing standards such as being 'a fit and proper person' and have sufficient resources to carry on business as a travel agent. Relevant legislation is administered by the Fair Trading portfolio in each State and Territory. Travel agents are also required to contribute to the Travel Compensation Fund to safeguard against the loss of money by consumers in the event of default by a travel agent. All individuals or bodies corporate who carry on business as travel agents must be licensed under the individual State and Territory Travel Agents Acts.

- The handling and sale of food by food businesses, including hotels and restaurants, is regulated under the Food Acts of all States and Territories, except Western Australia which has similar requirements in its *Health Act 1911*. Regulations made under these Acts prescribe food hygiene requirements for food premises. The Food Acts also make it an offence not to comply with the Joint Australia-New Zealand Food Standards Code.

Recreational, cultural and sporting services

The recreation services sector in Australia encompasses a diverse range of activities. Australia has made binding market access and national treatment commitments under the GATS on sporting and other recreational services (sporting services); other recreational services (park and recreational services); and news agency services. Operational and licensing qualification requirements vary between Australian States and Territories.

Under the *Broadcasting Services Act 1992, Radiocommunications Act 1992* Australia reserves the right to adopt or maintain any measure with respect to the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services.

Logistics and transport

Australia's liberalising efforts for logistics and transport services have been structured to maximise efficiency while ensuring appropriate community standards relating to such matters as security, health, safety and environment protection. Emphasis has been placed on maximising the benefits of domestic and foreign competition. Road transport is primarily regulated by state and territory governments, with generally open arrangements for freight and passenger transport. Australia's GATS commitments exclude regular urban bus services. Some relevant State and Territory transport websites are:

http://www.vicroads.vic.gov.au
http://www.rta.nsw.gov.au
http://www.dpi.wa.gov.au
http://www.transport.qld.gov.au
http://www.transport.tas.gov.au
http://www.transport.sa.gov.au
http://www.ipe.nt.gov.au
http://www.urbanservices.act.gov.au

Australia's arrangements for maritime transport and associated services are generally open to foreign vessels and service providers, subject to various requirements that apply equally to Australian operators. These include meeting health, safety, and environment protection and industrial relations standards.

Air traffic rights are negotiated through bilateral air services agreements. Ground handling services are open to foreign participation to the extent that such services are provided on a competitive basis by the private sector.

The framework for rail services in Australia has been significantly reformed since an agreement between Commonwealth, State and Territory Governments in 1997 to facilitate an increase in competition, private sector involvement, and the quality and connectedness of infrastructure. Rail track is largely government owned, while essentially full and open competition exists for above track operations (subject to non-discriminatory track access arrangements). There are no specific restrictions or discriminatory measures aimed at restricting foreign participation.

Energy services

Australia has an open and liberal market on a range of energy services. In the WTO context, Australia has made full commitments on pipeline transportation of fuels (CPC 7131), and partial commitments on services incidental to energy distribution (CPC 887) but has made no commitments on retailing of energy products, construction services related to mining and energy products and storage and warehousing services related to energy.

4.1.2.2 Investment

Under Australia's foreign investment policy, which comprises the *Foreign Acquisition and Takeovers Act 1975* (the FATA) and Foreign Acquisitions and Takeovers Regulations and Ministerial Statements, the following investment activities require prior notification and approval from the Australian Government:

- Acquisitions by 'foreign persons'[9] of 'substantial interests'[10] in existing Australian businesses, or prescribed corporations, the value of whose total assets exceeds $A50 million[11];

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[9] A 'foreign person' is defined in section 5 of the FATA. Permanent residents of Australia who are ordinarily resident in Australia are not considered to be 'foreign persons' and are therefore exempt from the operation of the Act.

Foreign Acquisitions and Takeovers Act 1975, Section 5 - Interpretation

foreign person means:

(a) a natural person not ordinarily resident in Australia;

(b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;

(c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;

(d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or

(e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Foreign Acquisitions and Takeovers Act 1975, Section 5A - Ordinarily resident non-citizens

(1) For the purposes of this Act, a natural person who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:

(a) the person has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

(b) at that time, either:

(i) the person is in Australia and the person's continued presence in Australia is not subject to any limitation as to time imposed by law; or

(ii) the person is not in Australia but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.

(2) For the purposes of paragraph (1)(b), but without otherwise limiting the generality of that paragraph, a person's continued presence in Australia is subject to a limitation as to time imposed by law if the person is an unlawful non-citizen within the meaning of the Migration Act 1958.

[10] A 'substantial interest' is defined in section 9 of the FATA.

[11] In determining the value of a corporation for the purpose of prior notification see section 13B as it operates in relation to Sections 13 and 13A of the FATA

- Proposals by 'foreign persons' to take over offshore companies whose Australian subsidiaries or total Australian assets are valued in excess of $A50 million;
- Proposals by 'foreign persons' to establish new businesses in Australia involving a total investment of $A10 million or more;
- Direct (i.e. non-portfolio)[12] investments by foreign governments or their agencies, or companies with greater than a 15 per cent direct or indirect holding by a foreign government or agency[13] or otherwise regarded as controlled by a foreign government, irrespective of size[14];
- Portfolio investments in the media sector of 5 per cent or more and all direct (i.e. non-portfolio) investments, irrespective of size;
- Acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisitions of interests in urban land corporations and trusts) that involve the:
  - acquisition of developed non-residential commercial real estate, where the property is subject to heritage listing, valued at $A5 million or more;
  - acquisition of developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at $A50 million or more;
  - acquisition of accommodation facilities irrespective of value;
  - acquisition of vacant urban real estate irrespective of value;
  - acquisition of residential real estate irrespective of value; or
  - proposals where any doubts exist as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.)

National interest

Under the FATA, the Treasurer may reject applications to control an Australian business or acquire an interest in urban land if he considers the matter is 'contrary to the national interest'. Notified investment may also be subject to interim orders and/or approved subject to compliance with certain conditions. Investment referred to above for which no notification is required or received may be subject to orders under sections 18, 19, 20, 21 and 21A of the FATA.

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[12] The distinction between direct and portfolio investments is fundamentally concerned with the amount of control over a company that is held by an investor. For the purposes of the Australian Government's foreign investment policy, an investment of 15 per cent or more is taken to be a direct investment (i.e. a controlling interest), unless considered otherwise by the Treasurer. In some sensitive sectors or companies such as the media (broadcasting, newspapers), Telstra and airports, investments between 5 and 15 per cent may also be deemed to be direct investments. Any investment of less than 5 per cent is considered to be a portfolio investment.

[13] This specifies tracing provisions for inter-company ownership. Any company that is directly owned 15 per cent or more by a foreign government or its agencies is considered to be controlled by that government, thus any direct interest of the company is an indirect interest of that government. Hence, a second company that is directly owned 15 per cent by a government controlled company is also considered to be controlled by that government. Thus, indirect government ownership can be traced back through multiple companies.

[14] Notification is required without regard to normal thresholds.

The Foreign Investment Review Board, in preparing its advice to the Treasurer on national interest issues, considers whether the proposal is inconsistent with:

- Existing government policy and law (for example, environmental regulation and competition policy);
- National security interests; and
- Economic development.

Where national interest concerns are identified, the Foreign Investment Review Board may seek to formulate conditions that address these concerns. However, Australia's foreign investment policy operates under the presumption that foreign investment proposals are generally in the national interest and should go ahead.

Urban land

Proposed acquisitions of real estate for development, including vacant residential real estate and 'off-the-plan' newly constructed residences, and developed non-residential commercial real estate are normally approved.

Proposed acquisitions of developed residential real estate are subject to restrictions. Approval may be granted to certain acquisitions by foreign nationals who are temporarily resident in Australia and hold a visa valid for more than 12 months.

Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or trust;
- foreign nationals purchasing (as joint tenants) with their Australian citizen spouse; and
- foreign nationals who are holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or trust.

Banking

Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959,* the *Financial Sector (Shareholdings) Act 1998* and banking policy, including the Government's 1997 announcement regarding the application of the FATA to foreign ownership in the banking sector. Any proposed foreign takeover or acquisition of an Australian bank will be considered on a case-by-case basis.

Australian domestic airlines

Proposals by 'foreign persons' (including foreign airlines) to acquire up to 100 per cent of the equity in an Australian domestic airline are notifiable, in accordance with the standard notification requirements set out in Australia's foreign investment policy, and are normally approved, unless the proposal is contrary to the national interest.

Australian international airlines

There is a 49 per cent (individually or in aggregate) foreign equity limit on Australian international carriers other than Qantas. Proposals by 'foreign persons' to acquire interests in Australian international airlines or establish new Australian international airlines are notifiable, in accordance with the standard notification requirements, and are normally approved provided the proposal is consistent with the 49 per cent foreign

equity limit and not contrary to the national interest. In addition, Australia's guidelines on 'effective control', for the purpose of designation, require that:

- at least two-thirds of the Board members must be Australian citizens;
- the Chairperson of the Board must be an Australian citizen;
- the airline's head office must be in Australia; and
- the airline's operational base must be in Australia.

Under the *Qantas Sale Act 1992*, total foreign ownership of Qantas Airways Ltd is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate foreign ownership by foreign airlines limited to 35 per cent. The following national interest criteria must also be satisfied :

- the head office of Qantas must always be located in Australia;
- the majority of Qantas' operational facilities must be in Australia;
- at all times at least two thirds of the directors of Qantas must be Australian citizens;
- at a meeting of the board of Directors of Qantas, the director presiding at the meeting (however described) must be an Australian citizen; and
- Qantas is prohibited from taking any action to become incorporated outside Australia.

Airports

Foreign investment proposals for acquisitions of interests in Australian airports are subject to case-by-case examination in accordance with the standard notification requirements. The *Airports Act 1996* stipulates a 49 per cent foreign ownership limit in airports offered for sale by the Commonwealth, a 5 per cent airline limit and cross ownership limits between the Sydney airport and Melbourne, Brisbane and Perth airports.

Media

All direct investment proposals by 'foreign persons' in the media sector require prior approval under the Government's foreign investment policy, irrespective of size. Proposals involving portfolio interests of 5 per cent or more must also be submitted for examination.

Broadcasting

Proposals for a 'foreign person' to acquire an interest in an existing broadcasting service or to establish a new broadcasting service are subject to case-by-case examination under Australia's foreign investment policy and must be consistent with the *Broadcasting Services Act 1992.* The *Broadcasting Services Act 1992* stipulates that foreign investment in commercial television be restricted to 15 per cent for individuals and 20 per cent in aggregate, a foreign person may not be in a position to exercise control and no more than 20 per cent of directors may be foreign persons. For subscription television broadcasting services, foreign persons are limited to a 20 per cent per individual and 35 per cent in aggregate.

Newspapers

All proposals to acquire a 5 per cent or greater interest in an existing newspaper or to establish a new newspaper in Australia require prior approval. The maximum aggregate foreign direct

investment/involvement (i.e. non-portfolio) in national and metropolitan newspapers is 30 per cent with any single foreign shareholder limited to a maximum interest of 25 per cent. Aggregate foreign direct investment in provincial and suburban newspapers is limited to less than 50 per cent. Foreign investment in newspapers is predominantly covered by Australia's foreign investment policy; however, it would also have to be consistent with Australia's cross-media rules.

Telecommunications

The maximum aggregate foreign ownership allowed in Telstra is 35 per cent of the Telstra shares that are not Commonwealth held[15]. The maximum individual foreign ownership allowed in Telstra is 5 per cent of the Telstra shares that are not Commonwealth held. Foreign investment in Telstra is governed by the *Telstra Corporation Act 1991*. The Chairperson and a majority of directors of Telstra must be Australian citizens and Telstra is required to maintain its head office, main base of operations and place of incorporation in Australia.

In accordance with the standard notification requirements of Australia's foreign investment policy, prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing business in the telecommunications sector. Proposals in this sector are normally approved provided they are not contrary to the national interest.

Shipping

The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (i.e. owned by an Australian citizen, a body corporate established by or under the law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

Resident directors

Under the *Corporations Act 2001,* at least two of the directors of a public company must be ordinarily resident in Australia.

[15] The Australian Government is required to hold *at least* 50.1 per cent of the voting shares in Telstra. As of 15 November 2004, the Government held approximately 51.8 per cent of the voting shares.

Annex 4A Practising law in Australia

Practice of Foreign Law in Australia

Australian government policy is to 'encourage and facilitate the internationalisation of legal services and the legal services sector by providing a framework for the regulation of the practice of foreign law in Australia by foreign lawyers as a recognised aspect of Australian legal practice'. This policy has been adopted by the Standing Committee of Attorneys-General (SCAG) which is comprised of the law Ministers of the Australian Government and all Australian States and Territories. The particular foreign lawyer regulatory model being adopted in Australia is the *limited licensing* model. Under this model, a *limited licence* is granted to foreign lawyers to:

- practise foreign law (home-country, third-country and international law) without having to undertake an unnecessarily burdensome process to meet admission criteria for the practice of host-country law in order to practise foreign law;
- have the freedom to voluntarily enter into commercial association and partnership with host-country lawyers and law firms; and
- to have the right to use their own firm name.

Access provided to foreign lawyers does not generally extend to providing them with a right to appear before courts on behalf of clients. However, in addition to providing legal advisory services in foreign law generally, they are permitted to provide legal services, including appearances, in relation to arbitration proceedings, conciliation, mediation and other forms of consensual dispute resolution.

To date, the States of NSW, Victoria and Western Australia as well as the Australian Capital Territory and the Northern Territory have implemented legislation based on the *limited licensing* model. The State of Tasmania has pre-existing legislation that provides for a similar limited licence approach providing foreign lawyers with a mechanism for obtaining a right to practise foreign law, either on their own account, or in association with local lawyers. The Government of Queensland expected to introduce a Bill in Parliament in 2004 for the purpose of implementing Part two of a comprehensive package of legal profession reforms, including on the regulation of the practice of foreign law based on the *limited licensing* model. The State of South Australia has implemented legislation which provides for a minimalist approach simply stating that a person does not commit an offence by practising foreign law in the relevant State or Territory.

Practice of Australian Law

There are no citizenship or nationality requirements to gain admission to practise in Australia. Therefore, subject to admission requirements, a foreign lawyer can practise Australian law, including appearance before courts, in the same way as an Australian lawyer. Admission to practise Australian law is based on the capacity to satisfy three elements.

1. Knowledge (academic) requirements – generally, a tertiary academic course including 11 areas of legal knowledge specified in the Australian Uniform Admission Rules (generally a four year degree, or a three year degree for those with a prior degree) or such course of studies resulting in areas of knowledge recognised in an Australian jurisdiction.

2. Practical legal training requirements – completion of an approved practical legal training course and/or articles of clerkship that typically would cover a period from six months to one year.
3. Suitability requirements – person must be a fit and proper person for admission as determined by the Supreme Court or certifying body of the relevant State or Territory.

Accordingly, a Japanese lawyer can gain admission to practise Australian law by satisfying the requirements identified in the above three areas. For foreign qualified lawyers from common law jurisdictions, satisfying the academic requirements for admission would be much easier than for lawyers from a civil or other legal system as they would only be required to complete a few Australia-specific subjects. Continued Liberalisation and the National Legal Profession Initiative Australia continues to undertake regulatory reforms to ensure the maintenance of a robust and mature legal system. The most recent of these reforms involves the in-principle agreement in August 2003, by SCAG, to the concept of creating a national legal profession in Australia.

The aim of the initiative is to remove barriers to the practice of law across borders and harmonise standards of regulation across Australia. Model provisions have been developed to achieve this aim and a Model Bill dated 23 April 2004 has been released. It is intended that the regulation of legal practice will remain a responsibility of States and Territories, but with the creation of a single legal services market with nationally consistent regulation governing admission, professional standards, discipline and the administration of legal practices generally.

One of the elements of this initiative is the inclusion of model provisions for a nationally consistent regulatory structure for the registration of foreign lawyers based on the *limited licence* model. When these model provisions are adopted by all Australian States and Territories, it will further enhance the current hospitable foreign lawyer regulations in Australia by creating a nationally consistent system governing the entitlements of foreign lawyers to practise foreign law, including the law of their home country, in Australia.

Annex 4B Establishing a university in Australia

There are three options available for a foreign institution seeking to operate as a higher education institution in Australia. It may:

- seek to be recognised as an Australian university (Protocol 1), or
- seek to operate as an "overseas" university in Australia, offering their own (non- Australian Qualifications Framework (AQF)) courses and awards (Protocol 2); or
- seek to operate as a non self-accrediting institution and without using the title 'university', offering courses which are accredited individually by the appropriate State or Territory accreditation authority under Protocol 3.

If an institution seeks recognition as an Australian university (Protocol 1) or to deliver accredited courses as a non-university provider (Protocol 3) they are given exactly the same treatment as a private Australian higher education institution. It would be subject to the identical accreditation and quality assurance arrangements required of Australian institutions approved under either Protocol 1 or Protocol 3.

If however an institution seeks and gains approval to operate in Australia as an overseas higher education institution (Protocol 2 - Overseas higher education institutions seeking to operate in Australia) there is provision for the following:

- If the relevant Australian accrediting authority is convinced that the home country of the institution has a rigorous system of quality assurance, that the institution itself is of good standing, and that the institution offers qualifications and learning outcomes which are comparable to those offered in a course at the same level and a comparable field in Australia, it may choose to allow the institution to offer their home country qualifications in Australia. The discretion is with the accreditation authority in Australia in respect of these judgements; or
- If the relevant Australian accrediting authority is not so convinced, the provider will be subject to the full scrutiny to which Australian providers are subject, even if it wishes to deliver overseas country awards.

Processes for Establishing a University

In Australia, most proposals to establish new universities are considered by State or Territory Governments under provisions set out in general education legislation, before an Act of Parliament to establish the particular university is approved. Protocol 1 outlines the criteria and processes for approval of new Australian universities, and is available at http://www.detya.gov.au/highered/mceetya_cop.htm

As indicated above, most of the States and Territories have enacted legislation and developed guidelines which give effect to the National Protocols. There is some variation in the procedures that different States and Territories have adopted, although the broad principles followed are those outlined in the National Protocols. The websites of the State and Territory accreditation authorities contain detailed further information. Three examples are:

http://education.qld.gov.au/strategic/accreditation/university/

http://www.highered.nsw.gov.au/aboutus/aboutus.htm

http://www.highered.vic.gov.au/providers/applyuni.asp

As a general rule, an applicant needs to be a legal entity (judicial person), may be either for-profit or not-for-profit, and does not have to be an Australian national, although they may have to establish an Australian company to operate the university. Most Australian universities operate on a not-for-profit basis.

In relation to procedures, the applicant is required to submit a detailed written application against the criteria set out in Protocol 1. An expert assessment panel will be convened to consider the application, comprised of members of the panel with broad experience and knowledge of higher education. Assessment panels usually consider submissions from the community, professional bodies and other interested parties. The assessment process typically takes several months.

Among the important criteria is that the proposed institution must offer courses leading to undergraduate and postgraduate awards of a standard equivalent to those offered by Australian universities. The proposal must also show that the university would have the resources and infrastructure which could sustain the broad range of teaching, scholarship and research appropriate to a university.

An example of the use of Protocol One to assess an application can be located at:

http://education.qld.gov.au/strategic/accreditation/university/operating-as-uni.html#proposedcairnsuni