

An Assessment of Growth in the Trade in Services between Thailand and Australia after the Implementation of the Thailand-Australia Free Trade Agreement*

Deunden Nikomborirak

The Thailand-Australia Free Trade Agreement (TAFTA), Thailand's very first bilateral trade agreement, which covers trade in both goods and services, entered into force on January 1, 2005. This study is aimed at assessing the extent to which Thai and Australian persons and businesses have exploited the trade privileges provided under TAFTA as they are related to the service sector. Since both parties decided to open negotiations every three years in order to phase in liberalization in the service sector, the results of this study will provide useful information to help guide future commitments aimed at promoting the trade in services between the two countries.

1. THAILAND'S LIBERALIZATION COMMITMENTS UNDER TAFTA

Unlike goods that can be traded across borders, the delivery of most services requires that suppliers be in physical proximity to their final customers. Hence, service sector liberalization involves the freeing of capital and labor flows across borders in order to enable foreign service suppliers to establish a commercial presence in the host country.

Under the agreement, Thailand has made marginal commitments in opening up its service sector to Australia. As can be seen in Table 1A, TAFTA allows Australian investors to hold an equity share of up to 60 or 100 percent in a few service sectors; by contrast, the Foreign Business Act 1999, Thailand's main foreign investment law, prohibits foreign persons from owning a majority equity share in any business in the service sector.

In observing the list of service businesses for which Thailand has provided concessions to Australia, one can see that, with the exception of mining, they are

of relatively minor economic significance. Education, and distribution and installation may appear to be businesses of economic importance, but the conditionalities attached to these services severely limit the scope of the liberalization to a minimal level. For example, liberalization of distribution and installation services applies only to those in-house or captive services provided by Australian companies that produce manufactured products in Thailand. Given that Australia has a very small manufacturing base in Thailand, such liberalization is in effect rather insignificant. Similarly, the scope of liberalization of the education sector is limited to very specialized fields. Concessions made in other service sectors have also been circumscribed by the minimum scale of investment required in terms of their financial contributions and physical dimensions.

Concerning the movement of persons, although the TAFTA text shows extensive commitments (summarized in Table 1B), this study found that most commitments do not go beyond the status quo already afforded by existing laws or other regulations. For example, the visa provisions for Australian nationals, contractual suppliers, intra-corporate transferees, business visitors, and Asia-Pacific Economic Cooperation (APEC) Business Travel Card (ABTC) holders are consistent with the existing regime. The only special privileges provided under TAFTA are provisions that (a) allow spouses of Australian intra-corporate transferees and contractual service suppliers to work as executives, specialists or managers, and (b) allow Australian intra-corporate transferees and contractual service suppliers to access the "one-stop service for visas and work permits."

Now that we have identified the major privileges accorded under TAFTA to Australian persons and businesses, the key question is: "To what extent have Australian persons and businesses made use of such privileges?"

* This article summarizes a report on the same subject that had been submitted to the Department of Business Promotion in December 2008. The report was prepared by Dr. Deunden Nikomborirak, Research Director for Economic Governance, with Weerawan Paibuljitt-aree, Senior Researcher, Boonwara Sumano and Pornchai Linhavess, Researchers, Sectoral Economics Program, TDRI.

Table 1 Thailand's Trade in Services Commitments under TAFTA**A: Commitments on Investments**

Sector	Equity share (%)	
Foreign equity participation (Mode 3)		
Sector-specific commitments		
General management consulting services	100	- Provision of service must be provided exclusively through a regional operating headquarters (ROH), the ROH's associated company or foreign branch
Distribution and installation services	100	- Distribution and installation services related to products manufactured by Australian juristic persons established in Thailand only
Hotel lodging services	60	- Service supplier must have minimum paid-up registered capital of 800 million baht (US\$1 = about 35 baht). The facility must have a minimum of 100 rooms
Restaurant services	60	- The facility must have a minimum area of 450 square meters - The provider must have minimum paid-up registered capital of 50 million baht
Convention services, excluding catering and beverage services	60	- Total area must be not less than 4,000 square meters - Total area of the largest hall must be not less than 3,000 square meters
International exhibition services	60	- Total area of not less than 50 rai (1 rai = 1,600 square meters) - Total area of the indoor exhibition area must be not less than 25,000 square meters
Construction services relating to basic public services in public utilities or transport requiring special tools, machinery, technology or construction expertise	100	- Minimum paid-up registered capital must be not less than 1 billion baht
Higher education services	60	- Tertiary education services must be provided only by institutions specializing in science and technology, including life sciences, bio-technology and nanotechnology - Service supplier must be situated outside Bangkok and its metropolitan area - At least half the members of the university council must be Thai nationals
- Theme park services - Zoological garden services	60	- A total area of not less than 200 rai is required - Service supplier must have minimum paid-up registered capital of 1 billion baht
Aquarium services	60	- A total area of not less than 10 rai is required - Service supplier must have minimum paid-up registered capital of 200 million baht
Support services for maritime transport (excluding cargo-handling) Port and waterway operation services, including marina facilities	60	- Service supplier must have facilities, including ship lifter, inland berthing, and shipyard, for maintenance and repair
Non-service sector Mining (including operations undertaken on land or under water to obtain minerals from an area, by any method or methods, but not including individual mining or panning for minerals)	60	- Concessions must be granted by the Department of Primary Industries and Mines, Ministry of Industry, as provided by the Mineral Act B.E. 2510 (1967), as amended subsequently by - Mineral Acts (No.2) B.E. 2516 (1973); - (No.3) B.E. 2522 (1979); - (No.4) B.E. 2534 (1991); and - (No.5) B.E. 2545 (2002) - At least two fifths of the members of the board of directors must be Thai nationals

(Continued on page 12)

Table 1 (Continued)

B: Commitments on Movement of Labor

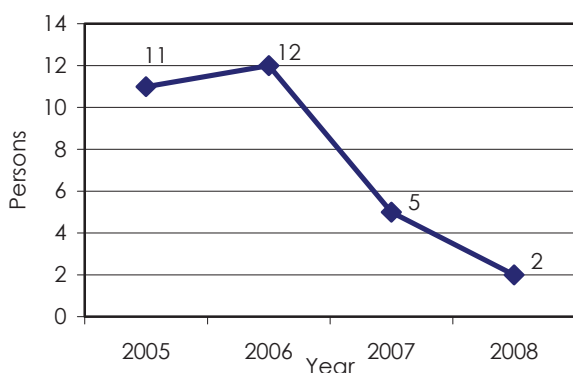
Movement of natural persons (Mode 4)		
Intra-corporate transferee	TAFTA	Domestic law/regulation
Australian nationals	Allows granting of work permit for one year Extension on an annual basis for not more than five years	<ul style="list-style-type: none"> - Work permit for one year allowed if (a) employer observes the 4-to-1 ratio of local to foreign employees, and (b) 2 million baht of paid-up capital per worker is maintained - No limit on the specific number of times a visa can be extended (hence, no legal restriction)
Branch or affiliate of Australian juristic person	Allows the hiring of up to 10 foreign employees. For each foreign worker employed, the undertaking must import foreign currency into Thailand equivalent in value to not less than 3 million baht	The specific provision is identical to the Department of Employment's "Rules Governing the Issuance of Alien Work Permits, 2004"
Spouses	Permits them to work as managers, executives or specialists	Not available under the current law
Contractual service supplier		
Australian nationals	Allows granting of work permit for one year. Extension on an annual basis for not more than three years	<ul style="list-style-type: none"> - Work permit for one year - No limit on the specific number of times a visa can be extended (hence, no legal restriction)
Juristic person registered in Thailand	Allows the hiring of up to 10 foreign employees. For each foreign worker employed, the undertaking must import foreign currencies into Thailand equivalent in value to not less than 3 million baht	The specific provision has been made available for foreign natural persons but is not yet available for foreign juristic persons under the current law. However, juristic persons can hire foreign workers as long as they maintain 2 million baht in paid-up capital for each foreign worker employed
Spouses	Permits them to work as managers, executives or specialists	Not available under the current law
Business visitor	Work permit/non-immigrant B visa, for 90 days that can be extended for one year	Thailand does not offer a "business visa." Business travelers need to apply for a non-immigrant B visa that is valid for 90 days. Thereafter, the visitor may apply to the Immigration Bureau for an extension of the visa for one year. Any stay beyond that requires a work permit from the Ministry of Labour that has a maximum validity of two years. However, the visitor would still have to renew his non-immigrant B visa every year
Asia-Pacific Economic Cooperation (APEC) Business Travel Card (ABTC)	Australian business travel card holders can stay up to 90 days and non-ABTC holders can stay up to 15 days	Foreign business travel card holders can stay up to 90 days and non-ABTC holders can stay up to 15 days
One-stop service center	<p><i>Eligible persons:</i></p> <ol style="list-style-type: none"> (1) <u>Australian investors</u> with paid-up capital of at least 2 million baht (2) <u>Australian intra-corporate transferee</u> of a branch or affiliate importing foreign currency into Thailand equivalent in value to not less than 3 million baht (3) <u>Australian contractual service suppliers</u> of a juristic person with fully paid-up capital of 2 million baht 	<p><i>Eligible persons:</i></p> <ol style="list-style-type: none"> (1) <u>Investors who:</u> <ul style="list-style-type: none"> - Import foreign currencies into Thailand equivalent in value to not less than 2 million baht are allowed a one-year permit - Import foreign currencies into Thailand equivalent in value to not less than 10 million baht for a stay of two years each (2) <u>Executives and specialists</u> of undertakings with paid-up capital exceeding 30 million baht

Source: Collected by TDRI.

First, in terms of investment, this study found that during the four years since the agreement came into effect, only one Australian company has taken up the preferential foreign equity share in product distribution and installation services. This particular case involves an Australian company that manufactures steel products for structural applications. TAFTA privileges have allowed it to integrate its post-sale distribution and installment services unit into its main production unit. Prior to the implementation of the agreement, the company had to operate its after-sales service businesses through a separate Thai legal entity in which it holds a 49 percent equity share. Owing to the TAFTA privilege, such a joint venture is no longer necessary.

Second, with regard to the movement of workers, the study found that the number of Australian workers granted work permits under TAFTA has been negligible, with only 11 permits having been granted in 2005, the first year of the agreement's implementation. Since then, the number has been declining, with only two permits having been granted in 2008, as may be observed in Figure 1. These investment and work permit figures reveal the failure of TAFTA to attract Australian capital and labor into Thailand. Why is this so?

Figure 1 Number of Australian Workers Granted Work Permits in Thailand under the Thailand-Australia Free Trade Agreement



Source: Office of Foreign Worker Administration, Ministry of Labour, Thailand.

The five main reasons why Australian investors have not taken up the privilege of holding a majority share in the business services that Thailand had offered under the agreement are as follows:

1. The privileges accorded by TAFTA are less attractive than those provided by Thailand's Board of Investment (BOI). TAFTA allows Australian investors to hold a majority equity share-holding in the specific services shown in Table 1A, whereas the BOI can provide exemptions to foreign equity restrictions for multiple services for promoted investments. In addition, the BOI can also permit foreign juristic persons to own land, which is normally prohibited by the land code, not to mention that it can provide tax incentives, including

exemptions from corporate income tax, and import duties on machinery and equipment. As a result, potential Australian investors would seek to obtain a "comprehensive" promotional package from the BOI rather than "piecemeal" privileges under TAFTA.

2. Certain domestic regulations are unfavorable to foreign juristic persons. For example, Australian investors are allowed to hold a majority share in the mining business, but Royal Forestry Department regulations deny foreign persons exploration permits in economic forest zones. Furthermore, a foreign company cannot own land, or operate any related services other than those committed in the schedule. As a result, to avoid the multiplicity of regulatory hurdles, Australian investors may prefer to operate as a Thai juristic person rather than a foreign alternative, especially when corporate control can still be had under such a joint venture structure.¹

3. As mentioned previously, the scope of liberalization in each of the service sectors shown in Table 1A has been circumscribed by the conditions attached. For example, investment in education services has been confined to services for tertiary education provided by institutions specializing in science and technology. Moreover, the service supplier must be located outside Bangkok and its metropolitan area. In other service sectors, minimum capital requirements confine the scope of liberalization to large-scale investments only.

4. Other domestic rules and regulations in Thailand that pose major barriers to foreign investment have not been removed. For example, the requirement that four Thai employees must be hired for every foreign person employed discourages potential investment in service businesses that rely on skilled professionals or specialists. While this restriction applies to local and foreign companies alike, it does not help to promote the establishment of skills or knowledge-intensive services in Thailand. Another law that needs to be reviewed is the Foreign Business Act 1999, which bars foreign operators from operating in any service business in Thailand.

5. Australian equity participation in certain sectors is limited to only 60 percent. Most investors find the restriction, although more relaxed than it had been previously, still overly burdensome as they still would have to find a local partner.

6. Thailand lacks vital supporting services that would make the operation of main businesses viable. For example, investment in mining requires many supporting services that are simply not available in Thailand as they are off-limits for foreign operations. These include, for example, geological exploration and survey services, environmental services, and mining engineering services.

As for visa and work permit-related privileges, the study found that the reasons why very few work permits have been issued under TAFTA are as follows:

1. Most privileges accorded under TAFTA, such as access to the one-stop service center and the granting of a work permit, could be obtained easily by investing 2

million baht in Thailand, without any conditionality being placed on the nature of the investment. The commitment to allow the extension of work permits for intra-corporate transferee and contractual service suppliers for a specific number of years is not more preferential than the existing law, which does not specify the number of times that a visa can be extended.

2. Owing to inadequate publicity, most Australians are unaware of the special privileges to which they are entitled, such as the permission for spouses to work in the specific capacities mentioned previously.

3. Major visa problems have not been solved under TAFTA. For example, it is not clear whether Australian business visitors with a “non-immigrant B visa” would need to obtain a work permit for attending conferences and meetings, or being involved in other activities that do not involve remuneration. According to the Thai labor law, the definition of work that would require a permit includes activities that require an “exertion of effort” and “employment of knowledge...” “whether or not for wages or other benefits.” Because the law is vague, interpretation is subject to the judgment of the administrator of the day. Another major visa problem is that, while a work permit issued by the Ministry of Labour is valid for up to two years, the maximum duration of the non-immigrant B visa issued by the Immigration Bureau is only one year. As a result, the work permit holder still must renew his/her visa on a yearly basis.

It may therefore be concluded that the liberalization commitments in the service sector that Thailand made under TAFTA have not resulted in a greater inflow of Australian investment or workers into Thailand.

2. AUSTRALIA’S LIBERALIZATION COMMITMENTS UNDER TAFTA

Australia is one of the countries in the world most open to foreign investment. Foreign investment may flow freely into Australia with little restriction. Foreign equity share limitations apply to a few sectors that are considered to be sensitive, such as banking, media, and broadcasting services, domestic and international airlines, airports, and residential real estate developments. Investments above a certain size would also have to be screened by the Foreign Investment Review Board (FIRB) established under the Foreign Acquisitions and Takeovers Act (FATA) to ensure that a particular investment project does not run counter to national interests.

Concerning its labor market, Australia is a country that faces persistent shortages of unskilled labor to work in its sizable agricultural sector, and of semi-skilled labor to work in its mines and construction industries. Recently, it has taken steps to relax its visa policy with the introduction of the Standard Business Sponsorship Subclass 457, which allows a foreign worker sponsored by a business registered in Australia

to obtain a non-renewable work permit valid for four years.² Moreover, his or her family members are also allowed to apply for jobs or pursue education in Australia during that four-year period.

At the same time, to promote the availability of short-term workers, Australia has introduced the “Work and Holiday Visa” which allows students who graduated with a bachelor’s degree or a diploma from an institution in Australia to work in Australia for one year. Also, the “Working Holiday Visa” allows foreigners who are tourists to pick up temporary work, such as picking fruit in orchards in Australia. As of 2008, 680 Thai workers were residing in Australia,³ a little over half of whom were in the hotel and restaurant business, with 8 percent in health-related businesses (working mainly as masseurs or masseuses), as can be seen in Figure 2.

This study examines Australia’s commitment in opening up its service sector to Thailand under TAFTA. The review reveals that, in terms of investment, Australia’s commitments do not exceed its domestic regulations. In other words, Thai investors are not granted any special investment privilege in the service sector as a result of TAFTA. In fact, owing to Australia’s recent unilateral moves to open up its service sector, certain commitments made under TAFTA already lag behind the country’s domestic laws. For example, the previously mentioned foreign equity participation limitation in the media sector, which includes newspapers and broadcasting services, has already been lifted. The threshold size of investment that would trigger the investment screening by the FIRB has also been increased from A\$50 million to A\$100 million for investments in existing Australian businesses, and from A\$50 million to A\$200 million for investments in multinational companies in Australia.

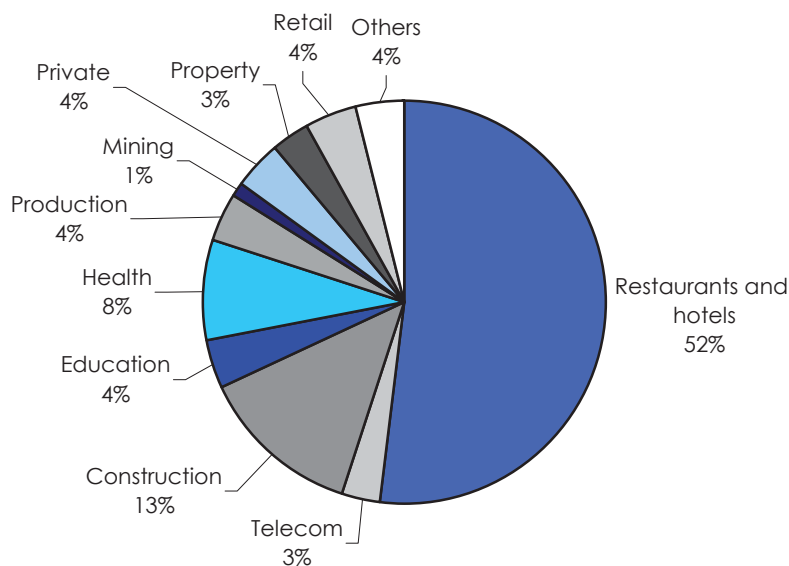
In terms of the movement of natural persons of Australia, business visas are classified into two types: (a) a short-term business visa, and (b) a long-term business visa. The long-term business visa consists of the general visa, namely the previously mentioned subclass 457 visa, and a visa for intra-corporate transferees, service sellers, and contractual service suppliers. Australia also requires testing for the employment of foreign workers. Since July 2007, foreign workers have been required to pass an English-language ability test prepared by the International English Language Test System (IELTS), except for those employees whose annual salary exceeds the minimum threshold of A\$70,000.

TAFTA provides Thai workers with the following privileges beyond what domestic laws accord to other nationals:

(1) Thai chefs holding a certificate from Thailand’s Department of Skill Development, Ministry of Labour, may maintain their work permit for a maximum of four years whereas other contractual service suppliers may do so for only three years.

(2) Intra-corporate transferees, service sellers, and contractual service suppliers (including cooks) are exempt from the previously mentioned language testing.

Figure 2 Thai Workers with Australian Work Permits Grouped by Employers' Business Classification (July 2008)



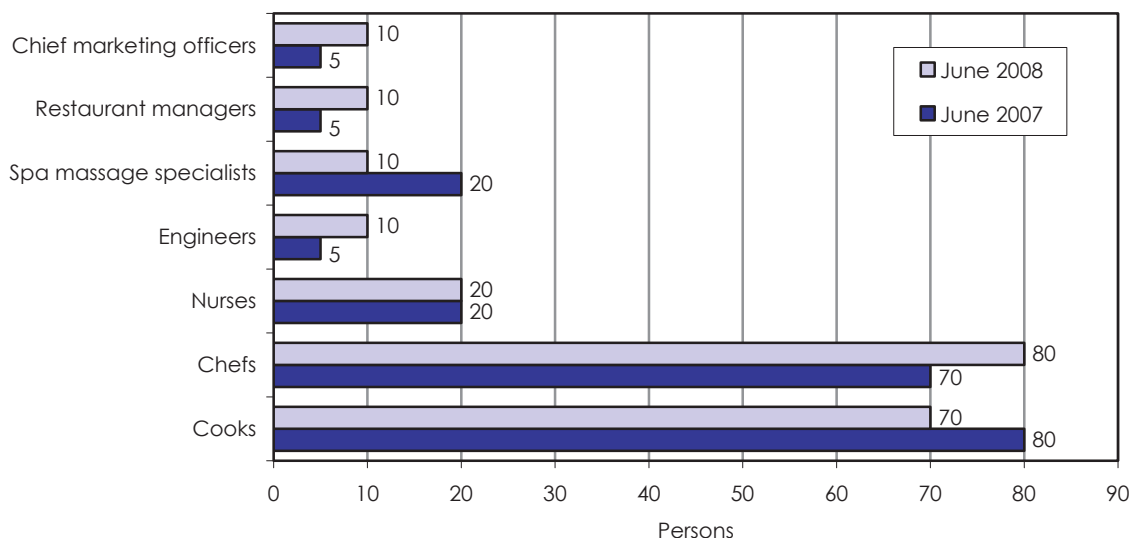
Source: Department of Immigration and Citizenship, Australia.

Statistics on the number of Thai workers granted work permits in Australia, which are shown in Figure 3, indicate that:

(1) The number of Thai workers in skilled professions, such as marketing, management, engineering and working as a chef, increased from July 2007 to July 2008, although from a relatively small base for certain professions. This may be attributed to the abolishment of the language testing requirement accorded under TAFTA. For example, the number of Thai chefs increased from 70 to 80, and the number of engineers, chief marketing officers, and restaurant managers increased from five to 10.

(2) The number of Thai workers declined in professions that require lower levels of skill, such as massage therapists and cooks. This is probably a result of the English-language proficiency requirement that came into effect in July 2007. According to an interview with officials from Australia's Department of Immigration and Citizenship and several interviews with Thai workers in Melbourne, it was confirmed that many Thai cooks, and masseurs and masseuses were unable to renew their work permit as they had failed to pass the English-language proficiency test.

Figure 3 Number of Thai Workers Granted Work Permits in Australia, Classified by Professional Services



Source: Department of Immigration and Citizenship, Australia.

This study also explored the opportunities to expand the scope of skill recognition under TAFTA beyond that of Thai chefs. The study found that there is a strong demand for skilled technicians, such as foremen, electricians, plumbers, welders, and engineers, in Australia. While there is no doubt that Thailand has an abundant supply of such technicians, the problem lies in the recognition of these skills, as no certification programs are available yet in Thailand. For these technicians to be able to take up jobs in Australia, they must possess certain skills that meet the standards and requirements established by relevant associations or institutions in Australia.

In conclusion, the study found that Thai investors have not benefited from TAFTA but highly skilled Thai workers were able to take advantage of the labor test requirement waiver granted to Thai contractual workers.

3. RECOMMENDATIONS

This study has revealed that much of the commitment to liberalize the service sector made by both Thailand and Australia accords only marginal preferential treatment to national persons and businesses. Moreover, most privileges accorded under TAFTA have not been fully exploited for several reasons, ranging from unaccommodating domestic rules and regulations to a general lack of awareness among those who could potentially utilize them.

In looking forward to the next round of service trade negotiations, the following steps are recommended in order to promote greater flows of investment and employment between the two countries:

Negotiation Method

1. Sectoral service liberalization needs to cover not only the issue of equity share, but also pertinent sector-specific regulations that are imperative to the decision whether or not to invest. To ensure that legal commitments do translate into increased economic activities between the two countries, the scope of the liberalization must be “comprehensive” rather than “piecemeal.”

2. Factors that pose major obstacles to the flow of investment and movement of workers across borders need to be defined beforehand. Negotiations should then concentrate on the removal of these obstacles rather than

on issues that may appear conceptually significant but practically trivial.

Promoting Opportunities for Thai Workers in Australia

3. Thai vocational and technical institutions as well as professional associations need to work closely with their counterparts in Australia in order to have certain professions, such as Thai therapeutic massage, officially recognized in Australia as being on par with alternative therapies and with Chinese and Japanese massage.

4. Thai workers clearly face a major disadvantage in terms of English-language proficiency. The Ministry of Labour needs to promote English-language proficiency among Thai workers in order for them to gain employment and work experience abroad. Once an English-language certification program is well established, the Thai government may seek to negotiate with Australia concerning recognition of the English-language proficiency certificate issued by the Department of Skill Development so that the Thai workers holding that certificate would not need to take the English-language proficiency test in Australia. It should be noted that English-language proficiency not only would broaden employment opportunities abroad for Thai workers, but also would enable them to defend their rights and avoid exploitation in foreign lands.

5. The Department of Skill Development should also consider establishing certification programs for technicians, such as electricians, plumbers, and welders, so that, in the longer run, it would be possible to have such certifications recognized by Australia and other countries where these skills are in demand.

ENDNOTES

- ¹ The definition of a foreign juristic person according to the Foreign Business Act 1999 is a person whose majority equity share is held by foreign natural or legal persons. The law does not consider a “foreign controlled” business to be a foreign juristic person.
- ² If the worker would like to continue working after this period, his/her employer would once again have to go through the whole process of justifying the hiring.
- ³ Department of Immigration and Citizenship, Australia



Thailand Development Research Institute

565 Ramkhamhaeng Soi 39, Wangthonglang District, Bangkok 10310 Thailand

Tel: 66 2 718 5460, 718 5678-89; Fax: 66 2 718 5461-2

Email: publications@tdri.or.th; Web site: <http://www.tdri.or.th>