

| Proposed Free Trade Agreement between India and Australia

_____ Middletons Submission

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Produced by

**Cameron Abbott
Simon McDonald**

Contact



Cameron Abbot

Partner

T: +61 3 9640 4261

F: +61 3 9205 2055

E: cameron.abbott@middletons.com



Simon McDonald

Senior Associate

T: +61 3 9640 4405

F: +61 3 9205 2055

E: simon.mcdonald@middletons.com

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Submission

Middletons welcomes the opportunity to provide a submission on the merits of the proposed Free Trade Agreement (**FTA**) between Australia and India.

Middletons has extensive experience in the Indian market having advised Australian clients on their dealings with Indian companies in India as well as Indian companies on establishing and participating in the Australian market for several years.

This submission focuses primarily on facilitating Australian companies or organisations establishing and maintaining operations in India.

General Comment Concerning the Proposed FTA

Middletons are highly supportive of the establishment of a FTA between Australia and India as it provides an opportunity to reduce barriers to entry, particularly for Australian companies and organisations seeking to operate in India.

India has a growing economy, large population, one of its official languages is English and finally, as a previous British colony, it has similar political, governmental and judicial institutions and structures to Australia. These elements mean that India arguably represents a better market opportunity for Australian companies and organisations than other countries in the region where language barriers or significantly different governmental and political legacies and structures constitute impediments to trade which cannot easily be alleviated through a FTA.

For these reasons, Middletons consider India a strategic market opportunity and have invested heavily in developing and furthering our relationships and interactions in the Indian market.

Despite the opportunity that the Indian market represents, however, there are currently significant impediments to Australian companies operating and participating in the Indian market which a FTA could alleviate. Some of these are discussed below.

Current Challenges

In our view, it is significantly more difficult for Australian companies or organisations to establish themselves and operate in India than it is for Indian companies to establish and commence operations in Australia. Generally, this is due to the high levels of government regulation which is generally difficult to navigate, with practical impediments when seeking to complete outside of India.

The process involved in obtaining a Director Identification Number (**DIN**) through the Ministry of Corporate Affairs (**MCA**) is indicative of the regulatory burden facing foreign operators seeking to access the Indian market.

Director Identification Numbers

Anyone wishing to be a director of an Indian company must obtain a DIN by making a submission to the MCA prior to appointment. The application process involves the following:

- **Proving the applicant's identity:** An applicant must provide proof of identity. The specified proofs of identity include passports, election cards, driving licences but the proof used must include the date of birth of the applicant. In proving the applicant's identity, the

applicant must also list the father's name. If an applicant's proof of identity does not contain details of the father's name separate proof must be provided. Australian licences and passports do not list the name passport or licence holder's father's name. Indeed the only document we have been able to use effectively has been the birth certificate of the applicant. In certain instances obtaining this documentation has been extremely difficult. It is also not clear what bearing an applicant's paternal history has on their suitability as a director.

- **Proving the applicant's residence:** The applicant must also submit proof of the applicant's address. This can take the form of a passport, election card, ration card, driving licence, electricity bill, telephone bill or bank account statement. While superficially this appears straight forward, any discrepancies, like hand written notes on the proof of residence, will result in the proof being rejected. This can be extremely frustrating given the next point.
- **Notarisation and Apostille:** As DFAT would be aware, various foreign governments require certain documents to be apostilled. In relation to the DIN application process, however, the application form, each proof of identity and proof of residence must be notarised by a public notary, apostilled by DFAT and finally stamped by the Indian High Commission. This is a costly and protracted exercise particularly given (as we have discussed above) minor discrepancies or alterations to any of the documents will result in that document needing to be resubmitted with all the necessary prior attestation and authentication.
- **Electronic vs Manual Process:** While the DIN application process involves the generation of an electronic form, this form cannot be submitted electronically. The form is printed and then submitted in hard copy with the associated proofs of identity and residence and cross referenced manually. This process effectively eliminates the efficiencies that could be obtained from an automated system.

The above process, in our view, indicates the practical difficulties for Australians seeking to act as directors of Indian companies where a process has been created without taking into account the impact on non-Indian resident applicants. More importantly, it is indicative of the high level of regulation which exists generally within India, regulations which represent a significant impediment to accessing India's market.

Foreign Companies

Again the highly regulated nature of the Indian market is illustrated where a foreign company wishes to establish a presence in India other than through an Indian subsidiary or joint venture company. To operate through an office in India a foreign company must establish a:

- liaison/representative office:
- project office; or
- branch office.

Each type of office is restricted in the types of activities it can undertake. For example, liaison offices must only act as channels of communication between the place of business and head office. A liaison office cannot engage, either directly or indirectly, in commercial activities or earn income in India. In contrast, a branch office is permitted to, amongst other things, export and import goods or render professional or consultancy services. That said, a branch office is

not permitted to carry out manufacturing activities on its own but can sub-contract manufacturing to an Indian company. The tax consequences vary according to the structure adopted.

Again the above system lacks the flexibility that is available to Indian residents trading in Australia. It illustrates the highly regulated structure which foreign entities must navigate to establish operations in India.

Foreign Professional Service Providers

There are a range of limitations effecting Australian companies and organisations wishing to engage in foreign direct investment into India. For example, the Indian market prohibits the provision of professional services by foreign law firms. Furthermore, Indian legal firms are restricted to 25 partners. In our view, the collective impact of these restrictions is that Indian law firms do not provide specialised services at competitive prices. Because the size of law firms is limited, the degree of legal specialisation is not as significant as in other markets. The lack of external competition seems to have resulted in Indian legal fees charged to overseas clients as being significantly higher than in other countries. While the firm sizes remain capped Indian firms will not be able to reach the scale necessary for them to be comfortable in competing in an open market.

Conclusion

The examples above are intended to demonstrate that the level of regulation and bureaucracy in the Indian market in India present significant barriers to Australian companies or organisations seeking to establish and maintain operations in India.

Obviously, to an extent the complexity of Indian legislation cannot be rectified through a FTA. That said, the FTA can seek to provide preferential arrangements to Australian companies or nationals seeking to operate in India. To use the DIN application process as an example, evidence of registration of an individual as a director with the Australian Securities and Investments Commission should provide the MCA with sufficient evidence to give that individual a DIN.

By providing preferential arrangements to Australian companies and organisations, to some extent the FTA can reduce the regulatory burden and associated costs of Australian companies and organisations seeking to establish operations in India.

