

Williams Trade Law
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Introduction to Trade Agreements between Australian and Japan

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History

- 1955 – trade in goods regulated under *General Agreement on Tariffs and Trade* 1948 (GATT) dealing with trade in goods: Australia was a party since 1948 and Japan acceded in 1955 -
- 1 Jan 1995 *Agreement Establishing the WTO*: Australia and Japan are original Members. The Members are bound by:
- General Agreement on Tariffs and Trade 1994, and 12 more specialized agreements dealing with aspects of trade in goods
- General Agreement on Trade in Services (GATS), and
- Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

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- *Japan Australia Economic Partnership Agreement*, signed Canberra, 8 July 2014. (in force 15 January 2015): goods, services, IP, investment & other matters
- *Trans Pacific Partnership Agreement*, signed Wellington 2 February 2016 (9 signatories including Australian and Japan) not in force yet. Covers goods, services, IP, investment & other
- Each has an FTA with ASEAN & may become parties to the proposed Regional Comprehensive Economic Partnership Agreement

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Consider treaty obligations affecting trade in goods under:

- 1. WTO : GATT1994 + 12 Multilateral Agreements on Goods
- 2. JAEPA 2015
- 3. TPP yet to be brought into force

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Essential Obligations of GATT – customs duties

- GATT Article II – parties cannot charge customs duties in excess of those set out for a product in their Schedule
- Concessions
- Binding
- Bound rates
- Tariffs, bound tariffs and applied tariffs

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Essential obligations under GATT – Most Favoured Nation clause

- Article 1 any treatment accorded by any Member to imports from any country must be unconditionally accorded to imports of any Member
- Note:
- The rule covers favourable treatment giving to imports from non-Members
- The rule covers any favourable treatment accorded under internal laws and taxes affecting imported goods not just favourable treatment under regulations affecting importation.
- There is an exception in GATT article XXIV for free trade areas and customs unions in accordance with article XXIV.

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Essential Obligations under GATT – prohibition of other restrictions on imports or exports

- GATT Article XI prohibits any “prohibitions or restrictions other than duties, taxes or charges, whether ... through quotas, import or export licences or other measures”, ... on the importation from another Member or exportation to another Member.
- GATT Article XI:2 permits some limited exceptions

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Essential Obligations under GATT – laws supporting the rule on tariff bindings

- Article II:1(b) 2nd sentence: limits other fees on import of bound products
- Article II:3 disciplines changes of method of valuation
- Article II:4 limits mark ups by import monopolies on bound products
- Article III:2 requires national treatment under internal taxes
- Article III:4 requires national treatment under internal regulations
- Article VII:2 value for customs purposes must be actual value
- Article VIII:1 limits other fees on import or export to the approximate cost of services

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Essential obligations under WTO – rules on subsidies

SCM Article 3 prohibits

- Export subsidies, and
- Import substitution subsidies
- Other subsidies are not prohibited but another party may retaliate if the subsidy is specific to an industry and it causes adverse effects.
- Parties may respond to subsidised imports with Countervailing duties if the subsidy is specific and caused injury to the domestic industry producing the like product.

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The content of Australia’s GATT Schedule

- Australia has tariff bindings on 97% of products including 96.6 % of non-agricultural products
- Simple average bound rate is 9.9% (3.5% on agricultural and 11 on non-agricultural;
- Only 3.8% of lines have bound tariffs higher than 15% & only 0.4 above 25%; none above 50%
- Source WTO tariff profiles at https://www.wto.org/english/thewto_e/countries_e/australia_e.htm

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The content of Japan’s GATT Schedule

- Japan has tariff bindings on 99.7% of products including 99.6 % of non-agricultural products
- Simple average bound rate is 4.6% (18.2% on agricultural and 2.5% on non-agricultural;
- 23% of tariff lines have bound tariffs higher than 15%; 12.2% of lines have bound tariffs higher than 25%; only 2.2% of lines above 50% and 4% above 100%
- Source WTO, tariff profiles at https://www.wto.org/english/thewto_e/countries_e/japan_e.htm.

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General Exceptions – Article XX

- (b) necessary to protect human, animal or plant life or health
- (c) necessary to secure compliance with laws
- (e) relating to the products of prison labour
- (g) relating to conservation of exhaustible natural resources
- SUBJECT to rule against arbitrary or unjustifiable discrimination or disguised restrictions on international trade

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12 Multilateral Agreements on Trade in Goods

- Agreement on Agriculture
- Agreement on Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the GATT 1994 (Agreement on Antidumping)

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12 Multilateral Agreements on Trade in Goods

- Agreement on Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation)
- Agreement on Preshipment Inspection
- Agreement of Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

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SPS Agreement

- Applies to all SPS measures – defined as measure to protect against risks from entry of (i) pests and diseases, and (ii) toxins or organisms in foodstuffs
- Art 3 & 5 Members must either:
 - Make measure conform to an international standard; or
 - Ensure the measure is based on a risk assessment of the risks, has a scientific justification and is not more trade restrictive than necessary to achieve the Member’s chosen level of protection against risks.
- Measures complying with the SPS Agreement are deemed to comply with GATT Art XX(b).

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TBT Agreement

- Applies to industrial and agricultural products but not to any measures covered by the SPS Agreement.
- Strict rules for ‘technical regulations’ – instruments requiring compliance with product characteristics, or production methods including packaging and labelling requirements.
- 2.1 ensure that treatment under technical regulations is not less favourable than like products of national origin and like products from any other country
- 2.2 ensure that technical regulations are not more trade restrictive than necessary to fulfil a legitimate objective (rebuttably presumed to satisfy 2.2 if a regulation accords with a relevant international standard).

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Essential provisions of JAEPA on trade in goods – customs duties

- JAEPA Chapter 2 on Trade in Goods
- Article 2.4.1 “... each party shall eliminate or reduce its customs duties on originating goods in accordance with its Schedule in Annex 1 ...”
- The obligation applies only in respect of goods that originate in the other country
- Chapter 3 on Rules of Origin defines when a good is an originating good of Japan or an originating good of Australia.

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Essential provisions of JAEPA on trade in goods – Rules of Origin

- Chapter 3 on Rules of Origin
- Basic rule is whether the product has undergone a change of tariff classification as a result of the manufacturing or processing operation in the exporting country
- But there are pages of rules for specific types of products
- Complicated.



Essential provisions of JAEPA on trade in goods – a limited MFN clause

- Chapter 2, Article 2.4.3 & 2.4.4
- There is no general MFN clause like GATT Article I but there is a limited MFN clause
- Under Article 2.4.4, if a party applies a generally available (i.e., non-preferential – or “applied MFN rate”) customs duty rate to WTO Members that is lower than its WTO bound rate, then the party must accord that lower rate of duty to imports from the other party.



Essential provisions of JAEPA on trade in goods – prohibition of other restrictions on imports and exports

- JAEPA does not incorporate the provisions of GATT Article XI – which is the approach taken in most FTAs.
- JAEPA Article 2.8 “Neither party shall adopt or maintain any non-tariff measures including quantitative restrictions, on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the other Party, except in accordance with its rights and obligations under the WTO Agreement or as otherwise provided for in this Agreement.”



Essential provisions of JAEPA on trade in goods – additional prohibitions of restrictions on exports of essential food or

- In relation to export restrictions, JAEPA goes beyond GATT.
- GATT Article XI:1 prohibits export restrictions but exceptions in GATT Article XI:2(a) for export restrictions "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party"; and
- In GATT Article XX(g) for export restrictions which relate to conservation of natural resources if made effective in conjunction with restrictions on domestic production or consumption
- JAEPA Chapter 7 on Food Security at Art 7.3.1 Parties must endeavour not to apply export restrictions under GATT Art XI:2(a) on export of any essential food to the other Party;
- JAEPA Chapter 8 on Energy and Natural Resources at Art 8.4.1 Parties must endeavour not to apply export restrictions under GATT Art XI:2(a) or Article XX(g) on export of any energy and mineral resources goods.
- and before applying any such export restriction must give notice, consult and give consideration to the negative effects on the other Party's food security [7.3.2] / energy and mineral resources security [8.4.2].

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Essential provisions of JAEPA on trade in goods – prohibition of export taxes

- GATT does not contain a prohibition on export taxes.
- WTO Members can schedule commitments not to charge export taxes in their GATT Schedules of Commitments – but they never do.
- JAEPA goes beyond the WTO obligations by adding a prohibition on export taxes.
- Article 2.6 prohibits duties on goods exported to the other in excess of any duties imposed on the goods for domestic consumption.

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The content of Australia's goods schedule under JAAEPA

- Category A already at zero duties
- Category B reduced to zero on entry into force
- Category C reduced to duty free 1 April of 3rd year (2018)
- Category C1 mixed duties where specific components of duties will not be reduced but ad valorem component reduce to zero 1 April 2018
- Category D reduced to 4% on entry into force and to zero on 1 April 2020
- Category E reduced to 8% on entry into force and to zero on 1 April 2020
- Category F reduced in 5 instalments starting 1 April 2019 reaching zero on 1 April 2023
- Category G reduced in 5 instalments starting 1 April 2019 reaching zero on 1 April 2023.
- Summary: on 1 April 2023, everything is bound at zero except for the specific duties on products in Category C1.

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The content of Japan's goods schedule under JAAEPA

- Category A reduced to zero on entry into force
- Category A* reduced to zero on entry into force but with some additional conditions indicated in column 5
- Category B3 reduced to duty free 1 April of 4th year (2019)
- Category B4 reduced to duty free on 1 April of 5th year (2020)
- Category B5 reduced to duty free on 1 April of 6th year (2021)
- Category B7 reduced to duty free on 1 April of 8th year (2023)
- Category B7* reduced to zero on terms indicated in column 5
- Category B10 reduced to in 11 instalments to be zero on 1 April of 11th year 2026
- Category B10* reduced in 6 instalments starting 1 April 2021 reaching zero on 1 April 2026
- Category B10** reduced in 9 instalments starting 1 April 2018 reaching zero on 1 April 2026.

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The content of Japan's goods schedule under JAAEPA

- Category B10*** reduced to zero on the terms set out in the note in column 5.
- Category B10**** reduced to zero on 1 April of 11th year (2026).
- Category B10S reduced in 11 instalments, reaching zero on 1 April of 11th year (2026) but subject reviewed under Article 2.20.
- Category B15 reduced in 16 instalments reaching zero on 1 April of 16th year (2031)
- Category P not eliminated but reduced as set out in column 5 [i.e., not reduced to zero]
- Category PS not eliminated but reduced as set out in column 5 and subject to review under art 2.20
- Category PS* or PS** - same
- Category Q not eliminated but reduced as set out in column 5.
- Category QS not eliminated but reduced as set out in column 5 and subject to review under art 2.20
- Category R no reductions – but to be subject to negotiations starting in the 5th year
- Category S no reductions – but to be subject to negotiations starting at the earlier of the 5th year or when agreed.
- Category X no tariff commitment at all.
- Under 2.20 negotiations may decide to accelerate reductions)

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The content of Japan's goods schedule under JAAEPA

- The special terms in column 5 refer to 56 different sets of conditions.
- For example for Note (3), the rate reduced from 32.5% down to 23% by the 16th year.
- For example for Notes (36) and (37) there is no reduction of the out of tariff rate, there is only a commitment to expand a tariff rate quota over a lengthy implementation period.
- The longest phase in period for expansions of TQ volumes is 21 years – that is until 2036 (Note 39) which relates to certain types of cheese.
- Category X – no commitments applies to
- Rice (10.06)
- Flour made from wheat, or maize or barley
- Pellets or flakes of wheat, rice or barley
- cane sugar or beet sugar (17.01)
- See summary at <http://dfat.gov.au/trade/agreements/jaepa/fact-sheets/Pages/default.aspx>

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Impact of Trans Pacific Partnership

- Further reductions of tariffs
- see <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-goods-market-access.aspx>
- For Japan:
 - Beef down to 9% within 15 years
 - Pork further reductions over 10 years
 - Wheat & barley – some reductions and expansion of TQs
 - Dairy – some tariff reductions and expansions of TQs



Consider treaty obligations affecting Trade in Services under:

1. GATS
2. JAEPA 2015
3. TPP yet to be brought into force



General Agreement on Trade in Services

- Generally applicable rules including Most favoured nation rule – Art II must accord to services and services suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
- Rules which affect on those sectors and modes of services which are listed in the individual Member's Schedule of Specific Commitments – 3 main rules as follows



Sectors & Subsectors

- 12 service sectors based on UN Central Product Classification
 - Business Services
 - Communications services
 - Construction services ,
 - Distribution services ,
 - Education services ,
 - Environment services,
 - Financial services,
 - Health related services,
 - Tourism and Travel related services
 - Recreation, Cultural and Sporting services
 - Transport Services
- And the 12 Sectors divided in 160 subsectors

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Modes of Service

- Cross Border - Provision (Art I.2(a)) – both the supplier and the consumer stay in their own territory; eg. Professional services, Banking
- Consumption Abroad (Art I.2(b)) – The Customer goes to the Supplier’s territory; eg. Servicing aircraft
- Commercial Presence (Art I.2(c)) – The Supplier sets up a place of business in the Customer’s territory; eg. Retailing, Banking
- Presence of Natural Persons (Art I.2(d)) – Persons go to the territory of the Customer temporarily; eg. Professional services

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Singapore - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
SECTOR: Eg., CONSTRUCTION	AND CONSTRUCTION	RELATED	SERVICES
Specific Sector: Eg., Construction Services (CPC 511 – 518)	1) None	1) None	
	2) None	2) None	
	3) None	3) None	
	4) Unbound except as indicated in the horizontal section.	4) Unbound	

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Thailand - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
HORIZONTAL	COMMITMENTS		
All Sectors Included in This Schedule:	3) Commercial Presence ... is permitted only through limited liability company incorporated in Thailand. 4) Temporary Movement of natural persons is Unbound except in the following categories	3) In establishing its commercial presence, a legal entity which is owned or controlled by foreigners must ... 4) Unbound except as provided in the Market Access column.	

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Rules on Quantitative Limitations – Article XVI:2

- In sectors where market access commitments are undertaken, Members “shall not maintain or adopt”
 - (a) Limits on number of Service suppliers (including via economic needs test)
 - (b) Limits on total value of service transactions or assets
 - (c) Limits on total quantity of service output
 - (d) Limits on the number of persons that can be employed
 - (e) Restrictions as to type of legal entity
 - (f) Limitations on foreign capital in value or percentage
- UNLESS otherwise specified in its Schedule
-

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Article XVII National Treatment rule

- In sectors inscribed in its Schedule
- Members must accord to services and services suppliers of any other Member
- treatment no less favourable than that it accords to its own like service and service suppliers
- “subject to any conditions and qualifications set out [in the Schedule]

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Article XVI:1 – treatment no less than set out in Schedule

- Members must Accord to services and service suppliers of another Member
- Treatment no less favourable than that provided for in the Schedule
- Under “terms, limitations and conditions” specified in the Schedule.

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Singapore - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
SECTOR: Eg., CONSTRUCTION	AND CONSTRUCTION	RELATED	SERVICES
Specific Sector: Eg., Construction Services (CPC 511 – 518)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound	

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Thailand - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
HORIZONTAL	COMMITMENTS		
All Sectors Included in This Schedule:	3) Commercial Presence ... is permitted only through limited liability company incorporated in Thailand. 4) Temporary Movement of natural persons is Unbound except in the following categories	3) In establishing its commercial presence, a legal entity which is owned or controlled by foreigners must ... 4) Unbound except as provided in the Market Access column.	

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Impact on Investment

- GATS commitments may require domestic law on investment to allow services providers covered by a Mode 3 commitment for a particular sector to establish a commercial presence.
- Limits on the establishment are allowed only if a relevant qualification is in the schedule
- Derogations from national treatment are allowed only if a relevant qualification is in the schedule.
- Note : GATS applies only to establishing commercial presence for service suppliers not to establishing a commercial presence for manufacturing

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Impact on Movement of Natural Persons

To the extent commitments are made relating to movement of natural persons, Member must grant entry and temporary stay visas subject to other provisions of their immigration law

This usually applies to

- Managers
- Executives
- Persons with specialist skills (sometimes limited to those with proprietary knowledge of the operations of the business)

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Coverage of Commitments under GATS

-
- Australia and Japan are among the WTO Members which have made commitments on a relatively high number of services sub sectors
- Australia has listed 109 services sub sectors in its GATS Schedule
- Japan has listed 112 services sub sectors in its GATS Schedule
- Source: member info at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

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JAEPA Chapter 9 on Services

- On a negative list basis rather than the positive list approach in GATS
- Art 9.3 A rule (similar to GATS Article XVI:2) prohibiting some specific types of restrictions (mostly quantitative restrictions)
- Art 9.4 A rule (similar to GATS Article XVII) requiring national treatment
- Art 9.5 a rule (similar to GATS Article II) requiring most favoured nation treatment
- Art 9.6 prohibiting parties from requiring maintenance of a local office or residence as a condition for supplying a service
- But these rules apply to all service sectors (other than air transport traffic rights) except to the extent that they are excluded in:
- Article 9.7.1 by The Annex 6 Schedule of Non-Conforming Measures
- Article 9.7.2 by The Annex 7 Schedule of Measures with respect to certain listed sectors, sub-sectors or activities.

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JAEPA – Trade in Goods – Annex 6 of Non-conforming Measures

- Article 9.7.1 provides that Articles 9.3 (market access), 9.4.1 (NT), 9.5 (MFN) and 9.6 (establishment or residence) do not apply to
- (a) any non-conforming measure that is maintained on [15 January 2015] as set out in Schedules in Annex 6 of (i) central government or (ii) a state of territory or prefecture;
- (b) any non-conforming measure of a local government maintained on 15 Jan 2015
- (d) an amendment .. to a non-conforming measures referred to in paras (a) or (b), provided that the amendment or modification does not decrease the conformity of the measure, as it existed immediately before the amendment, with articles 9.3, 9.4.1,9.5, and 9.6.

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JAEPA – Trade in Goods – Annex 7 of Measures in Excluded Sectors

- Article 9.7.2 provides that Articles 9.3 (market access), 9.4.1 (NT), 9.5 (MFN) and 9.6 (establishment or residence) “do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities set out in its Schedule in Annex 7 ... “

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JAPEA – Services – Denial of Benefits

- Australia’s / Japan’s obligations only relate to services suppliers of Japan /Australia
- Most important limit is Article 9.14.2
- “A Party may deny the benefits of this chapter ... to a services supplier of the other Party that is an enterprise of the other Party, where the denying Party establishes that the enterprise is owned or controlled by persons of a non-Party or of the denying Party and has no substantial business activities in the area of the other Party.
- Eg. Japan need not accord the benefits to a company incorporated in Australia which is majority owned by nationals of a 3rd country and has no substantial business activities in Australia.

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Format of Schedule in Annex 6

Sector	
Obligations Concerned	
Level of Government	
Source of Measure	
Description	

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Example of Australia’s Schedule in Annex 6

Sector	All sectors
Obligations Concerned	Market access (Article 9.3) National Treatment
Level of Government	Central and regional
Source of Measure	Australia’s Foreign Investment policy, which includes <i>Foreign Acquisitions and Takeovers Act 1975</i> (Cth) and ...
Description	The following investment may be subject to objections ... or notifications ...

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Format of Schedule in Annex 7

Sector	
Obligations concerned	
Description	
Existing Measures	

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Example of Australia Schedule in Annex 7

Sector	All Sectors
Obligations concerned	Market access (Article 9.3)
Description	Australia reserves the right to adopt or maintain any measures with respect to the supply of a service by the presence of natural persons, subject to the provisions on Chapter 12 (Movement of Natural Persons)
Existing Measures	

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JAIPA Ch Investment

- Article 14.3 national treatment
- Article 14.4 MFN
- Article 14.5 minimum standard of treatment
- Article 14.9 prohibition of performance requirements
- But these rules apply to all service sectors (other than air transport traffic rights) except to the extent that they are excluded in:
- Article 14.10.1 by The Annex 6 Schedule of Non-Conforming Measures
- Article 14.10.2 by The Annex 7 Schedule of Measures with respect to certain listed sectors, sub-sectors or activities.
- [the same Schedules as apply to the Services chapter]

JAEPA Outcomes on Services and Investment

- Some useful summaries on commitments made by Japan under JAEPA at:
- <http://dfat.gov.au/trade/agreements/jaepa/fact-sheets/Pages/quick-guide-key-services-and-investment-outcomes.aspx>
- Includes some incremental liberalization in
 - Legal services;
 - Financial services,
 - Education services;
 - Telecommunication services
 - Other professional services

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Impact of Trans Pacific Partnership

- Further liberalisation of services and investment
- see summary at
- <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-services-market-access.aspx>
- For all TPP parties:
- Allowing card payment systems on a cross border basis
- Japan:
 - Ground handling and airport services
 - Availability of extensions of short term stay visas for business persons

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Any Questions?

- 1. ...
- 2. ...
- 3. ...

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