



BUSINESS COUNCIL OF AUSTRALIA  
**SERVICES, INVESTMENT AND  
INTELLECTUAL PROPERTY IN  
THE CHINA–AUSTRALIA FTA**  
PRIORITIES FOR BCA MEMBER COMPANIES

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## Introduction

The Business Council of Australia (BCA) is an association of around 100 chief executives representing Australia’s leading companies. Collectively, their businesses employ nearly one million people and account for one-third of Australia’s exports.

The BCA was established in 1983 to provide a forum for Australian business leaders to contribute to public policy debates to build a better and more prosperous Australian society. The organisation and its Members are committed to achieving the changes required to improve Australia’s competitiveness and to establish a strong and growing economy as the basis for a prosperous and fair society that meets the aspirations of the whole Australian community.

The BCA and its Members support the continued development of a strong economic, political and social relationship between Australia and China. It is well recognised that there are substantial potential benefits to the Australian economy and business stemming from China’s growth outlook. These benefits will be further enhanced if Australia is able to develop deeper economic relations and improved market access with China, and if Australian business is able to compete effectively with domestic producers in the Chinese market and the many other countries who also wish to benefit from China’s growth.

China is an increasingly large source of trade and investment for Australia as well as being a dominant force in regional trade and an increasingly important political influence in the region.

Australia’s economic and political relationship with China needs to be managed strategically so that the Australian economy and business can benefit from the relationship.

As earlier BCA papers and submissions on the Australia–China relationship have noted, while ‘traditional’ complementarities in trading relations between China and Australia are important, over time the challenge for Australia is to ensure that its trade and investment relations evolve as China develops.

In this regard, Australia has important comparative advantages in many key services sectors and should be looking to develop these fully. The ability of Australian business to compete in domestic markets in China in the provision of services will be an important determinant of how much we benefit from sustained strong Chinese economic activity over time.

With that in mind, the following background information aims to elaborate on the interests of BCA Member companies in a Free Trade Agreement with China.

In particular, the BCA believes that negotiations with China on an FTA must aim to:

- address comprehensively all barriers to trade in goods, services and investment, including the movement of people and intellectual property protection;
- ensure that Australian companies are able to compete genuinely and effectively in China;
- support China’s full and ongoing participation in the WTO;

- establish commitments for robust and compulsory processes of dispute settlement; and
- incorporate mechanisms for ongoing, regular, formal and informal consultation and cooperation on issues related to increasing free trade and investment opportunities between the two countries.

### **Significance of services trade, investment and intellectual property**

In 2004/05 China was Australia's second largest trading partner for trade in goods and Australia's sixth largest trading partner in services. This reflects the dominance of goods in the trade relationship and of education and tourism exports in the services sector. This can be partly attributed to both Australia's strength as an exporter of primary commodities, and the lesser developed state of the Chinese service economy.

It is difficult to measure the precise extent of Australian owned and invested intellectual property in the Chinese market. Interests in intellectual property for BCA Member companies are likely to grow as services and investment interests in China become increasingly important.

#### *Services trade*

Flows of professional services, one of the key areas of interest to BCA Member companies, are relatively small at present in comparison to Australia's main services exports of tourism and education.

In recent years, exports of services to China have experienced the fastest growth of all of Australia's major services trading partners, experiencing over 22 per cent trend growth from 2003/04 and almost 20 per cent trend growth since 1999/00.

In 2004/05, Australian service exports to China were worth \$2.3 billion, or 6.6 per cent of Australia's total services exports. Of this total, tourism and education accounted for \$1.9 billion or 85 per cent.

Although current growth levels can be attributed mainly to a strong rise in the number of Chinese students studying in Australia, exports in most areas of interest to BCA have also grown over last five years, in some cases outpacing growth rates to Australia's major services trading partners. From 2000/01 - 2004/05, exports of communication services more than doubled and exports of computer and information services and other business services also grew.

#### *Investment*

China is ranked as Australia's 22nd largest destination for foreign investment and Australia had around \$1.2 billion invested in China in 2004, which was less than 1 per cent of Australian investment abroad. Major destinations for Australian investment are the United States (45 per cent), the United Kingdom (17 per cent) and New Zealand (4 per cent). While the services and investment relationship of relevance to BCA Members is currently small, China's service economy is set to grow very rapidly. In particular, growing sophistication in the market orientation of China's economy is expected to drive strong demand for professional services and foreign investment.

#### *Intellectual property*

The value of intellectual property (IP) currently invested and owned by Australian interests in China is difficult to measure. The significance of IP in China relates predominantly to the inadequate levels of protection and enforcement afforded holders of intellectual property right in China.

The global dissemination of intellectual property has accelerated as general commercial trade in products and services has become more global. As Australia's services trade and investment with China grows over the longer term, intellectual property protection and enforcement will become more important for Australian companies.

## **Interests of BCA Member companies in the bilateral relationship with China**

### *Investment and services*

Australian investors and service providers have an interest in any provision in the FTA that promotes a more predictable regime for foreign service-suppliers and investors, further opens the market to foreign suppliers and investors, or limits the room for preferential treatment of domestic business interests over foreign suppliers and investors.

Notably, BCA Member companies would benefit from:

- A relaxation of ownership controls and capital requirements for establishing a commercial presence in China;
- Further raising the FDI project value limit above which approval has to be submitted to central government departments and increasing the approval powers of local government accordingly;
- Eliminating restrictions on the type of service that can be delivered in China and restrictions on the nationality of persons that can be employed by foreign enterprises;
- Guarantees that all regulations dealing with investments and supply of services will be made public and a commitment to consult existing investors on changes to regulations and criteria for licensing and approval;
- More transparency in regulatory and administrative decision-making at both the central and sub-central level, in the operation of the judiciary and in the adoption of timelines for approval of both foreign investment and licensing of foreign service providers;
- A more transparent tax system;
- Regular reports on compliance with WTO commitments in the Agreement on Trade Related investment Measures (TRIPS) and the General Agreement on trade in Services (GATS);
- Mutual recognition of professional qualifications to enhance the ability of foreign nationals to deliver professional services in China, and
- The freer movement of skilled business personnel between economies.

Particular industry-specific barriers exist relating to banking, insurance, securities and funds management, telecommunications, engineering and construction, legal services, and manufacturing.

In addition, commitments by China not to expropriate assets and the development of a comprehensive investor-state dispute mechanism are considered very important.

*Intellectual Property Rights*

While TRIPS provides for the comprehensive protection of IP rights, there are a number of areas where China is not meeting its commitments, particularly in relation to enforcement.

Member companies have an interest in ensuring that China meets its current commitments under TRIPS and other international agreements to which both countries are signatories. Companies have an interest in the development of measures that could facilitate the implementation and enforcement of TRIPS and other international agreements, including the settlement of disputes.

# 1 The Nature of BCA Members' Interests

## 1.1 Services and investment

### *Scope of interest*

BCA Members generally have interests in:

- Improving access to China for the supply of services and flow of investment by reducing barriers which inhibit establishment in China, restrict business scope or restrict direct investment; and
- Improving the supply of services and flow of investment within China by addressing regulatory or technical issues in the domestic market (“beyond border interests”).

In services, interests are to a large extent determined by the way services are traded across borders and the type of restrictions or barriers which apply. Four modes of service delivery are recognised by the WTO (and often in FTAs). These include elements of traditional cross border trade, trade relying on the movement of natural persons and direct investment through the establishment of a commercial presence. Due to the nature of services themselves, they also often involve domestic regulation. See Box 1 below.

#### **Box 1 -Recognised modes of delivery for the supply of services in the WTO GATS Agreement**

**Mode 1-** The supply of services traditionally, through the supply of services across borders, where the service supplier does not leave their home country (e.g: delivery of legal advice from an Australian law firm to a Chinese client by email);

**Mode 2-** Where the consumer of the service travels to the country of the service supplier to consumer the service there (e.g: A Chinese student traveling to Australia to undertake an Australian accounting degree);

**Mode 3-** Where an entity seeks to provide a service in a foreign country by establishing a commercial presence in that country (e.g: an Australian bank seeks to set up and operate a subsidiary in China);

**Mode 4-** Where a foreign national travels to another country to temporarily supply services there (e.g: an Australian lawyer practicing in Shanghai) or a Chinese national traveling to Australia to deliver services (such as use of Chinese labor for mining operations). The supply of services in this way is closely related to the movement of labour, usually highly skilled.

Like services, investment interests between Australia and China are determined by the type of investment and the type of barrier. In addition to establishment (which is generally considered to be part of services trade) investment interests relate to actual or Foreign Direct Investment (FDI), or investment that confers control on the foreign investor.

Interests in services trade and investment can be categorised generally into three types: interests related to establishment, business scope, and domestic regulation or “beyond border issues”.

### ***Establishment***

Interests in establishment relate to:

- Restrictions or prohibitions on the establishment of Australian service suppliers in China (such as measures which restrict the type of legal entity or joint venture that can supply services, or limitation on the participation of foreign capital in terms of percentage limits on foreign capital joint venture and foreign equity limits); and
- Prohibitions or limitations on the foreign investors (such as the closing of certain sectors; quantitative restrictions on the number of foreign companies admitted to a certain sector; minimum capital requirements and strict requirements around the authorisation and registration of investment), as well as restrictions on actual levels of investment.

### ***Business scope***

Interests in business scope relate to:

- Restrictions on the scope of business activity in China, such as limitations on the type and manner of services that may be provided, as well as restrictions applicable to the hiring of natural persons, or on Australian service suppliers in China (such as limits on the number of Australian, but not Chinese service suppliers).
- Impediments to foreign ownership and control to general operations of foreign investors (including restrictions on employment of foreign key professional or technical personnel, performance requirements, restrictions on imports of capital goods, and restrictions on where operations can be located).

### ***Beyond border issues***

Interests in beyond border issues concern domestic regulatory and technical issues in the Chinese (or Australian) domestic market which restrict the supply of a service once it has crossed the border, or which inhibit investment flows.

These interests relate specifically to the supply of the service in a particular mode (for example, technical requirements relating to recognition of qualifications which prevent an Australian lawyer practicing in China), or may apply to the supply of services generally (for example, inconsistent interpretation or lack of transparency in laws which apply at the provincial level).

Beyond border interests related to services typically include:

- Transparency and notification – enhancing transparency and notification of domestic laws and decision-making processes;
- Application and approval procedures – addressing problems or inconsistencies in the application of domestic requirements and procedures, authorisation and licensing requirements;
- Mutual recognition or equivalence – facilitating mutual recognition of qualifications, standards and criteria for authorisation, licensing and certification of service suppliers; and
- Movement of personnel – improving visa and immigration requirements which inhibit the movement of personnel across borders to supply a service.

## **Coverage**

Services interests of BCA Member companies tend to be concentrated in the areas in which Members mainly provide services. These include:

- Professional services;
- Computer services and information technology;
- Financial services, including banking, accounting and broking;
- Telecommunications; and
- Construction and engineering related services.

BCA Member companies with possible interests in services are numerous. Almost 60 companies (around 60 per cent) are service providers in the key areas listed. Most (about 40 companies) are concentrated in financial, legal and other professional services.

Investment interests of BCA Member companies tend to have a whole of economy focus. Investment interests span both services and manufacturing, with the focus of the latter on FDI. Additional areas of investment interest include the mining, energy and automotive sectors.

## **1.2 Intellectual property**

### ***Scope of interest***

BCA Member companies generally have interests in both:

- Improving intellectual property protection for businesses operating in China by enhancing the level of protection and enforcement of that protection; and
- Improving the protection of intellectual property rights in China by addressing regulatory or technical issues in the domestic market (“beyond border interests”).

Beyond border interests generally mirror the interests that apply in the case of services and investment, which are related to transparency and application of domestic regulation.

These interests are incidental to, and generally arise as a result of, trade or cross border transactions. They will therefore likely be strongest for those companies that interface with the Chinese market, either by means of trade (in both goods and services) or investment, or where trade and investment flows are significant.

Interests encompass protection in all forms of intellectual property, such as copyright, patents, industrial designs, integrated circuits, trade marks and data protection. Such interests arise for most BCA Member companies.

## **Coverage**

This report assumes that most companies have a general interest in assuring that levels of intellectual property protection in China are equivalent to those maintained by Australia. The dissemination of intellectual property has accelerated as general commercial trade in products and services has become more global. Research has shown that over the last 20 years, large global companies have come to hold a high and increasing proportion of their value in intangible assets.<sup>1</sup> This trend is reflected among BCA Members. Some areas of intellectual property protection of significant interest to BCA Members are noted below.

An examination of the subject and top 100 user statistics of patents, designs and trademarks in Australia is useful as an indicator of the forms of intellectual property that are of interest to Australian companies. In Australia, most intellectual property rights granted are for trademark protection, with around 22,461 trademarks, 2,755 designs, 1,162 standard patents and 173 plant breeder rights granted or registered to Australian residents in 2005. Copyright protection does not require any formal registration and therefore administrative statistics are unavailable.

- Patents are of importance to service providers such as those in civil engineering, building and construction, information technology and transport, and also manufacturers such as those in the consumer goods and equipment and medical engineering sectors.<sup>2</sup>
- Designs are of importance to manufacturers such as those in the packaging, transport and equipment sectors.<sup>3</sup>
- Trademarks are important to both service providers and manufacturers.<sup>4</sup> Around two-thirds of trade mark applications in Australia were for goods such as paper, cardboard, pharmaceuticals, medical preparations, herbicides and pesticides. Around one third of applications were for services such as business management and administration, legal, insurance, finance, real estate and building construction.

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<sup>1</sup> PriceWaterhouseCoopers (2005) *Redefining Intellectual Property Value: The Case of China*, a Technology Centre Publication, p. 7.

<sup>2</sup> This analysis includes only Australian residents.

<sup>3</sup> This analysis includes residents from all countries.

<sup>4</sup> *ibid.*

- Copyright is important for service providers. Examples of copyright protections of importance to BCA Members include: journal articles and reports, computer programs, databases, architectural plans and buildings and broadcasts.<sup>5</sup>

At least 10 BCA Members have significant interests in one or more of the above, with many more recording some interest.

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<sup>5</sup> According to the Australian Copyright Council, copyright may include: textual material e.g. journal articles and reports; computer programs, compilations e.g. directories and databases; artistic works e.g. architectural plans, buildings, maps and plans; dramatic works, musical works, cinematograph films, sound recordings, broadcasts: e.g. TV and radio broadcasters; and published editions. Source: Australian Copyright Council, Copyright in Australia: An Introduction, Information Sheet, July 2005.

## 2 BCA interests in the FTA context

### 2.1 Interests in services and investment

The interests of BCA Members in the liberalisation of services and investment are outlined below. They are divided among interests relating to establishment/control, to business scope and to “beyond border issues” related to domestic regulation in China.

#### ***Establishment***

##### *General*

BCA Member companies have a clear interest in FTA provisions that promote a more certain regime for foreign investors and service suppliers. This would include commitments that further open the market to foreign investors and service suppliers and limit the room for discretionary preferment of domestic investors and suppliers over foreigners.

BCA Member companies benefit from additional increases in Chinese foreign direct investment limits, along with increased FDI approval powers at the local government level. In particular, Members would benefit from a one stage process of approval for foreign direct investment. Eventually, Members would benefit from automatic approval for all projects meeting published approval criteria in full.

Foreign portfolio investors would have an interest in a further loosening of China’s capital account to permit freer portfolio investment. This would involve a loosening of the restrictions currently in place under the Qualified Foreign Institutional Investor (QFII) scheme, including a broader group of registered investors, higher cumulative quotas for portfolio investment and more flexible foreign exchange conversion rules.

Currently, land cannot be acquired in China and business investors and service providers would benefit from a liberalisation of private land ownership.

*Industry-specific*

Table 1 outlines industry-specific interests relating to establishment, by industry.

**Table 1. BCA Members’ interests, by industry, for liberalisation of investment and services: interests in establishment**

Industry	Interest
Banking	<p>Raising the levels of equity investors can hold in banks from 20 per cent (single investor) and 24.9 per cent (all investors).</p> <p>Loosening restrictions that require 3 years prior business experience in China when setting up a bank.</p> <p>Lowering of various operating capital requirements for banks.</p>
Insurance	<p>Loosening requirements that limit the level of equity foreign insurers can have in a joint venture.</p> <p>Lowering the capitalisation requirements for licenses.</p> <p>Removing the requirement that foreign branches wanting to sub-branch in the insurance industry must establish a subsidiary.</p>
Securities, funds management	Removing the limitations on foreign ownership.
Telecommunications	Removing limits on equity and from loosening capitalisation requirements.
Legal services	<p>Removing de facto economic needs test that currently applies to the establishment of foreign legal offices.</p> <p>Removing restrictions that require branch law firms to be established for 3 consecutive years before opening another office.</p>
Engineering industry	Lowering registered capital requirements and incorporation requirements for foreign firms.
Automotive and automotive components	Removing equity limits and minimum capital requirements.

## ***Business Scope***

### **General**

BCA Member companies would have an interest in addressing restrictions which apply on the type of services that can be delivered in China and on the nationality of persons that can be employed by foreign enterprises.

Clearly Member companies would have an interest in opening up the market for services from which foreigners are currently excluded.

Member companies would also have interest in ensuring that procedures and regulations are applied on a non-discriminatory basis between national and foreign service suppliers.

## Industry specific

### Table 2 outlines industry-specific interests relating to business scope, by industry.

Table 2. BCA Members' interests in business scope

Industry	Interest
Banking	<p>Broadening the range of foreign currency services Australian banks can offer.</p> <p>Loosening of restrictions that limit the capacity of Australian banks to operate in derivative markets.</p>
Insurance	<p>Removing restrictions that prohibit foreign providers from working in the statutory, property and casualty insurance markets.</p> <p>Increasing transparency in regulations on branching rights to limit the potential for discrimination against foreign firms.</p>
Securities, funds management	<p>Removing restrictions on the scope of activities in which they can engage.</p> <p>Removing the limitations on trading in shares and underwriting share offers and a loosening of the criteria for trading A shares under the QFII scheme.</p>
Telecommunications	<p>Removing or loosening of price controls on foreign businesses.</p>
Legal services	<p>Removing the prohibition on Australian law firms advising on Chinese law.</p>
Engineering industry	<p>Removing restrictions that limit the types of construction activity permitted.</p> <p>Removing restrictions that prohibit foreign firms from hiring local professionals in engineering and architecture.</p> <p>Securing a right to have projects approved directly by government rather than requiring approval from a Chinese firm.</p>

## ***Beyond border issues***

### **General**

#### *Transparency and notification*

BCA Member companies have clear interests in:

- A guarantee that all regulations dealing with investments are made public;
- A commitment to consult existing investors on changes to regulations and criteria for licensing and approval, or at very least, a commitment to publish new criteria well in advance of their adoption;
- Each local regulatory authority making an outline of the coherence between national and local regulators publicly available in all matters relating to the regulation of foreign investors and service providers;
- Greater transparency in regulatory and administrative decision-making at both the central and sub-central levels and in the operation of the judiciary;
- A more transparent tax system. Clarification is needed as to which government department can authorise tax terms and pre-conditions to be filled; and
- Regular reports on local compliance with investment-related commitments relating to the WTP agreement on Trade Related Investment Measures obligations.

#### *Approval procedures and regulations*

BCA Member companies have interests in:

- Streamlining procedures for licensing and approval for investments;
- A guarantee that the approval process for licensing and investment would be based on objective, understandable and transparent criteria; and
- The adoption of timelines for approval of both foreign investment and licensing of foreign service providers, and from a direct route for receiving feedback on why proposals were rejected.

#### *Mutual recognition of professional qualifications*

Member companies have an interest in achieving mutual recognition of professional qualifications to enhance the ability of foreign nationals to deliver professional services in China.

#### *Movement of business personnel*

Member companies have interests in ensuring the freer movement of skilled business personnel between the two economies. Currently movement between China and Australia is regulated by strict visa requirements in both countries. This is a significant barrier to services trade.

**Industry-specific**

**Table 3 outlines industry-specific interests relating to post-establishment regulation, by industry.**

Table 3. BCA members’ interests in post-establishment regulation

Industry	Interest
Banking	Accelerating and rendering more transparent the license approval processes.
Insurance	Securing mutual recognition of relevant Australian qualifications, such that the qualification requirements for the insurance industry can be minimised.
Securities, funds management	Loosening capital flows under QFII scheme.
Legal services	Securing a right to sit the Chinese bar exam (currently denied foreign lawyers).
Telecommunications	Enhancing transparency, particularly in the activities of the industry regulator.  Codifying the relationship between national, regional and local policies.
Construction / engineering industry	Enhancing transparency in the application of regulation governing the industry, In particular, codification of the system for grading engineering firms.
Retailing and distribution	Enhancing transparency in the content and application of laws.  Securing national treatment in the application of laws.
Direct investors in mining	Enhancing transparency in approval processes an impartial and objectively reliable licensing system that guarantees that once a foreign explorer locates a commercial resource and secures exploration rights the company will secure the right to mine that resource.

## **2.2 Interests in intellectual property protection**

BCA member interests in IP protection include ensuring that China meets its current commitments under TRIPS and international conventions for protection and enforcement, securing TRIPS-plus levels of protection, and addressing problems associated with domestic regulation.

### ***TRIPS and international conventions***

While TRIPS provides for the comprehensive protection of IP rights, there are a number of areas where China is not meeting its commitments, particularly related to enforcement.

BCA Member companies have an interest in ensuring that China meets its current commitments under TRIPS and other international agreements to which both countries are signatories. Further, Member companies have an interest in measures that could facilitate the implementation and enforcement of TRIPS and other international agreements, including the settlement of disputes.

### ***Beyond border issues***

#### *Transparency and notification*

Beyond border interests of BCA Member companies include:

- Improving the transparency of rules and regulations dealing with IP, including the application and registration procedures and in ensuring all laws and regulations are publicly and readily available;
- Timelines for proposed and implemented regulatory changes and provisions for public comments and consultation would also assist business interests; and
- Greater transparency in regulatory and administrative decision-making and in the operation of the judiciary.

#### *Approval procedures and regulations*

Member companies would have an interest in streamlining procedures for IP protection and ensuring that they are based on objective, understandable and transparent criteria.

## **3 Recommendations for addressing business concerns about services, investment and intellectual property in the FTA**

### **3.1 General approaches**

This section outlines practical approaches to securing the interests listed in the previous sections.

The BCA believes an FTA with China should adopt the following principles:

- It should be comprehensive and include separate chapters on cross-border trade in services, investment and intellectual property rights;
- It should adopt a ‘negative list approach’ for services and investment, whereby sectors that are exempted from liberalisation are specifically identified on an annex to the Agreement. It should include a “ratchet mechanism” which prevents measures that are subsequently liberalised or removed from the list from being replaced with less liberalising commitments;
- Generally speaking, the FTA should provide liberalisation beyond what is committed for in the WTO, in the sense it is “GATS and TRIPS plus;” and
- Chapters on services, investment and IP should address cross border issues (relating to market access and national treatment barriers) and beyond border measures (issues relating to the regulation of trade and investment in the importing or host country).

The scope of chapters for services, investment and intellectual property will each be dealt with in turn.

### **3.2 Approaches to services**

#### ***General***

The chapter on services should commit both parties to national treatment across the board. It should also accord most favoured nation status in services trade.

Both parties should also commit to ensure that their laws, regulations and approval processes do not result in technical barriers to trade.

Areas exempted from liberalisation should be included as an Annex (a ‘negative list’) and subject to the ratchet mechanism. A commitment could also be made to improve commitments for liberalisation of services over time.

## ***Establishment***

Commitments should be made to remove equity limits, immediately or progressively, in the following industries:

- Banking;
- Insurance;
- Telecommunications; and
- Securities and fund management.

In the industries listed below, commitments should be made to ensure that capitalisation requirements are the same for foreign enterprises as for domestic enterprises, and that capitalisation requirements move towards international norms:

- Banking;
- Insurance;
- Telecommunications; and
- Engineering and construction.

Commitments should be made that allow foreign service providers to make decisions about business form, branching and market entry on the basis of commercial considerations.

## ***Business scope***

Commitments should be made to remove the restrictions on foreign legal and accounting service providers from hiring local staff.

In the sectors listed below, a commitment should be made to remove restrictions on the type and scope of services that can be supplied, in line with domestic firms in the same sector:

- Banking (removal of restrictions on foreign currency and derivatives);
- Insurance (opening of the market for casualty, statutory and property insurance);
- Securities and funds management (removal of restrictions on underwriting shares and loosening of the criteria for trading A shares);
- Legal services (removal of the prohibition on foreigners providing advice on Chinese law. This could be done in conjunction with securing relevant recognition of Australian qualifications – see below); and
- Construction services (expanding the types of services that foreigners can supply and removing restrictions preventing dual engineering and project management services).

## ***Beyond border issues***

The FTA should include provisions to improve domestic regulation in China at both central and sub-central level. These could include commitments:

- On transparency and notification, whereby all regulations that relate to services trade are made public prior to their adoption;
- To adopt timelines for licence approvals and adopt a contact point for feedback on unsuccessful applications;
- That each local regulatory authority will regularly publish statements that outline transparently the coherence between all regulatory decisions made at local, regional and central level that relate to the provision of services;
- To establish contact points for information on applicable laws and regulations; and
- To ensure all regulations relating to service provision are objectively verifiable and based on transparent criteria.

The FTA could also include commitments to facilitate mutual recognition of professional qualifications. A commitment could be made to conclude mutual recognition agreements for professional qualifications, for example in the accounting and legal sector. This could be supported by a side letter whereby both parties agree to commit to work programs in specific areas, for example to permit Australians to sit the Chinese bar exam.

The services chapter could include measures to facilitate the movement of business personnel. A commitment should be made to expand GATS commitments for short and long term temporary stay of skilled business persons. This could include the creation of a special visa, modelled on the provision in TAFTA, that permits skilled professionals (such as business visitors and intra corporate transferees) to move between the parties for extended periods of time and with minimal administrative burden.

A Committee on Services should be established. The Committee should supervise the implementation of the services chapter, including commitments on domestic regulation and further liberalisation; and consider issues regarding services trade that are referred to it by a party, including ways to further integrate financial services sectors between the parties. The Committee should meet annually to assess the functioning of this Agreement as it applies to services trade. A commitment should be made to provide regular reports to the Services committee on progress in the implementation of the commitments in the services chapter.

## **3.3 Approaches to investment**

### ***General***

The term ‘foreign investment’ should be defined in a broad sense, to include movable and immovable property; shares and any other rights of participation in the management or economic results of a company or firm; minority shares; stocks, bonds, and claims to money from trade in goods or services.

The nationality of a juridical entity should be determined by the place of organisation (that is, a company that has concrete operations in Australia should benefit from the provisions of the chapter).

### ***Establishment***

Commitments should ensure:

- A right to entry, in Australia’s case limited by the relevant provisions of Foreign Acquisitions and Takeovers Act, such that all investments must be considered by the Parties to be in the national interest;
- National treatment and most favoured nation status to investors of both Parties;
- Transparency in the regulation of foreign investment, including a commitment for each Party to publish in advance any measure it plans to adopt in the regulation of foreign investment and to provide business and Parties a reasonable opportunity to comment on proposed measures;
- The transfer of funds of foreign investors are made freely and without delay, in a usable currency at the market rate of exchange prevailing on the date of transfer;
- The investment provisions are applied to all sub-national governments. This can be done with a phase-in period if necessary; and
- Performance requirements are prohibited. These provisions should prohibit all performance requirements prohibited under TRIMs. In addition, they should prohibit performance requirements in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking, to
  - export a given level or percentage of services content;
  - achieve a given level or percentage of domestic content;
  - purchase, use or accord a preference to goods produced or services provided in the territory of either party;
  - restrict sales of goods or services that an investment produces or provides by making them dependent on the value of exports or foreign exchange earnings;
  - transfer technology, a production process or other proprietary knowledge to a person in its territory;
  - mining companies have access to areas they have secured licenses to mine; and
  - equity limits and minimum capital requirements for investment in manufacturing operations for automobiles and automotive improvements.

### ***Beyond border/investment protection***

A commitment should be made to provide levels of fair and equitable treatment as per customary international law.

A commitment should be made not to expropriate (direct or indirectly) the foreign investments of a party unless for public purpose and with compensation.

## ***Dispute settlement***

A commitment should be made to provide investor-state dispute mechanism, whereby, in the event of a dispute between a Party and an investor of the other Party relating to a covered investment, consultations shall take place between the Parties concerned with a view to resolving the case amicably.

If the dispute in question cannot be resolved through consultations and negotiations, the dispute may, at the choice of the investor, be initiated before the Party's competent judicial or administrative bodies, in accordance with the laws and regulations of the Party; or resolved by an international arbitral tribunal under the rules of the World Bank's International Covenant on Settlement of Disputes.

### **3.4 Approaches to intellectual property protection**

Parties should also affirm their commitment to TRIPS and other international agreements to which both countries have ratified and acceded.

The chapter on IP should also commit both parties to national treatment.

To improve transparency, commitments could be made by each party to ensure that all laws, regulations, and procedures at both central and sub central level concerning the protection and enforcement of IP rights be in writing, published and made readily available.

To further these commitments, a dedicated Working Group on Intellectual Property could be established to serve as a forum for implementation, discussion, information exchange and consultation of IP protection and enforcement under the FTA. The Working Group could comprise relevant IP officials from both Australia and China.

It should:

- be mandated to enhance the implementation of commitments in the FTA, the protection and enforcement of IP;
- engage in regular information exchange, cooperation and coordination on IP;
- be required to meet at least annually;
- report to the Joint Committee on its progress and further direction of its work within two years of the entry into force of the Agreement; and every three years thereafter.

Commitment could be also be made to establish an IP dispute mechanism, which would be additional to recourse to general dispute settlement provisions available under the FTA. Provisions could provide that on notification of a dispute a panel be established. The panel could provide for the arbitration and settlement of disputes according to international arbitration rules or procedures or as determined by the parties.

# Acronyms and abbreviations

<b>ACFTA</b>	ASEAN–China Free Trade Area
<b>ANZCERTA</b>	Australia New Zealand Closer Economic Relations Trade Agreement
<b>ASEAN</b>	Association of South East Asian Nations
<b>AUSFTA</b>	Australia–United States Free Trade Agreement
<b>BCA</b>	Business Council of Australia
<b>BIT</b>	Bilateral Investment Treaty
<b>CIRC</b>	China Insurance Regulatory Commission
<b>CPA</b>	Certified Practicing Accountant
<b>CNOOC</b>	China National Offshore Oil Corporation
<b>EU</b>	European Union
<b>FATA</b>	Foreign Acquisitions and Takeovers Act 1975
<b>FDI</b>	Foreign Direct Investment
<b>FIE</b>	Foreign Invested Enterprise
<b>FIRB</b>	Foreign Investment Review Board
<b>FTA</b>	Free Trade Agreement
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GATS</b>	General Agreement on Trade in Services
<b>IP</b>	Intellectual Property
<b>IPR</b>	Intellectual Property Right
<b>JCCT</b>	US-China Joint Commission on Trade and Commerce
<b>JV</b>	Joint Venture
<b>MFN</b>	Most Favoured Nation Treatment
<b>MII</b>	Ministry of Information and Industry
<b>MOFCOM</b>	Ministry of Commerce
<b>MOFTEC</b>	Ministry of Foreign Trade and Economic Cooperation (now MOFCOM)
<b>NAFTA</b>	North American Free Trade Agreement
<b>NPL</b>	Non-Performing Loan
<b>NDRC</b>	National Development and Reform Commission
<b>OECD</b>	Organisation of Economic Cooperation and Development
<b>PBOC</b>	People’s Bank of China
<b>QFII</b>	Qualified Foreign Institutional Investor Scheme

<b>SAFTA</b>	Singapore-Australia Free Trade Agreement
<b>SASAC</b>	State-owned Assets Supervision Administration Commission
<b>TAFTA</b>	Thailand–Australia Free Trade Agreement
<b>TRIMS</b>	Agreement on Trade Related Investment Measures
<b>TRIPS</b>	Agreement on Trade Related Aspects of Intellectual Property Rights
<b>UK</b>	United Kingdom
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>US</b>	United States
<b>USTR</b>	United States Trade Representative
<b>WFOE</b>	Wholly Foreign Owned Enterprises
<b>WIPO</b>	World Intellectual Property Organisation
<b>WTO</b>	World Trade Organization