



Australian Government
Australian Trade and Investment Commission



**AUSTRALIA'S CAPABILITY IN
INTERNATIONAL
COMMERCIAL
ARBITRATION**



CONTENTS

Introduction	03	Building capacity through quality education and training	11
Industry overview	04	Further information	12
An esteemed judicial system and modern legislative framework	06	About Austrade	12
World class legal expertise, arbitrators and infrastructure	08		

Disclaimer

This report has been prepared by the Commonwealth of Australia represented by the Australian Trade and Investment Commission (Austrade). The report is a general overview and is not intended to provide exhaustive coverage of the topic. The information is made available on the understanding that the Commonwealth of Australia is not providing professional advice.

While care has been taken to ensure the information in this report is accurate, the Commonwealth does not accept any liability for any loss arising from reliance on the information, or from any error or omission, in the report.

Any person relying on this information does so at their own risk. The Commonwealth recommends the person exercise their own skill and care, including obtaining professional advice, in relation to their use of the information for their purposes.

The Commonwealth does not endorse any company or activity referred to in the report, and does not accept responsibility for any losses suffered in connection with any company or its activities.

Copyright © Commonwealth of Australia 2018



The material in this document is licensed under a Creative Commons Attribution – 4.0 International licence, with the exception of:

- the Commonwealth Coat of Arms
- the Australian Trade and Investment Commission's logo
- any third party material
- any material protected by a trade mark
- any images and photographs.

More information on this CC BY licence is set out at the creative commons website: <https://creativecommons.org/licenses/by/4.0/legalcode>. Enquiries about this licence and any use of this document can be sent to marketing-comms-helpline@austrade.gov.au.

Attribution

Before reusing any part of this document, including reproduction, public display, public performance, distribution, dissemination, communication, or importation, you must comply with the Attribution requirements under the CC BY licence.

Using the Commonwealth Coat of Arms

The terms of use for the Coat of Arms are available from the It's an Honour website (www.itsanhonour.gov.au).

17-18-57. Publication date: April 2018.



INTRODUCTION

Australia offers world-class international dispute resolution services and expertise to promote global trade, safeguard commercial relationships and manage risk in cross-border investment.

International commercial disputes can be high risk often involving complex legal issues, jurisdictional challenges and enforcement difficulties.

International commercial arbitration (ICA) is a private dispute resolution process in which parties from different countries choose to have their disputes decided by one or more arbitrators, without recourse to the courts of a particular country. For centuries, arbitration has been chosen by businesses looking to manage disputes in an efficient and commercial manner, while maintaining successful commercial relationships. Given its many advantages, ICA remains the preferred means of resolving cross-border disputes today.¹

ICA balances the need for due process with expediency and flexibility, allowing parties to tailor procedures to their requirements. It provides the power to enforce contracts with finality and protect investment across borders within a private setting.

Australia is a politically stable, neutral location for the arbitration of disputes between parties in the Asia-Pacific region and beyond. Extensive legal and judicial expertise, specialist institutions, infrastructure, education and training are some of the many advantages of arbitration in Australia, supported by a modern legislative framework facilitating best practice in ICA. In 2018 the World Bank continues to rank the quality of Australia's judicial processes as the world's best.²

This industry capability report provides an overview of Australian capability in the ICA sector, including examples of Australian specialist expertise.

austrade.gov.au

WHY USE INTERNATIONAL COMMERCIAL ARBITRATION (ICA)?



FLEXIBILITY OF PROCESS



FINAL AND BINDING



PRIVATE & CONFIDENTIAL BY AGREEMENT



TIME & COST EFFICIENCY



NEUTRALITY OF FORUM & DECISION-MAKER



GLOBAL ENFORCEABILITY UNDER THE NEW YORK CONVENTION

INDUSTRY OVERVIEW

In a global economy, ICA is a vital part of doing business and effectively managing commercial relationships and risk. The past decade has seen an increase in the use of ICA, particularly in the Asia-Pacific region. This is largely due to the significant growth of the Australian and Asian economies and their increased participation in global commerce.

Global forecasts predict Australia will maintain its position as the world's 13th largest economy (in US dollar terms) in 2018. Australia's nominal GDP is estimated at US\$1.5 trillion (A\$1.9 trillion) and accounts for 1.8 per cent of the global economy. Growing more than three per cent on average each year since 1992, Australia is the only major developed economy to have recorded no annual recessions from 1992 to 2017 and is now in its 27th year of consecutive growth.³

The Australian economy is resilient; sustained by sound macroeconomic policies, strong institutions and solid trade ties with the Asia-Pacific region. In 2016-2017, Australia's two-way trade in goods and services was worth over A\$735 billion, with significant growth in trade between Australia and Asia. In 2016-2017, China was Australia's largest individual two-way goods and services trading partner, accounting for 23.8 per cent (\$174 billion) of total trade. Japan was the second largest at 9.3 per cent, followed by the United States at 9.0 per cent.⁴

The natural result of this trade and investment in the region is the growth in complex cross-border disputes. Over the last five to ten years, the ICA landscape in Australia has evolved considerably.

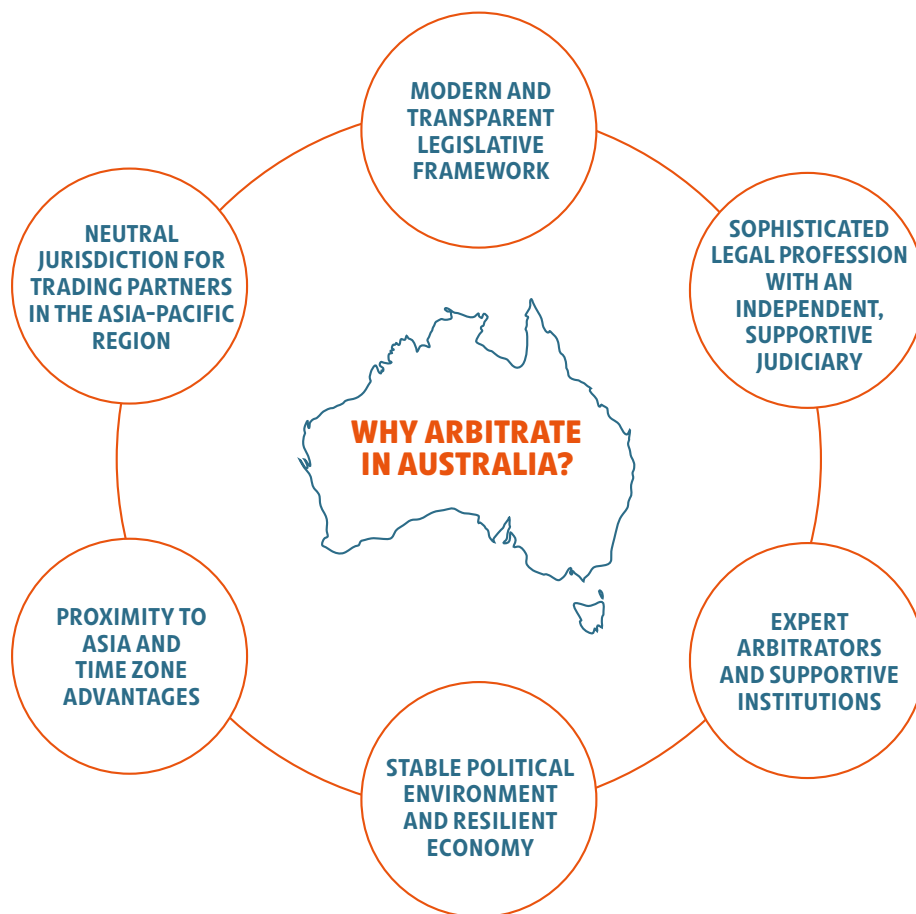


Changes include:

- › key legislative changes providing a modern and refined procedural law, incorporating the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law), for ICA in Australia
- › a sophisticated approach developed within the court system to support arbitration, including the allocation of arbitration cases to Judges with special expertise
- › entry into the market of a growing number of global law firms, either with the opening of new offices or through relationships with a local firm, resulting in a deepening of the expertise in, and broadening of the reach and capacity of, the legal profession
- › growth of dedicated ICA teams within law firms and increased specialisation in this area at the Bar
- › increased case load and use of Australian seats for ICA

- › opening of dedicated dispute resolution centres offering high quality venues and logistical support for ICA proceedings
- › significant growth and proficiency in the market for ICA support services and technology
- › increased education and skills training offerings, from university level through to arbitrator training.

Australia presents a compelling option as a neutral forum for ICA between trading partners in the Asia-Pacific region and the country's geographical proximity creates time zone advantages. In addition, Australia's multicultural society and reputation as a liberal democracy and transparent economy puts Australia in a convincing position to offer high quality dispute resolution services internationally.



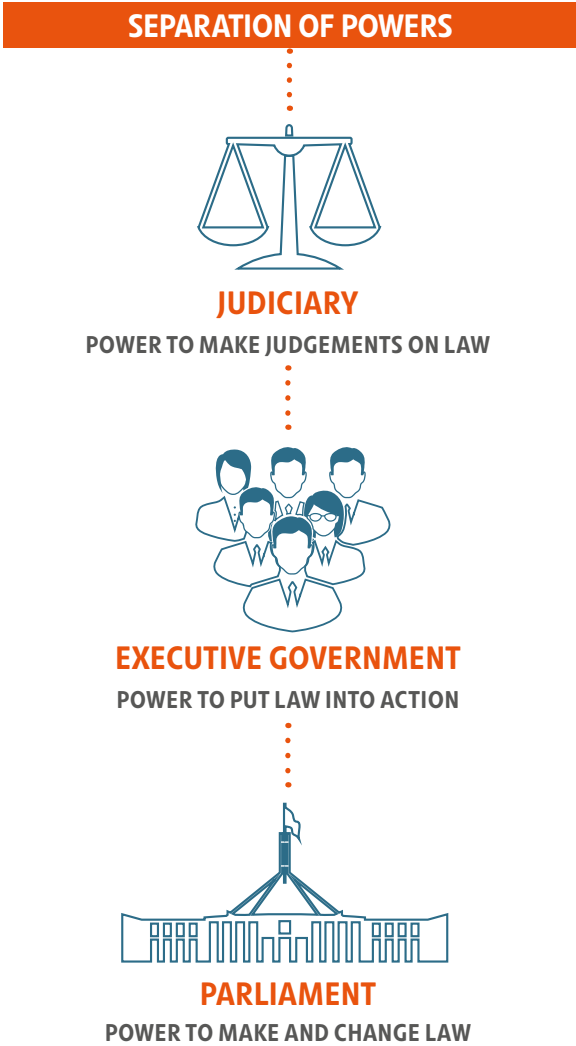
AN ESTEEMED JUDICIAL SYSTEM AND MODERN LEGISLATIVE FRAMEWORK

The separation of powers doctrine is enshrined in the Australian Constitution. This divides the institutions of government into three branches; the legislative which produces the law, the executive which puts the law into action, and the judiciary which makes decisions about the law.

The quality and integrity of the Australian judiciary is well recognised. Judicial appointments are made on the basis of a legal practitioner’s integrity, high level of legal skills and the depth of his or her practical experience. Parties seeking the assistance of the Australian courts can have confidence that the determinations reached will be based on applicable law, well considered and free from bias.

This is crucial in ICA, as the courts can be called upon to provide support during the course of arbitral proceedings, and to recognise and enforce foreign and local arbitral awards in an efficient manner.

Over the last decade, the Australian judiciary has developed significant familiarity and expertise in the application of ICA law. The Federal Court of Australia and the New South Wales, Victorian and Western Australian State Supreme Courts have, variously, put in place specialist arbitration lists, detailed procedural rules or practice notes for arbitration-related actions and appointed judges with expertise to appropriately administer these lists and hear arbitration-related cases. Decisions from these courts over the course of recent years demonstrate the Australian judiciary’s ongoing commitment to maintaining the right balance between court support and intervention in the arbitral process.⁵ Australian courts have been recognised as demonstrating highly sophisticated internationalist decisions.⁶



Australia's highest court, the High Court of Australia, has unanimously upheld the finality of international arbitral awards and the voluntary nature of international arbitration agreements, recognising the role of the courts in supporting arbitration.⁷ The approach of the Australian courts instils great confidence in Australia as a venue for ICA.

ICA in Australia is regulated at a federal level by the *International Arbitration Act 1974* (Cth) (IAA). The IAA gives force of law and effect to the 2006 version of the Model Law, which is designated as the exclusive mandatory procedural law for all ICA proceedings in which an Australian seat or place of arbitration is designated. The IAA also implements Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

The IAA provides a familiar, clear and effective modern international arbitration framework which:

- › recognises and respects parties' choice of ICA as the means to resolve their disputes
- › limits the scope of judicial intervention in arbitral proceedings
- › provides a comprehensive regime to protect the confidentiality of proceedings (with a provision allowing parties to opt-out should they wish to do so)
- › recognises parties' rights to be represented in arbitration by any person of their choosing
- › provides a right of immunity to arbitrators from liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.

The IAA's objective is to "facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes"⁸ and implement a pro-enforcement, streamlined arbitration regime that reflects international best practice.

A LEADING LOCATION FOR ICA



THE QUALITY OF AUSTRALIA'S JUDICIAL PROCESSES ARE THE BEST IN THE WORLD⁹



7 AUSTRALIAN UNIVERSITIES ARE AMONG THE WORLD'S TOP 50 FOR LAW AND LEGAL STUDIES¹⁰



AUSTRALIA RANKS 13TH OUT OF 180 COUNTRIES ON TRANSPARENCY INTERNATIONAL'S CORRUPTION PERCEPTION INDEX¹¹



AUSTRALIA IS RANKED 15TH OUT OF 190 ECONOMIES FOR EASE OF DOING BUSINESS¹²

WORLD CLASS LEGAL EXPERTISE, ARBITRATORS AND INFRASTRUCTURE

Legal Expertise

The Australian legal profession is independent and highly trained, with recognised specialist expertise in international business law and cross-border disputes, and a reputation for fair and ethical practice. Seven Australian universities are among the world's top 50 universities for law and legal studies in the QS World University Rankings by Subject 2017, the highest after the US (13 universities) and UK (8 universities).¹³ These include:

- › The University of Melbourne ranked 8
- › The University of Sydney ranked 11
- › The University of New South Wales ranked 13
- › The Australian National University ranked 15
- › Monash University ranked 23
- › The University of Technology Sydney ranked 41
- › The University of Queensland ranked 45

Following graduation, law students are required to undertake legal practice training in order to qualify for admission as a solicitor. Most large and medium-sized law firms in Australia also offer graduate development programs which run between 12-24 months to build and refine skills, knowledge and performance to the highest professional standard. Admission to the Bar in Australia typically requires additional study, examinations and the completion of a readership program through which new barristers are tutored.¹⁴

Australian lawyers and barristers often develop specialised subject matter expertise working in dedicated teams and within specialised chambers at the Bar. Given the role of the resources and maritime sectors in the Australian economy, Australian practitioners are particularly well known for being at

the forefront of expertise in the energy, resources, construction, infrastructure and maritime industries that frequently use ICA as a dispute resolution mechanism.

The opening of Australian offices by many large international law firms has consolidated Australian capacity to provide service to clients around the clock. The liberalised Australian legal market also allows foreign lawyers to practice in Australia, broadening the global expertise available.

Australian law firms and members of the Australian Bar with a focus on ICA practice have developed considerable experience offering specialist advice and advocacy for ICA proceedings.

The multicultural nature of Australian society has contributed to the development of a culturally diverse legal profession with significant foreign language capacity. Many Australian practitioners seek to extend their skills development through focused education or practice abroad, broadening the international expertise that is offered within Australia. For these reasons, Australian legal expertise remains highly sought after. Offering a cost competitive fee structure when compared with other jurisdictions in the Asia-Pacific region, Australia also provides excellent value for money.

Leading International Arbitrators

Many of the world's leading international commercial arbitrators are Australian nationals, including Gavan Griffith AO QC, Doug Jones AO, Peter McQueen, Karyl Nairn QC, Michael Pryles AO PBM, Kim Rooney, James Spigelman AC QC and Jeffrey Waincymer. With a focus on the fair, efficient and cost-effective delivery of commercial outcomes, Australian arbitrators have developed a reputation for high quality, enforceable awards.

Infrastructure

Arbitrations seated in Australia benefit from strong institutional and administrative support. With wide-ranging capacities in the provision of support services to ICA, Australia has the capacity to meet growing global demand for comprehensive, neutral ICA services and facilities.

Specific areas of expertise offered by companies in Australia include:

- › impartial administration and appointment services
- › venue and logistics support services
- › comprehensive legal process management solutions and technology.

Impartial Administration and Appointment Services

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's international arbitration institution. Established in 1985 as a not-for-profit organisation, ACICA provides a broad range of services to support international dispute resolution including:

- › acting as a neutral appointment and administering body for ICA and mediation, under the ACICA Rules and for ad hoc processes
- › maintaining panels of international arbitrators and mediators from around the world as a public recourse
- › providing a set of Rules and Model Clauses to facilitate best practice in the conduct of arbitration and mediation

- › provision of deposit-holding services for tribunal and mediator fees in Alternative Dispute Resolution (ADR) processes
- › hosting of conferences, seminars and development of skills training programs
- › assisting with venue hire, logistical support and other legal process services.

In 2007, with the support of the Federal Attorney-General's Department, ACICA established the Australian Maritime and Transport Arbitration Commission (AMTAC), a specialist commission dedicated to the promotion of maritime and transport dispute resolution and the provision of efficient dispute resolution services to the shipping and transport industry.

Transnational disputes are often complex and parties seeking to resolve these disputes in Australia can be confident that all of their requirements will be taken care of in a seamless manner. ACICA and AMTAC have the independence, expertise and experience to efficiently administer high value, complex international arbitration cases.

Venue and Logistical Support

Australia offers a network of hearing venues to support ICA in Australia, whatever the chosen seat.

In 2010, with support from the New South Wales and Federal Governments, the Australian Disputes Centre (ADC) established a purpose-built hearing centre in the heart of Sydney's business district to provide world class facilities and specialised infrastructure to parties seeking to resolve disputes. ADC provides flexible, custom-designed facilities for all alternative dispute resolution proceedings, in a business centre environment.



ACICA and AMTAC are headquartered at the ADC and together these organisations have the capacity to provide a fully integrated service for the hearing of ACICA and AMTAC cases, taking a proactive approach to comprehensive service provision. Similarly, the ADC provides support to ad hoc ICA proceedings and those conducted under other institutional rules.

Other leading venues Australia-wide include:

- › The Melbourne Commercial Arbitration and Mediation Centre (MCAMC), Melbourne. Established in 2014 under a memorandum of understanding between the Department of Justice, Victorian Bar, Law Institute of Victoria and the courts, the MCAMC provides start-of-the-art facilities for arbitration and mediation, in central Melbourne.
- › Queensland Law Society venue, Brisbane. Located in central Brisbane, the Queensland Law Society offers contemporary and professional premises with facilities and equipment to meet all arbitration hearing requirements.
- › The David Malcolm Justice Centre, Perth. Conveniently located in Perth's CBD, the Centre, which is due to open in April 2018, will offer multi-purpose hearing rooms and mediation rooms with extensive technology.

These organisations recognise that alternative dispute resolution is an integral part of global business and that ICA (and other ADR processes), as an alternative to litigation, can deliver benefits to the international business community including expediency, commercial privacy as well as business harmony and relationship maintenance. Australia's capacity to provide high level venue services and facilities to assist parties with the efficient resolution of their disputes is essential to the maintenance of profitable business and building of community confidence.

Comprehensive legal process management solutions and technology

Australia offers leading document management and technology solutions to support ICA and other ADR proceedings. Capacities encompass e-discovery services, document production assistance, e-trial solutions, real time reporting and transcription services. These services provide time and cost efficiencies to optimise the ICA process and provide confidence

to parties conducting ICA in Australia. Various organisations within Australia, many also supported by a global network, provide these services.

Political Stability

Australia is a politically stable, liberal democracy where the rule of law is respected and upheld without bias:

- › Transparency International's Corruption Perception Index ranked Australia 13th out of 180 countries globally, higher than the majority of countries in the Asia-Pacific region.¹⁵
- › Australia is ranked 14th out of 190 economies for ease of doing business, and fifth when compared to economies with a similar or larger population.¹⁶
- › In 2016, Australia ranked 6th globally for regulatory quality. The index, published by the World Bank, captured perceptions of the ability of government to formulate and implement sound policies and regulations that permit and promote private sector development.¹⁷
- › The Economist Intelligence Unit ranked Australia 13th in its 2017-2021 global rankings of the best places to do business. This model measures the quality of business environments in 82 countries based on both historical and expected conditions for the next five years. It considers the political environment, macroeconomic environment, market opportunities, policy towards free enterprise and competition, policy towards foreign investment, foreign trade and exchange controls, taxes, financing, the labour market and infrastructure.¹⁸
- › Australia was ranked more than 10 percentage points higher than any other country in the Asia-Pacific region in the biannual corporate governance survey compiled jointly by CLSA Limited and the Asian Corporate Governance Association. The decade-long publication has become a region-wide marker on macro corporate governance quality in the region.¹⁹

BUILDING CAPACITY THROUGH QUALITY EDUCATION AND TRAINING

Many leading Australian universities offer ICA courses as a part of their undergraduate or post-graduate legal degrees, building student capacity in this area even before they commence practice. Australian organisations with specialist expertise in ICA offer quality postgraduate education and skills development training to meet the needs of the industry and provide the competencies required for job roles in the sector, including as counsel and as arbitrator.

The Chartered Institute of Arbitrators (CIArb) is a global professional association that advocates the development and practice of arbitration. CIArb Australia is the Australian branch of the Institute. It provides education, training and accreditation for arbitrators and mediators. CIArb Australia, in joint venture with the CIArb East Asia and CIArb Singapore branches, offers the CIArb Asia Pacific Diploma in International Commercial Arbitration course. The Diploma course is the foremost tertiary course in international arbitration. Completion of the course offers participants a globally recognised qualification as a Member of CIArb, and a pathway to Fellowship which may be obtained through successful completion of the Practice and Procedure and Award-Writing examinations.

CIArb, in conjunction with ACICA, provides a Tribunal Secretaries training course delivering the necessary knowledge and skills to act as a Tribunal Secretary in ICA proceedings. This course provides an opportunity for young practitioners to progress their arbitration career by gaining practical experience. Successful completion of the course provides entry to ACICA's Tribunal Secretary panel.

ACICA offers other skills-based training in ICA, including a series of intensive workshops enabling the development of skills for effective advocacy in International Arbitration. The course assists participants familiarise themselves with the essential criteria for effective international arbitration advocacy and provides an opportunity to practise those skills in a live environment with feedback from experienced practitioners.

Both organisations also offer seminar programmes to provide continuing legal education to students, practitioners and arbitrators practising in this field.

The practice of ICA is continually evolving and the industry faces challenges in its efforts to remain an accessible, effective and commercial dispute resolution mechanism for users. Australian ICA education and training providers can help counsel, arbitrators, the judiciary, users and students to enhance their skills and develop further knowledge in this area.

FURTHER INFORMATION

The following organisations are some of the bodies involved with supporting international arbitration in Australia. Contact your local Austrade representative about connecting with the Australian international arbitration industry.

- › **Australian Centre for International Commercial Arbitration**
acica.org.au
- › **Australian Disputes Centre**
disputescentre.com.au
- › **Chartered Institute of Arbitrators Australia**
ciarb.net.au
- › **David Malcolm Justice Centre**
supremecourt.wa.gov.au
- › **Epiq**
epiqglobal.com
- › **Melbourne Commercial Arbitration and Mediation Centre**
mcamh.com.au
- › **Law In Order**
lawinorder.com.au
- › **LitSupport**
litsupport.com.au
- › **Queensland Law Society venue**
qls.com.au

ABOUT AUSTRADE

The Australian Trade and Investment Commission – Austrade – contributes to Australia’s economic prosperity by helping Australian businesses, education institutions, tourism operators, governments and citizens as they:

- › develop international markets
- › win productive foreign direct investment
- › promote international education
- › strengthen Australia’s tourism industry
- › seek consular and passport services.

Austrade helps companies around the world to identify and take up investment opportunities in Australia as well as to source Australian goods and services. Our assistance includes:

- › providing insight on Australian capabilities
- › identifying potential investment projects and strategic alliance partners
- › helping you identify and contact Australian suppliers.

W austrade.gov.au

E info@austrade.gov.au

A photograph of three business professionals in a meeting. On the left, a bald man with glasses and a beard, wearing a dark suit and white shirt, is gesturing with his hands while speaking. In the center, a man with glasses and a white shirt with a patterned tie is listening. On the right, a woman with blonde hair in a ponytail, wearing a dark top, is seen from the back, also listening. They are in a room with large windows overlooking a city skyline.

REFERENCES

1. School of International Arbitration, Queen Mary University of London and White & Case, *International Arbitration Survey: Improvements and Innovations in International Arbitration (2015)*. arbitration.qmul.ac.uk/docs/164761.pdf
2. World Bank. Doing Business 2018, Reforming to Create Jobs. doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf
3. Austrade. 2018 Why Australia Benchmark Report. austrade.gov.au/international/invest/resources/benchmark-report
4. Department of Foreign Affairs and Trade, Australia's Trade in Goods and Services. dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Documents/australias-goods-services-by-top-15-partners-2016-17.pdf
5. For example, *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5, *Ye v Zeng* [2015] FCA 1192, *Ye v Zeng (No 2)* [2015] FCA 1243, *Robotunits Pty Ltd v Mennel* [2015] VSC 268
6. Lecture by Dr Dean Lewis (Partner, Pinsent Masons, Hong Kong on 19 April 2016, Australian Disputes Centre.) See also D. Lewis, *The Interpretation and Uniformity of the UNCITRAL Model LAW on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore*, 2016, Wolters Kluwer
7. Australian Maritime and Transport Arbitration Commission. Why Arbitrate in Australia? amtac.org.au/whyarbitrateinaustralia/
8. *International Arbitration Act 1974 (Cth)*, s2D
9. World Bank. Doing Business 2018, Reforming to Create Jobs. doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf
10. QS World University Rankings by Subject 2017 (Law and Legal Studies), topuniversities.com/university-rankings/university-subject-rankings/2017/law-legal-studies
11. Transparency International. Australia. transparency.org/country/AUS
12. World Bank. Doing Business 2018, Reforming to Create Jobs. doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf
13. QS World University Rankings by Subject 2017 (Law and Legal Studies), topuniversities.com/university-rankings/university-subject-rankings/2017/law-legal-studies
14. Note that state and territory requirements differ
15. Transparency International. Australia. transparency.org/country/AUS
16. World Bank. Doing Business 2018, Reforming to Create Jobs. doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf
17. World Bank. Doing Business 2016 - Measuring Regulatory Quality and Efficiency. documents.worldbank.org/curated/en/743931468189255809/pdf/100653-WP-Box393240B-PUBLIC-DB2016-AUS.pdf
18. The Economist Intelligence Unit. Business environment rankings 2017 country.eiu.com/article.aspx?articleid=1705322554&Country=Australia&topic=Business&subtopic=Business+environment&subsubtopic=Rankings+overview
19. CG Watch 2016. Ecosystems matter. September 2016. acga-asia.org/upload/files/research_preview/20161014021202_3.pdf

austrade.gov.au



Australian Government

Australian Trade and Investment Commission

