



a guide to doing business in Australia

gadens lawyers
September 2007

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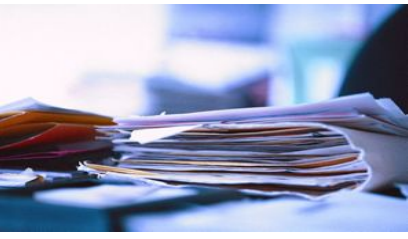
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about gadens lawyers

firm profile

gadens lawyers, established in 1928, is a corporate and commercial law firm that provides services to many of the Asia Pacific's largest, most successful and fastest-growing companies, as well as for government and sovereign entities.

gadens lawyers is a national law firm with offices in Sydney, Melbourne, Brisbane, Perth, Adelaide, Cairns and Port Moresby, as well as a network of affiliate firms in Canberra, Darwin and Hobart.

The firm is rated in the top ten of Australian legal firms in terms of revenue and was recently rated the second fastest growing national law firm.

gadens lawyers currently has 115 partners and a total staff of around 1040. The firm is structured around the following practice groups:

- banking and financial services
- corporate advisory
- energy, resources, infrastructure and project finance
- e-commerce
- litigation
- insurance
- native title and cultural heritage
- planning environment and government
- property and construction
- workplace relations
- trade practices and competition
- intellectual property and technology.

our international profile

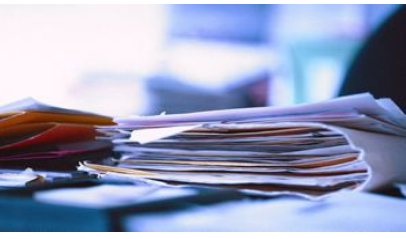
Internationally, we undertake assignments for clients in Asia (including China, Japan, India, Indonesia, Vietnam, Singapore, Thailand and Malaysia) and Papua New Guinea (PNG), specialising in commercial law, banking and finance, project acquisition and development, and energy, resources and infrastructure. A number of our partners have extensive international experience.

The firm recently marked the 35th anniversary of its PNG office, which practises principally in major infrastructure and resource projects, finance and commercial litigation.

gadens lawyers is the only Australian member of the International Lawyers' Network, one of the world's largest associations of independent legal firms. This gives us access to 80 full-service law firms in 61 countries on 6 continents. In addition we also have a network of individual contacts in a range of overseas law firms who we know well and have worked successfully with in the past.

We welcome your enquiries and assure you that your business will be handled professionally, efficiently and with the personalised attention of our partners.

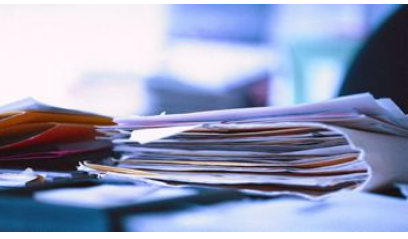
This publication by gadens lawyers highlights the important legal issues to consider in setting up or doing business in Australia. It is provided to clients and correspondents for their information on a complimentary basis. It represents a brief summary of the law applicable as at September 2007 and should not be relied on as a definitive or complete statement of the relevant laws. Advice should always be sought on specific circumstances.



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a guide to doing business in Australia

introduction to foreign investment in Australia

The Australian Government welcomes foreign investment in recognition of the substantial contribution that it makes to Australia's economic growth. The Government's policy is to encourage direct foreign investment which is consistent with the needs of the Australian community including:

- the expansion of private investment
- the development of internationally competitive and export-oriented industries
- the creation of employment opportunities.

Advantages of investing in Australia include:

- strong economic credentials
- democratic and political stability
- highly skilled and multilingual workforce
- dynamic financial services
- sophisticated telecommunications and information technology systems
- innovative culture with excellent R&D infrastructure
- cost competitive location
- open and efficient regulatory environment
- strategic time zone
- welcoming attitude and excellent quality of life.

Investors may encounter commercial and legal differences when establishing a business in Australia. Legal advice should be sought at an early stage to fully maximise business opportunities and minimise the risk of misunderstanding.

system of government and laws

Australia is a democracy with a federal system of government, which means that government is divided between the Commonwealth and the governments of the States and Territories (comprising New South Wales, Queensland, Victoria, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory).

The Federal Government legislates on specific areas listed in the Constitution which are of relevance to the nation as a whole, such as trade and commerce, defence, foreign affairs, taxation, banking, communications and customs. The State and Territory Governments retain the right to legislate in the remaining areas, such as education, health, transport and housing.

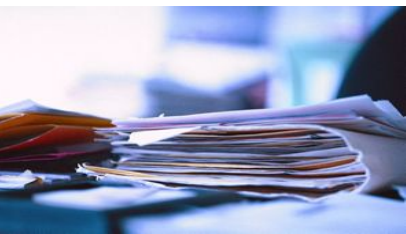
In addition to the Federal and State Governments, there is a third level of government, being the Local Governments for cities and municipalities, which make regulations applying to their particular local area.

A business established in Australia will therefore be bound by Federal laws, the laws of the particular States or Territories in which it operates and the regulations of Local Government areas.

Australia is a common law country. Where the common law or equity has not been overruled by statute it runs beside much of it.

legislation and authorities

Legislation and statutory authorities that foreign companies may be required to comply with include:



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Corporations Act 2001

This Act is administered by the Australian Securities and Investments Commission (ASIC), which is responsible for regulating companies, the securities industry and the financial services industry.

taxation

The Australian Taxation Office is the statutory body responsible for administering the federal taxation system.

Reserve Bank

The Reserve Bank of Australia is the central bank, which is responsible for monetary policy and financial stability (including issuing of currency).

Australian Prudential Regulation Authority

The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the Australian financial services industry. APRA supervises all bank and non-bank financial institutions to ensure that prudential standards and practices are met to maintain a stable and competitive financial system.

Trade Practices Act 1974

This Act is administered by the Australian Competition and Consumer Commission (ACCC), which regulates competition, acquisitions, pricing and misuse of market power.

Foreign Acquisitions and Takeovers Act 1975

This Act is administered by the Foreign Investment Review Board (FIRB), which is responsible for assessing direct investment proposals submitted by foreign interests. FIRB also makes recommendations to the Federal Government on foreign investment proposals, and advises foreign investors on government policies.

intellectual property

IP Australia is the statutory authority responsible for administering intellectual property legislation, including the *Patents Act 1990*, the *Trade Marks Act 1995*, the *Designs Act 2003* and the *Plant Breeders' Rights Act 1994*.

For further information, refer to the Useful Links at the end of this guide.

visas and migration

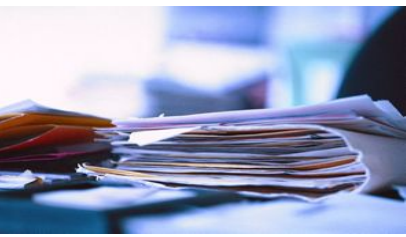
The Australian Government regulates the entry of non-Australian citizens and permanent residents to Australia.

The focus is to facilitate the entry of an increased number of skilled and business migrants who have the ability to advance the Australian economy. Skilled migration is aimed at overcoming skill shortages – skilled and business migrants are also seen to develop new businesses, contribute to technological development and improve Australia's international trade and business markets.

Eligibility for any visa is determined by strict criteria, which the applicant must meet for the application to succeed. In addition, all persons seeking permanent entry to Australia must meet rules on health and character. In some visa categories, temporary entrants to Australia must also meet these rules.

Australian and international businesses seeking to recruit overseas employees to work in Australia can sponsor the employee to enter Australia either as a temporary or permanent resident.

There are a wide range of visa categories regulating temporary and permanent entry to Australia. For information on visa categories, refer to the 'useful links' at the end of this guide.



foreign investment policy

foreign investment incentives

The Australian Government supports foreign investment and has a national investment agency – Invest Australia.

Invest Australia helps international companies build their business in Australia. Invest Australia's objective is to attract productive foreign direct investment into Australia to support sustainable industry growth and development.

Examples of ways that Invest Australia can assist include:

- assisting to efficiently pass proposals through regulatory approval processes;
- locating suitable joint venture partners; and
- collecting information on overseas operating costs for comparison.

For more information see 'useful links' at the end of this guide.

foreign investment regulation

Foreign investment in Australia is governed by the *Foreign Acquisitions and Takeovers Act 1975*, which is a national statute administered by the Foreign Investment Review Board (FIRB).

Foreign investment regulation applies to 'foreign persons'. Foreign persons include a company in which:

- a person who does not ordinarily reside in Australia; or
- a company incorporated overseas,

holds 15% or more of the company (or where 2 or more of these persons or companies hold 40% or more of the company).

From 1 January 2005 the law has changed to provide concessions for United States investors. This is a result of the Australia-US Free Trade Agreement.

impact of the Australia-US free trade agreement on foreign investment

US investors no longer have to notify FIRB for most investments in Australia of less than A\$871 million.¹ As a result, US investors will receive preferential treatment over competing foreign investors and are likely to have lower transaction costs.

The benefits to US investors from the Agreement also include undertakings from Australia:

- to provide national and most favoured nation treatment for US investors;
- to provide investment protections; and
- not to introduce laws that impede US investors making, or dealing freely with, investments.

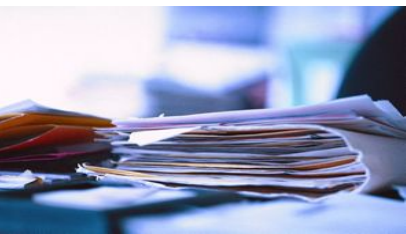
acquisitions which must be approved

foreign investors

As a general overview, 'foreign persons' must notify FIRB if they propose to acquire:

- a substantial Australian company shareholding or an Australian business with total assets valued at more than A\$100 million;
- Australian urban land of any value; or
- any interest in a business which is in a 'sensitive sector' (for example, defence, media or telecommunications).

¹ US figures are subject to annual indexation.



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united states investors

US investors must notify FIRB if they propose to acquire:

- the assets of an Australian business valued at more than A\$871 million. FIRB must be notified of proposed investments of more than A\$100 million in businesses in a 'sensitive sector';
- Australian urban land of any value, except for certain types of commercial properties where:
 - the land value is less than A\$871 million (A\$50 million for non-US investors); or
 - the acquisition is incidental to the conduct of the investor's business.
- a substantial shareholding (15% or more of the company, or 40% or more where 2 or more parties act together) in an Australian company:
 - with total assets in excess of A\$871 million (A\$50 million for non-US investors); or
 - with more than half of its assets in Australian urban land;
- an offshore company with downstream Australian assets:
 - in excess of A\$871 million; or
 - which account for 50% or more of the company's global assets.
- interests in debt instruments with quasi-equity characteristics – such instruments will be treated as direct foreign investment.

A US investor includes:

- an entity constituted or organised under US law; and
- a branch of an entity located in the US and carrying on business activities in the US.

Once a proposed acquisition is notified to FIRB, a decision as to whether consent will be given to the

acquisition will be made within 30 days in most cases. Approval is normally granted unless the acquisition is judged to be contrary to the national interest.

penalties

Divestment of an asset may be ordered if FIRB was not notified of an acquisition when it should have been.

application of Trade Practices Act

The *Trade Practices Act* 1974 (TPA) can also have application to acquisitions of shares or assets of Australian companies by foreign interests. Section 50(1) of the TPA prohibits such acquisitions where they would have the likely effect of substantially lessening competition in a 'substantial market'. Section 50A of the TPA provides for regulation of mergers that take place outside Australia which have an anti-competitive effect within Australia.

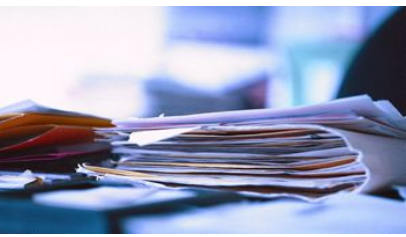
For more information on foreign investment see the section below – 'Australia's Free Trade Agreements'.

types of business entities

A foreign investor wishing to commence business in Australia may choose from a variety of business structures, ranging from a branch office or subsidiary company to a partnership, joint venture, sole proprietorship or trust. The final decision as to the structure to be adopted will depend upon the precise needs of the investor and financial and tax considerations.

Australian branch

A foreign company planning to carry on business in Australia must register with the Australian Securities and Investments Commission (ASIC). A branch office can be established by registering with ASIC as a foreign company. An Australian resident local agent



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must be appointed. ASIC will issue an Australian Registered Business Number (ARBN).

Documents that ASIC usually require include:

- a certified copy of the company's current Certificate of Incorporation or Registration;
- a certified copy of the company's constitution (Memorandum and Articles of Association);
- forms detailing any charges over the property of the company;
- if the directors include directors who are both resident in Australia and members of a local board of directors, a memorandum signed by the foreign company stating the powers of those directors; and
- a memorandum of appointment of a local agent.

As opposed to a company, a branch will not be a separate legal entity and liabilities will be those of the foreign company.

newly incorporated company

A newly incorporated Australian company may be set up to carry on business in Australia.

In practice, the differences for a foreign investor between establishing an Australian company or an Australian branch are minor. Branches may have difficulty in sourcing external funding from Australian bankers without specific guarantees from an overseas parent. Also, a branch does not require an Australian resident director whereas a company does.

The 'limited liability' company is the most popular form of business structure adopted by foreign investors carrying on business in Australia.

The liability of members is limited to the purchase of the shares in the company.

Companies may be either proprietary (private) companies that are limited by shares, or public companies limited by shares or guarantee.

Both public and proprietary companies may be established immediately.

proprietary company

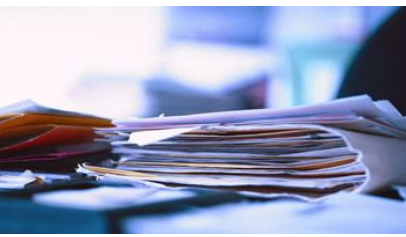
A private proprietary company is denoted by the abbreviation 'Pty Limited'. A proprietary company:

- must have at least one but no more than 50 non-employee shareholders;
- must have at least one director residing in Australia;
- must have a registered office in Australia;
- are not required to have a company secretary but if they do have one or more secretaries, at least one must ordinarily reside in Australia; and
- must not engage in fund raising activities (other than offering shares to existing shareholders or employees).

public company

A public company is denoted by the abbreviation 'Limited'. A public company:

- must have at least one shareholder with an unlimited maximum number of members;
- must have at least three directors, two of whom must ordinarily reside in Australia;
- must have at least one company secretary that ordinarily resides in Australia;
- must appoint an auditor; and
- may raise capital by issuing a prospectus to offer shares and other securities to the public.



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Companies are regulated by the *Corporations Act* under which directors have substantial and wide-ranging obligations. The common law also imposes significant responsibilities on directors. Although companies have limited liability, the directors may be personally liable for breach of duties. See the section below on 'duties of company directors'.

joint venture

Two or more individuals or corporations may carry on business as a joint venture. Joint venturers may take the proceeds of the venture in output or product. This is why joint ventures are a popular structure for energy, mining and manufacturing enterprises.

These vehicles are distinguished from partnerships in that they are usually formed for a particular project or product (contrasting with partnerships, which are formed to carry on business in common with a view to profit).

Joint ventures are governed by the common law and the law of contract. They may be incorporated (with the limited liability of a separate entity) or unincorporated.

A joint venture will often share many of the characteristics of a partnership. In fact, many so-called 'joint venture agreements' actually create the relationship of a joint partnership at law.

partnership

A partnership is an agreement between two or more people or companies who decide to carry on business together with a view of profit.

Partners in a partnership are liable for the whole of the debts and obligations of the venture personally.

The law recognises a form of partnership known as a limited liability partnership. This has been created to

encourage foreign investment in Australia and is a form of partnership that limits the participants' liability.

sole proprietor

A foreign investor may choose to carry on business in Australia as a sole proprietor trading under his or her own name or another business name. If another business name is chosen, it must be registered.

A sole proprietor will be personally liable for all debts and obligations in carrying on his or her business.

trusts

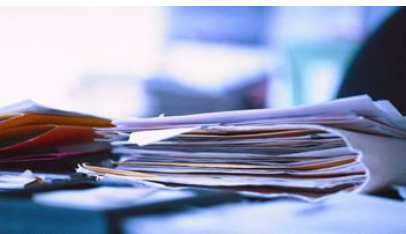
A trust is a relationship in which one person (the 'trustee') holds the legal title to property on behalf of and for the benefit of others (the 'beneficiaries'). A trustee may be an individual or a company.

A trust may be created in order to carry on a business.

Trusts are generally a fixed trust, a discretionary trust or a unit trust. With a discretionary trust, net profit is distributed at the discretion of the trustee and may change from year to year. Unit trusts distribute their profits in relation to the unit holdings of the beneficiaries.

Trusts may be useful from both a tax planning and asset protection perspective. Administration and establishment costs are similar to that of companies. Trusts are governed by common law and contract law.

Taxation issues in relation to trusts are complex and can depend on the purpose of the trust and the nature and number of the beneficiaries.



company and business names

company names

Any foreign undertaking that is commencing business in Australia should ensure that the company and/or business name of its choice are protected for its future use. This protection is achieved through registration.

If an entity wishes to trade in Australia as a limited liability corporation it must register its name with ASIC.

If a company wishes to carry on business under a name which is different from its company name, that business name must be registered in all states and territories in which the business will be conducted. Registration of a business name is necessary in order to carry on business under that name.

business names

Unlike company names, business names are administered under state law by state authorities, although ASIC does maintain a National Names Index, which is kept up-to-date by access to the Business Names Registers of each of the states and territories.

If a person is carrying on business under any name other than their own they must register a business name. Registration of a business name does not create a legal entity.

trade marks

Protection of brand names may be achieved by means of registration of a trade mark or service mark through IP Australia. A trade mark is used to distinguish the goods and services of one trader from those of another trader. Australia is a signatory to the international TRIPS Agreement and the Madrid Protocol, and maintains very similar intellectual property laws to many countries around the world.

passing off and the Trade Practices Act 1974

In Australia the common law protects the use of marks used to distinguish the source or origin of goods or services by allowing an action for passing off.

Often such an action is coupled with an action under section 52 of the *Trade Practices Act 1974*. This section prevents traders from engaging in misleading or deceptive conduct in the course of trade.

taxation

introduction to taxation

The law relating to taxation in Australia is detailed and can be complex in specific situations. Careful consideration should be given to the nature of the business to be conducted in Australia and any taxation implications resulting from the nature of the business. Therefore, the following information should not be used in substitution for detailed legal advice.

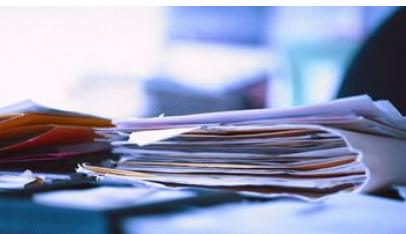
The Australian tax year ends 30 June, however it is possible to apply for a substituted year end to coincide with the financial year of a parent company.

direct taxes

The principal direct tax which is levied by the Federal Government is income tax which is assessed on individuals, companies and trusts.

Australian residents are subject to tax in Australia on income derived from all (worldwide) sources, but tax credits will typically be available where foreign tax is paid by an Australian resident taxpayer in relation to income derived from a foreign source.

Non-residents are normally taxed in Australia on income derived from Australian sources only.



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The general income tax rate for companies is currently 30%. The current personal tax rates for individuals is based on a sliding scale from 0% to 45% (for the year ended 30 June 2007) for the component of the individual's assessable income over the relevant threshold for each rate.

Most businesses are required to pay quarterly (PAYG) instalments throughout the year based on their estimated tax liability, although it is necessary to lodge an annual tax return to determine their actual income tax liability.

Capital gains tax is also payable on the disposal of capital assets which have been acquired after 19 September 1985. The net capital gains of the taxpayer (reduced by capital losses) are included in the taxpayer's total assessable income in the same way as other items of assessable income.

indirect taxes

The principal indirect tax assessed and imposed by the Federal Government is Goods and Services Tax (GST), but there are also excise duties imposed on certain commodities and customs duties on imported goods.

state taxes

State taxes comprise mainly payroll tax, which is levied on the gross payroll of a business; land tax levied on the unimproved value of land; and stamp duty levied on certain transactions and documents.

local taxes

Local taxes comprise mainly rates, which are broadly levied on the value of land.

other taxes

fringe benefits tax

Fringe benefits tax (FBT) is a tax payable by employers on the value of certain benefits that have been provided to their employees or to associates of the employees. It typically applies to 'in kind' benefits and is payable at the top personal tax rate based on the taxable value of the benefit.

superannuation contributions

Superannuation contributions to a fund which complies with Federal Legislation are tax deductible to the employer making the contributions provided they do not exceed a maximum threshold. Income derived by a complying fund, including the contributions it receives, is taxable at the rate of 15%.

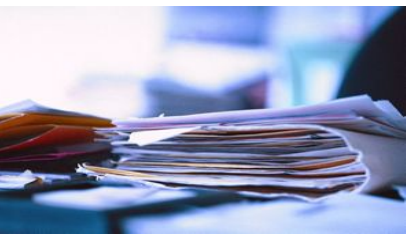
Medicare levy

The Medicare levy is payable by individuals at rates of up to 1.5% of the individual's assessable income. High income taxpayers without private patient hospital insurance are liable to pay an extra 1% surcharge in addition to the general levy.

goods and services tax

GST applies at a flat rate of 10% on the supply of most goods and services. The GST is a multi-staged tax payable by suppliers (similar to a Value Added Tax), whereby each stage in a supply chain is potentially taxable but with registered entities being entitled to refunds of GST incurred on their business inputs (referred to as 'input tax credits'). Importantly, GST is not applied to most exports of goods and services.

Regardless of whether business in Australia is conducted through an Australian company or an Australian branch, businesses must register for GST if they make taxable supplies of more than A\$50,000 per annum (increasing to A\$75,000 from 1 July 2007).



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payroll tax

Each state and territory has payroll tax legislation under which an employer is liable to pay tax on the employer's annual payroll. The tax is only payable where the employer's annual payroll exceeds a minimum threshold.

stamp duty

Each state and territory imposes its own stamp duties. Stamp duty is a tax on transactions and certain instruments, including leases, securities, conveyances of real property, business assets and share transfers. The rates vary among the states and territories and depend on the nature of the transaction.

The duty is generally payable by the lessee, mortgagor, purchaser or transferee (as applicable).

land tax

Land tax is an annual tax levied on the owner of land in Australia based on the unimproved capital value of the land (which excludes the value of the building or capital improvements).

superannuation guarantee levy

It is compulsory for all employers to make superannuation contributions for the benefit of all employees. The minimum contribution is 9%.

death, inheritance and gift taxes

There are no specific death, inheritance or gift taxes in Australia, although each of these events can have significant tax implications.

capital gains tax

Capital Gains Tax (CGT) applies to a wide range of events (such as an asset disposal) affecting most forms of property or enforceable rights. The CGT liability is determined by subtracting the cost base of

the asset from the capital proceeds for the event. Gains are generally assessed on realisation or other specified event (such as ceasing to be an Australia resident), not on an accruals basis.

The ordinary income tax rates apply to capital gains, however individuals are generally eligible for a 50% discount on CGT if they held the asset for at least 12 months. There are a range of concessions and deferral mechanisms for businesses and individuals.

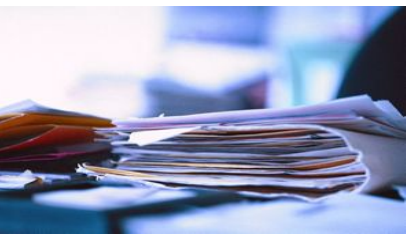
withholding tax

The general rule that non-residents are liable for Australian tax on all Australian source income is modified in relation to dividend, interest and royalties. Payers are required to withhold tax from interest, dividends and royalties paid to non-residents. Trustees, agents or others who receive interest, dividends or royalties on behalf of a non-resident, where withholding tax has not been withheld by the payer, are also required to withhold tax.

The tax rates of withholding tax vary depending on, amongst other things, whether a 'Double Tax Treaty' applies.

The dividend, interest or royalty does not need to be actually paid to the non-resident to be subject to withholding tax. The liability can also arise where the income is re-invested, accumulated, capitalised or otherwise dealt with on behalf of the non-resident.

Certain other payments to non-residents by a resident business are subject to foreign resident withholding tax (FRWT) rules. However, the recipient of a payment subject to withholding under the FRWT rules is generally entitled to a credit for that amount once it is determined that no income tax is payable.



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thin capitalisation

Australia's thin capitalisation rules are designed to prevent entities with cross border operations from funding their operations with excessive levels of debt in order to procure a more favourable Australian tax result. Interest deductions are limited by reference to a statutory debt/equity ratio assessed on the total debt of the Australian operations.

transfer pricing rules

The transfer pricing rules seek to counter international profit-shifting techniques by ensuring that related parties to international transactions determine their pricing based on arm's length methodologies.

The rules allow the Tax Commissioner to reallocate income or adjust deductions to reflect an arm's length arrangement. The rules extend to branches or divisions of the same enterprise where non-arm's length transactions are made between an Australian permanent establishment and an overseas permanent establishment of the same enterprise.

consolidation regime

The consolidation regime allows qualifying groups of entities to be treated as a single entity for income tax purposes.

Once part of a consolidated group, intra group transactions will be ignored for tax purposes. The consolidated group will generally be required to lodge only one income tax return and one franking account.

employment

Most Australian workplaces are governed by one federal industrial relations system because they are 'constitutional corporations', that is, foreign, financial or trading corporations who are one type of employer covered by the legislation. The balance of the

workforce is governed by the industrial relations laws of the various states and territories of Australia.

The federal system set out in the *Workplace Relations Act 1996 (Cth)* (WR Act) is described below.

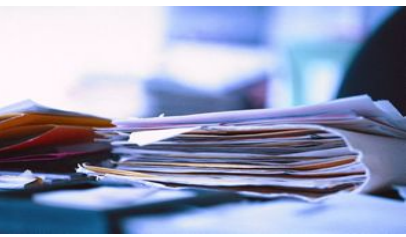
There are minimum terms and conditions known as the 'Australian Fair Pay and Conditions Standard' (AFPCS), which apply to all employees in the federal system despite their remuneration but which may be displaced by more generous terms and conditions offered by an employer. The AFPCS covers hours of work, minimum rates of pay, annual leave, personal leave (sick / carers leave and including compassionate leave) and parental leave (paternity / maternity / adoption).

Other matters set out in and prescribed by the WR Act include:

- minimum notice periods of termination for some employees
- meal breaks and public holidays
- the making, varying and termination of workplace agreements including AWAs
- terms and conditions of employment to be offered in a transmission of business
- prohibited conduct (freedom of association)
- unlawful termination
- unfair dismissal
- union rights of entry and industrial action.

A failure to comply with various terms of the WR Act may result in penalties being imposed and various other remedies eg reinstatement in an unfair dismissal situation.

In addition to the AFPCS there are minimum terms and conditions set out in 'industrial instruments', which are awards or agreements made under the WR Act (a



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workplace agreement) or agreements made under the state or territory industrial relations laws (if prior to 27 March 2006). Industrial agreements may be individual or collective. Collective agreements may be union collective or non-union collective.

An award may either be 'federal' or 'state' although state awards are now part of the federal system, at least until 2009. For employers bound by state awards these apply automatically by virtue of an industry or occupation whereas federal awards require the employer or a body of which it is a member (ie an employer association) to be named.

Not all employees' terms and conditions will be covered by an award or agreement.

There is a complex set of rules regarding the operation of agreements and awards which bound employers prior to 27 March 2006 and their ongoing 'enforceability'.

There are other laws which are relevant to employees and these include various taxation laws, laws regarding workers' compensation, occupational health and safety, discrimination, superannuation and long service leave.

trade practices legislation

The *Trade Practices Act 1974* (TPA) is a national statute which governs competition between companies and consumer protection.

The restrictive trade practices provisions are intended to prevent practices which reduce competition. Practices which involve a misuse of market power, exclusive dealing, resale price maintenance or price discrimination are illegal under the TPA if they substantially reduce competition.

The consumer protection provisions aim to prohibit false and misleading advertising and representations regarding price and quality of goods and services.

corporate governance

principles of good corporate governance

In March 2003 the Australian Stock Exchange's Corporate Governance Council (Council) released a set of guidelines, referred to as 'Principles of Good Corporate Governance and Best Practice Recommendations'. These guidelines have been extensively reviewed by the Corporate Governance Council and a public consultation process was carried out. Updated guidelines were released on 2 August 2007.

These guidelines set out 8 principles that the Council believes underlie good corporate governance. The Council also provides guidance in the form of best practice recommendations.

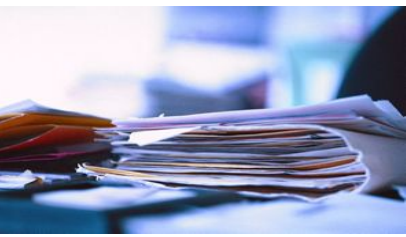
In contrast to the prescriptive approach to corporate governance adopted by United States legislators post-Enron, the recommendations are not mandatory.

Listed companies are required to provide a statement in their annual report disclosing the extent to which they have followed the recommendations, and the reasons why they have not followed any of the recommendations.²

The Council's principles include that a company should:

- lay solid foundations for management and oversight;

² ASX Listing Rule 4.10.



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- structure the board to add value;
- promote ethical and responsible decision-making;
- safeguard integrity in financial reporting;
- make timely and balanced disclosure;
- respect the rights of shareholders;
- recognise and manage risk; and
- remunerate fairly and responsibly.

duties of company directors

Australian law requires a high standard of corporate governance. Directors' duties are set out in the *Corporations Act 2001* and in the common law. The Australian Securities and Investments Commission (ASIC) is responsible for enforcing the Act.

foreign companies

The civil and criminal penalties for breach of certain directors' duties do not apply to an act by a director of a foreign company unless the act occurred in connection with:

- the foreign company carrying on business in Australia; or
- an act or decision by the foreign company in Australia.

who is a director?

A director includes people:

- who act in the position of a director, whether or not validly appointed (de facto director); and
- whose instructions or wishes the directors of the corporation are accustomed to acting in accordance with (shadow director).

If the board of a subsidiary company accepts the decisions of its holding company without independent thought, the holding company is likely to be a shadow director.

directors' duties

The duties of directors include:

A. duty to act with due care and diligence

This duty requires that directors:

- take reasonable care and diligence when performing functions;
- acquire an understanding of the company's business;
- keep continually informed and assess whether practices are proper;
- read and understand the accounts regularly;
- enquire about any financial matters that call for enquiry; and
- regularly attend board meetings.

B. duty to act in good faith

A director must act:

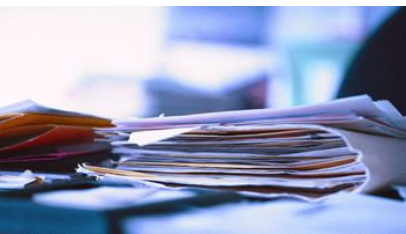
- in good faith;
- in the best interests of the company; and
- for a proper purpose.

C. duty not to improperly use their position or information obtained during the course of their directorship

A director should not improperly use their position, or information gained as a result of that position, to gain an advantage for themselves or someone else, or to cause detriment to the company.

D. duty not to act recklessly or dishonestly

A breach of directors' duties gives rise to civil penalties. These penalties can include fines of up to \$200,000; a ban from managing companies; and/or an order to compensate the company.



Criminal penalties may arise if there is a 'reckless or intentional breach' of certain duties. Criminal penalties can include fines of up to \$200,000; and/or jail for up to five years.

E. duty to prevent insolvent trading

Directors have a duty to ensure that the company does not incur a debt while insolvent, or does not become insolvent by incurring a debt. A holding company can be liable for the debts of its insolvent subsidiary.

F. fiduciary duties

Directors also owe fiduciary duties to the company as a whole (not to shareholders individually). In particular, a director:

- must act honestly, in good faith and to the best of their ability in the interests of the company; and
- must not allow conflicting interests or personal interest to override the interests of the company.

delegation

A director may delegate any of their powers to an employee or another person and will not be responsible so long as:

- the delegation is recorded in the company's minute book;
- the director believes on reasonable grounds that the delegate will exercise the power in conformity with the director's duties; and
- the director believes on reasonable grounds, in good faith and after making proper inquiry that the delegate is reliable and competent in relation to the power delegated.

fundraising in Australia

The *Corporations Act 2001* governs debt and equity fundraising in Australia. The Act also regulates

participants in the financial services and securities industry.

The Act requires certain disclosure in relation to the issue and sale of securities. Securities include shares, debentures, rights or interests in securities or options to acquire securities (by way of issue).

Australian Stock Exchange

The Australian Securities Exchange (ASX) operates Australia's primary national stock exchange for equities, derivatives and fixed interest securities. ASX has:

- a domestic market capitalisation of \$1.63 trillion;
- a total of 2090 listed companies; and
- an MSCI index rating of 8th in the world (as at 30 June 2007).

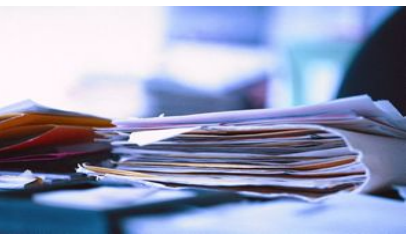
For entities listed on ASX, Listing Rules (as well as the *Corporations Act 2001*) will affect the manner in which offers of securities are made.

The impact of the Listing Rules is not covered in detail, however it is important to be aware that they prevent a company from issuing more than 15% of its issued equity securities in any 12 month period (unless the approval of ordinary shareholders is obtained).

Corporations Act 2001

The *Corporations Act* governs the offer of securities received in Australia, regardless of where any issue or sale takes place. Therefore, foreign companies offering securities where the offer is received in Australia, including by electronic means such as the Internet, need to be aware of the requirements under the Act.

The Act requires that a disclosure document must be prepared and lodged with ASIC in relation to offers for



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the issue of securities, unless an exception to disclosure applies.

The majority of offers of existing securities are not regulated under the Act. One important exception is offers of existing securities where the securities were issued without a disclosure document and either the offerer or the buyer had the intention of the buyer on-selling the securities.

issuing securities – disclosure document requirements

An offer of securities by a company must generally be accompanied by a disclosure document. A prospectus is the most commonly used disclosure document. Among other things, a prospectus must include all the information that investors (and their advisers) would reasonably require to make an informed assessment of:

- the rights and liabilities attaching to the securities; and
- the assets and liabilities, financial position and performance, profits and losses and prospects of the company issuing the securities.

The disclosure document must also include knowledge of particular people associated with the issue, including the underwriter and the directors of the offerer.

The disclosure document must be registered with ASIC. ASIC will usually have 7 days to review the prospectus – after this time the issuer may commence issuing the securities.

There are serious penalties for misstatement in a prospectus. In order to protect against liability it is important that people involved in preparing the prospectus can show that they made all reasonable enquiries and believed on reasonable grounds that the

prospectus was not misleading or deceptive – this is referred to as the 'due diligence defence'.

exceptions to the requirement to prepare a disclosure document

The main exceptions to the requirement to lodge a disclosure document include:

- small scale personal offers (subject to ceilings on the number and value of offers);
- offers where the minimum amount payable for the securities by the investor is \$500,000 (with an allowance for aggregation with amounts previously paid by the investor);
- offers to sophisticated or professional investors;
- offers of securities to existing holders;
- companies borrowing from a related company; and
- companies borrowing from a bank.

financial services law

The *Corporations Act* was amended with effect from 11 March 2002 in order to facilitate regulation of the financial services industry. The changes introduced requirements for:

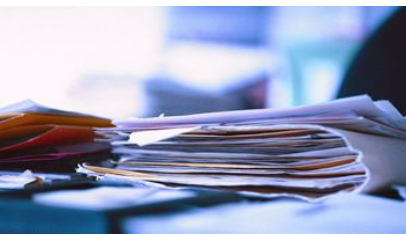
- certain participants in the financial services industry to be licensed; and
- specific disclosure in relation to 'financial products'.

managed investment schemes

Under the *Corporations Act*, an interest in a managed investment scheme is defined as a right to benefits produced by the scheme.

A managed investment scheme has the following features:

- investors contribute funds to acquire rights to benefits produced by a scheme;



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- the contributions are pooled or used as a common enterprise;
- the contributions produce financial benefits or benefits consisting of rights or interests in property for the investors; and
- the investors do not have day-to-day control over the operation of the scheme.

The issue of debentures by a company is specifically excluded from the definition of an 'interest in a managed investment scheme'. However, other debt instruments issued to investors may be an interest in a managed investment scheme and subject to the requirements under the Act.

Managed investment schemes must be registered with ASIC if they are operated in Australia and:

- have more than 20 members;
- the operator is in the business of promoting managed investment schemes;
- are part of a closely-related scheme which together have more than 20 members.

There are a number of exemptions to the registration requirement. For example, a managed investment does not need to be registered if all of the interests in the scheme are held by 'wholesale investors' (as defined by the *Corporations Act*). ASIC has also issued a number of class orders providing registration exemptions.

financial services providers

A person who 'carries on a financial services business in Australia' is generally required to hold an Australian Financial Services Licence.

A person will be carrying on a financial services business in Australia if they engage in conduct that is intended (or likely) to induce people in Australia to use their financial services. It makes no difference whether

the person carrying on the business is located in Australia or elsewhere in the world.

Generally, a person will be providing a financial service if they provide financial product advice, deal in a financial product or operate a registered scheme.

A 'financial product' is a facility through which an investor makes a financial investment, manages financial risk or makes non-cash payments.

One-off transactions are not likely to be caught by the requirement to hold an Australian Financial Services Licence. Things that may indicate the carrying on of a business include – a place of business in Australia or administering or otherwise dealing in property in Australia.

who needs to hold an Australian financial services licence?

An Australian Financial Services Licence only needs to be held by the person providing the financial service. Licensees may appoint authorised representatives to act under their licence, however the licensee will generally be responsible for all acts of its authorised representatives.

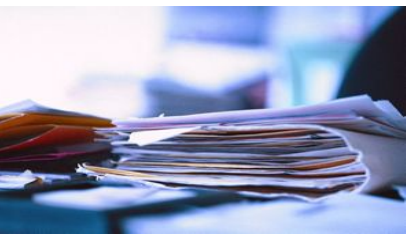
failure to comply with financial services law

There are serious consequences for failing to comply with financial services laws.

The consequences can include fines, jail, banning orders and/or, in certain circumstances, the right for clients to rescind agreements.

offering financial products to investors

An issuer of financial products who intends to offer financial products to 'retail clients' (as defined by the



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Corporations Act) will need to register a product disclosure statement or prospectus with ASIC and give the document to potential investors.

An investor will be a 'retail client' **unless**:

- the price paid for the financial product (or its value) is \$500,000 or more;
- the financial product is provided in connection with a business that is not a small business (ie a business employing at least 20 people or a manufacturing business employing at least 100 people);
- the investor is a 'professional investor' (as defined by the *Corporations Act*);
- the investor:
 - has net assets of \$2.5 million; or
 - has gross income of \$250,000 or more for each of the last 2 financial years;
- the investor is a 'sophisticated investor' and the financial product is not a general insurance product, a superannuation product or a retirement savings account. The 'sophisticated investor' exemption requires the licensee to:
 - assess the client's knowledge and understanding of the financial product,
 - provide the client with written reasons for why they consider the client is a 'sophisticated investor'; and
 - obtain a written acknowledgement from the client that they have not been given a product disclosure statement (or other document that would be given to the client as a 'retail client') and the licensee has no other obligation to the client as a 'retail client'.

There are certain exemptions from the requirement to prepare and lodge a product disclosure statement. Examples of these exemptions include small-scale

personal offerings and exemptions made in ASIC's discretion.

Australia's free trade agreements

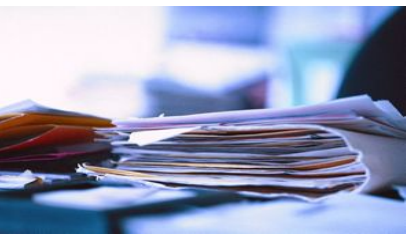
The Australian Government is committed to pursuing opportunities to increase trade and investment opportunities. One important way the Government does this is by negotiating free trade agreements (FTAs) with important trading partners.

The Australian Government's strategy is to promote trade liberalisation at multilateral, regional and bilateral levels.

An FTA is a contractual agreement between two or more parties under which they give each other preferential market access. Australia's FTAs apply to most trade in goods between the two parties and also cover trade in services, as well as other non-tariff issues such as the recognition of standards, protection of intellectual property rights and regulation of foreign investment.

Australia currently has four FTAs, the mutual benefits of these agreements are set out below:

1. United States Free Trade Agreement – effective since January 2005
2. Thailand Free Trade Agreement – effective since January 2005
3. Singapore Free Trade Agreement – effective since July 2003
4. New Zealand Closer Economic Relations Trade Agreement – effective since 1983.



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proposed free trade agreements

Australia and New Zealand are undertaking FTA negotiations with the 10 members of the Association of Southeast Asian Nations.

Australia is also in FTA negotiations with:

- China
- Chile
- Japan
- Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE)
- Malaysia.

There is also a joint study on a possible FTA with the Republic of Korea.

For further information refer to the 'useful links' and the 'foreign investment' section of this guide.

benefits of the US – Australia FTA

benefits for Australia

tariffs

- Over 97% of Australian manufactured exports to the US are now duty free, with the remainder phased out by 2015.
- For agricultural products generally, 66% of agricultural exports will be duty free immediately – with the remainder of duty phased out in 18 years.
- The US will waive the Merchandise Processing Fee levied on all imports, saving Australian industry around US\$10m a year.
- Australian industries that will particularly benefit from the FTA include:
 - commercial vehicles and auto parts

- metals, particularly aluminium
- minerals
- processed seafood
- paper, chemicals, wine and ship repair.

rules of origin

The 'rules of origin' test is generally whether or not a manufactured product has been 'substantially transformed' in either Australia or the United States before it can benefit from the agreement.

textiles, clothing and footwear

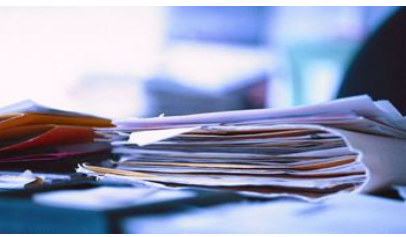
- Australia will provide US imports with a 2% tariff preference, with all tariffs phasing to zero by 2015.
- The US will match Australian tariff rates where the US rates are higher, and will provide a preference of one-tenth the tariff rate where the US rates are lower.

US government procurement AUSFTA provides access for the first time to US Government Procurement worth around A\$200 billion a year.

benefits for USA

tariffs

- More than 99% of US manufactured exports to Australia will become duty-free immediately upon entry into force of the Agreement.
- Significant benefits for: autos and auto parts; chemicals, plastics and soda ash; information technology products; electrical equipment and appliances; non-electrical machinery; fabricated metal products; construction equipment; paper and wood products; furniture and fixtures; and medical and scientific equipment.
- All US agricultural exports to Australia will receive immediate duty-free access.



market access

Australia has allowed US access in sectors such as telecommunications, express delivery, computer and related services, tourism, energy, construction and engineering, financial services, insurance, audio/visual and entertainment, professional, environmental, education and training, and other services sectors.

foreign investment

The following changes to Australia's foreign investment policy were agreed under the AUSFTA:

- Exemption from the Foreign Acquisitions and Takeovers Act of acquisitions of certain interests in financial sector companies.
- A screening threshold of A\$871 million³ for acquisitions of interests in Australian businesses in non-sensitive sectors.
- A screening threshold of A\$100 million for acquisitions of interests in Australian businesses in sensitive sectors (such as media, defence and telecommunications).
- A screening threshold of A\$871 million for acquisitions of interests in non-residential developed commercial property.
- Removal of existing policy-based screening requirements for the establishment of new Australian businesses (other than investment by the United States Government).

Government procurement

US suppliers are granted non-discriminatory rights to bid on contracts from 80 Australian government entities.

³ All US figures are subject to annual indexation.

benefits of the Thailand – Australia FTA

mutual benefits

tariffs

- 95% of all current trade between Australia and Thailand will be tariff-free by 2010.
- Tariffs for most agricultural products will be eliminated by 2020.

rules of origin

For a number of products, particularly manufactures, the exported good must contain a defined amount of local content. In most cases, this is 40% or 45%.

Investments

Both countries' investors will enjoy fair and equitable treatment, full protection and security against expropriation, the right to prompt and adequate compensation and the right to transfer their funds out of Australia or Thailand.

competition law

Ensure laws are in place between both countries with respect to anti-competition law, co-operation and exchange of information between countries.

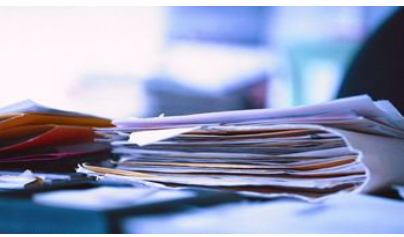
intellectual property

Australia and Thailand will co-operate to eliminate trade in goods which infringe intellectual property rights.

benefits for Australia

tariffs

Australian exports to Thailand will benefit immediately from tariff cuts, particularly in areas such as agriculture, processed food and beverages, mining and automotive products. Approximately 80% of all



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tariffs currently paid by Australian exporters will be eliminated.

investments

Thailand will eliminate or relax foreign equity restrictions in a number of sectors of interest to Australia, including mining, certain distribution services, management consultancy services, certain construction services and a range of other services.

services

Permitted equity participation of up to 50% (up to 60% in some services) by Australian investors/service suppliers in most services.

Services and Investment	Ownership before FTA (% Share Limited)	Ownership after FTA (% Share Limited)
Mining Operations	49.9%	Up to 60%
Distribution Services	49.9%	Up to 100%
Construction Services	49.9%	Up to 100%
Major Restaurants or Hotels	49.9%	Up to 60%
Management Consulting Services (through a regional branch)	49.9%	100%
Tertiary Education Institutions	49.9%	Up to 60%
Maritime Cargo Services	49.9%	Up to 60%

benefits for Thailand

tariffs

Reductions in tariffs:

- Australia will progressively eliminate tariffs in apparel and finished textiles of Thai origin by 2015.
- Australia will eliminate tariffs in automotives, steel, plastics and chemicals by 2010.

conducting business

Thai nationals are permitted to enter Australia and work as executives, manager and experts without labour market testing under certain circumstances.

investment in Australia – specific categories

- Education – Thai secondary and higher education services can operate in Australia in most modes of supply.
- Legal services – Australia permits Thai service suppliers to provide advisory services in Thai law, third country law and international law.
- Mining and related services – Australia permits Thai service suppliers to provide consultancy and other services incidental to mining.

financial services

The Thai Central Bank and government monetary institutions may invest in Australia without providing assurances to the Reserve Bank.

benefits of the Singapore – Australia FTA

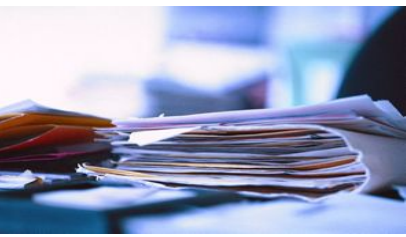
benefits for Australia

tariffs

- Tariffs on all originating goods traded between Australia and Singapore have been eliminated.
- All products must generally contain at least 50% Singaporean or Australian content.

customs

- Generally, customs clearance and inspection procedures should be faster.
- Mutually recognised sanitary and phytosanitary procedures – this is significant as Australia is Singapore's second largest source of meat and



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meat products and third largest source of fruit and vegetables.

market access

Neither country may restrict access to their markets, either by quantitative restrictions (for example, numerical quotas on services suppliers) or qualitative restrictions (for example, requirement to supply a service through a joint venture).

services

- Both countries also agree to grant service suppliers of the other country the same treatment that they give to their domestic service suppliers.
- Both sides commit to liberalisation in a wide range of services sectors, including open market access and national treatment. Sectors covered by this Agreement include professional services, transportation services, distribution services, tourism services, environmental services, and recreational, cultural and sporting services.

education

- National treatment and market access commitments for Australian education providers.
- Both countries committed to facilitate exchanges in a number of fields, such as online education, higher education and teacher development.

investment

- National treatment – both countries cannot discriminate the other country's investors in comparison with their own investors.
- Free transfers – both countries will allow investors to freely repatriate and transfer funds related to their investments (such as capital, profits, dividends and royalties) into and out of the country.

intellectual property

Co-operation on eliminating trade in goods infringing intellectual property rights.

immigration

Both countries have committed that neither country will require labour market testing, labour certification tests or other similar procedures as a condition for temporary entry of business persons.

benefits for Singapore

tariffs

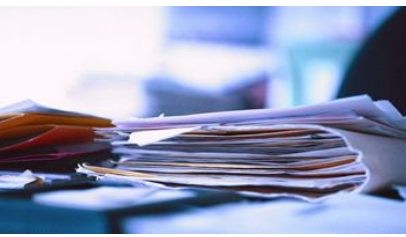
Tariff rates for products entering Australia from Singapore capped at 25% (metals 15%, minerals 5%, plastic products 25%, textiles and textile articles 25%) – potential cost saving of approximately S\$31.6 million.

market access / trade in services

The following services have been liberalised by Australia – real estate services, distribution services, tourism services, energy services and professional services, such as legal services, engineering services, and architectural services.

investment

- Assets of Singapore companies in Australia will be given better protection.
- Australia has set up a designated help desk to assist Singapore companies with issues relating to the national interest test and information required for their investment applications.
- Investors who can benefit are also not limited to nationals of Singapore or companies owned by Singaporeans, but include permanent residents and enterprises with substantive business operations in Singapore.



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financial markets

Singapore financial institutions are assured of receiving the same treatment that the Australian government gives to Australian suppliers.

trade efficiency

- An expected greater trade efficiency for the import and export of goods to and from Australia.
- Enabling electronic versions of all trade administration documents.

movement of business persons

- Business visitors are permitted to enter and engage in business activities within Australia for a period of three months.
- Intra-corporate transferees (that is, managers, executives and specialists within organisations) are permitted to stay and work in Australia for a committed period of up to 14 years.

Australia's investment treaties bilateral investment treaties (BIT)

A BIT is a treaty between two states. Under a BIT, each state assumes certain obligations regarding investments made by an investor from the other state in its territory. A BIT is directly enforceable by an investor through international arbitration.

contracting states

Australia is a party to nineteen BITs currently in force, (and three BITs that are yet to come into force), with the following states:

- Argentina
- Chile
- China
- Czech Republic

- Egypt
- Hong Kong
- Hungary
- India
- Indonesia
- Lao People's Democratic Republic
- Lithuania
- Pakistan
- Papua New Guinea
- Peru
- Philippines
- Poland
- Romania
- Uruguay
- Vietnam
- Mexico (yet to enter force)
- Sri Lanka (yet to enter force)
- Turkey (yet to enter force).

features of BITs

Generally, Australia's BITs:

- impose obligations on each respective state to protect the other state's investor from:
 - unfair and inequitable treatment; and
 - expropriation;
- recognise the other as a most-favoured-nation trading partner; and
- guarantee the protection and security of investments.



other investment treaties

Energy Charter Treaty

Australia is a signatory to, but has yet to ratify, the Energy Charter Treaty. Australia has not accepted the treaty's provisional application.

The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues.

A useful link:

www.unctad.org/sections/dite_pcbb/docs/australia.pdf

Australia New Zealand Closer Economic Relations agreement (CER)

mutual benefits

tariffs

- Most tariffs and quantitative import restrictions on trade in goods are prohibited under the CER.
- Currently 99% of goods entering Australia from New Zealand are tariff-free.

government procurement

Since 1991 both Australian and New Zealand suppliers of goods and services have had equal treatment in competition for government business.

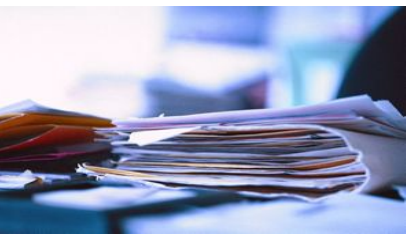
movement of people

The CER endorses the freedom of travel between the two countries. It also provides reciprocal agreements on social security and health treatment.

related agreements

Other agreements between Australia and New Zealand since the CER include:

- The Trade in Services Protocol (signed in 1988) – included services in CER from January 1989. Almost all trans-Tasman trade in services is now open.
- The Trans-Tasman Mutual Recognition Arrangement (1998) – provides that most goods that may legally be sold in either country may be sold in the other. A person who is registered to practise an occupation in either country is entitled to practise an equivalent occupation in the other.
- MOU on Business Law Coordination (2000) provides a framework on the alignment of business laws in order to increase the ease of capital flows and trans-Tasman business integration.



useful links

The following links are provided for background information. However, **gadens lawyers** makes no representation as to the accuracy of the information provided from these sites.

AusIndustry

www.ausindustry.gov.au

AusIndustry is the Commonwealth Government's central point for business assistance and information.

Austrade

www.austrade.gov.au

Austrade can provide information on overseas markets and foreign investment partners.

Australian Business

www.Australianbusiness.com.au

Australian Business Angels is an investor network that represents \$200 million in available capital.

Australian Competition and Consumer Commission

www.accc.gov.au

The ACCC promotes competition and fair trade in the market place and regulates national infrastructure services.

Australian Financial Review

www.afr.com.au

Latest business and finance news.

Australian Securities and Investments Commission

www.asic.gov.au

ASIC is responsible for enforcing and regulating company and financial services laws. The website provides information on setting up a newly

incorporated company and establishing an Australian branch.

Australian Stock Exchange

www.asx.com.au

Provides comprehensive market data and information to a range of users.

Australian Taxation Office

www.ato.gov.au

The site provides information on a wide range of taxation matters.

Australian Venture Capital Association Limited

www.avcal.com.au

Promotes the venture capital industry and encourages investment in growing business enterprises.

Axiss Australia

www.axiss.com.au

Axiss Australia seeks to position Australia as a global financial services centre in the Asian time zone.

Biofirst

www.biofirst.nsw.gov.au

Provides information on biotechnology issues.

Business Entry Point

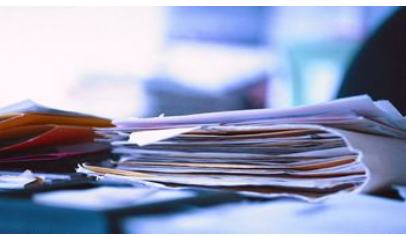
www.business.gov.au

The Business Entry Point provides access to resources from Government agencies and industry associations.

Commonwealth Law

www.comlaw.gov.au

Provides access to Commonwealth legislation.



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Department of Immigration and Citizenship

www.immi.gov.au

Provides information on visa categories and eligibility.

Federal Treasurer

www.treasurer.gov.au

The website of the Federal Treasurer.

Federal Treasury

www.treasury.gov.au

Provides information on Federal Government policy and decisions.

Foreign Investment Review Board

www.firb.gov.au

Provides information on direct investment in Australia.

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www.gadens.com.au

Provides information on our services and people and access to our publications on legal developments.

Invest Australia

www.investAustralia.gov.au

Invest Australia facilitates investment into Australia. It has investment advisory specialists in 14 locations around the world, including New York, London, Paris, Frankfurt, Hong Kong, Singapore and Tokyo, to provide investors with on-the-ground support and free investment advice.

IP Australia

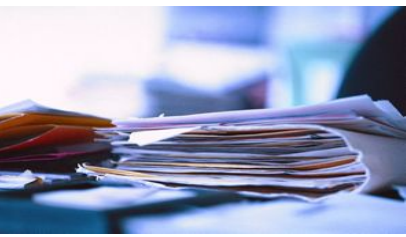
www.ipAustralia.gov.au

IP Australia is the federal government agency that grants rights in patents, trade marks and designs.

Migration Information

www.migrationexpert.com

Provides information on visa categories and eligibility.



**NSW Department of State and Regional
Development**

www.business.nsw.gov.au

The first point of contact within government for companies wishing to do business in NSW.

Oz NetLaw

www.oznetlaw

Provides legal information on the main issues arising out of the use of the Internet and e-commerce.

Queensland Chamber of Commerce and Industry

www.qcci.com.au

Provides information on business in Queensland.

Reserve Bank of Australia

www.rba.gov.au

The Reserve Bank of Australia's main responsibility is monetary policy. Provides information on interest rates, exchange rates and money and credit growth.