2 March 2016

Law Council
OF AUSTRALIA

Australia-European Union Free Trade Agreement
Europe Division
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221

By email: a-eufta@dfat.gov.au

Dear Madam or Sir

Trade in Legal Services under an Australia-European Union Free Trade Agreement

Significance of the legal services in trade negotiations

The European Union (EU) is a significant market for Australian legal services providers. Over the last decade, around 25% of Australia's legal services exports have been to the EU. This is Australia's second largest destination for legal services exports after North America (the United States and Canada).

However, the current size of the European market for Australian legal services exports and the prospect of growing that market further, are not the only reasons to negotiate improved access for providers of legal services, should Australia and the EU agree to commence Australia-European Union Free Trade Agreement (A-EUFTA).

Trade cannot take place in a legal vacuum. The availability of legal services covering the laws of multiple jurisdictions facilitates and encourages trade and investment throughout the entire economy. Lawyers help to establish trade and investment by:

- advising clients about cross-border business opportunities and legal issues,
- reducing investment risk, for example by providing effective contracts, and
- delivering remedies should things go wrong.

Improving market access for Australian lawyers to follow their clients into the EU would better facilitate and underpin two-way trade across all goods and services sectors. Therefore, in order to maximise the ongoing benefit of an A-EUFTA, strong and meaningful market access commitments for providers of legal services must be a priority if and when A-EUFTA negotiations go ahead.

Current level of market access

Australian lawyers generally enjoy a good level of access into some European legal services markets. However, there is a wide range of variation in terms of the restrictions that apply to Australian lawyers between EU countries.

For example, access to provide Australian legal services in the United Kingdom (UK), which accounts for around 50% of Australia's total legal services exports to the EU, is very good. In the UK, Australian lawyers are able to:

- provide legal services as "foreign legal consultants" on a fly-in, fly-out basis

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

- establish a commercial presence in the UK
- enter into partnership with an English lawyer after becoming a Registered Foreign Lawyer
- employ English partners and solicitors and practice in 'reserved' areas of law (which can be generally described as appearing before English Courts and providing domestic consumer legal services such as probate) through the vehicle of a Registered foreign law firm

However, Australian lawyers who wish to practise foreign law in EU countries in continental Europe face a range of market access and behind-the-border barriers. For example:

- In Denmark, only lawyers with a Danish licence to practise may sit on the board or be part of the management of a Danish law firm. A Danish licence can only be obtained through passing a Danish legal examination. Denmark also limits marketing of legal advice services to holders of a Danish licence to practise.
- France and Germany do not permit Australian lawyers to provide legal services on a fly-in, fly-out basis.
- France does not permit Australian lawyers to enter into partnership or employ French lawyers.

The text of the EU-Singapore Free Trade Agreement (published May 2015) contains the most up to date picture of the kinds of access likely to be offered by the EU. It includes a variety of limitations to access including nationality conditions, residency requirements (including requiring permanent residency in the case of Mode 4 mediation services provided in Bulgaria), limitations on foreign equity, prohibitions against foreign lawyers having "decisive influence in decision making", quotas, requirements to partner with local lawyers even when advice is strictly regarding foreign law and restrictions on firm structures available to non-EU lawyers.

The level and type of legal services market access sought across the EU

The Law Council has developed a *Generic Legal Services Market Access Request* (**Attachment B**). This document identifies the market access priorities of Australia's legal profession internationally and provides a useful starting point for assessing legal services offers should negotiations proceed. If required, the Law Council is also able to develop more detailed, country-specific information to support negotiations.

Essentially, an A-EUFTA should aim to achieve a level of access for Australian lawyers into continental Europe that is equivalent to the level of access currently enjoyed by European lawyers when moving between EU countries. For example, Australian lawyers should be treated in the EU as if they were qualified as legal practitioners from England & Wales.

There are three main arguments in favour of this position. Firstly, Australian lawyers are already able to gain admission to practise English and Welsh law by passing a basic skills test on fundamental aspects of domestic English law and practice. After passing this test, an Australian lawyer will have the same rights to practise within the EU as any English lawyer. However, this is a roundabout means of gaining access to practise Australian law within the EU. It is preferable that this level of access is available to any Australian qualified lawyer, not only those who have sat a basic skills test intended to determine whether they are suitably trained to practise domestic law in England and Wales.

Secondly, Australian legal education is highly regarded internationally and the Australian profession is acknowledged for being well-regulated and highly professional. Permitting Australian lawyers to practise Australian law throughout the EU will promote the availability of high quality Australian legal services without engaging the kinds of risk for clients that restrictions on the practice of foreign law often attempt to address.

Thirdly, EU lawyers enjoy a very good level of access to practise law in Australia. The Law Council's summary of the *Essential Features of the Regulation of the Practice of Foreign Law in Australia* (**Attachment C**) describes the level of access currently enjoyed by all EU lawyers to the Australian legal services market. Although Australia's experience has been that unilateral liberalisation of the legal services market has benefitted the Australian legal services sector, gaining the same level of access under trade agreements remains an important objective.

The A-EUFTA could also consider including provisions to guide further liberalisation of legal services markets. For example, the Trans-Pacific Partnership includes provisions (at Annex 10-A: Professional Services, cl 9 and 10) that are based on the Law Council's *Best Practice Principles for the Regulation of Foreign Lawyers and Foreign Legal Practice* (**Attachment D**).

The Law Council's support for free trade negotiations

The Law Council's Transnational Practice Division was established to be a leading source of information and advice to Government about market access restrictions and behind the border barriers affecting Australian legal services providers. The Transnational Practice Division has been actively involved in supporting the Department of Foreign Affairs and Trade in ongoing trade negotiations and reviews of existing trade agreements. The Law Council also has a role in the implementation of market access commitments for legal services under several existing trade agreements.

Further information about the Law Council is provided at **Attachment A**.

Despite Transnational Practice being a relatively new focus for the Law Council (Transnational Practice Division was established in July 2015), the Law Council has already demonstrated its capacity to support trade outcomes and positively influence the context in which trade negotiations occur.

The Law Council looks forward to continuing to support the Government's welcome focus on achieving strong trade outcomes and to being actively involved in further consultations should Australia agree to commence trade negotiations with the EU.

Should you require further information, please contact:

- Arjuna Nadaraja, Director Transnational Practice
  +61 2 6246 3753 | Arjuna.Nadaraja@lawcouncil.asn.au.
- Christopher Dyer, Policy Lawyer
  +61 2 6246 3716 | Christopher.Dyer@lawcouncil.asn.au.

Yours sincerely



Michael Brett Young
Chief Executive Officer

Law Council
OF AUSTRALIA

THE LAW COUNCIL OF AUSTRALIA

The Law Council of Australia represents the legal profession at the national level, to speak on behalf of the state and territory law societies and bar associations on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which represent the large law firms in Australia. The Law Council's members are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
  (formerly The Large Law Firm Group)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:



Mr Duncan McConnel,
President



Ms Fiona McLeod SC,
Treasurer



Mr Stuart Clark,
President-Elect



Mr Morry Bailes,
Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Law Council
OF AUSTRALIA

GPO Box 1989, Canberra
ACT 2601
19 Torrens St. Braddon
ACT 2612

T: (02) 6246 3788
F: (02) 6246 0639

@thelawcouncil
@LCAPresident
Law Council TV

Generic Legal Services Market Access Request

Law Council OF AUSTRALIA

This document identifies the market access priorities of Australia's legal and related service suppliers internationally. This information will:

- assist trade negotiators and others engaged in advancing the market access interests of Australia's legal and related service suppliers; and
- assist the legal profession and its representative bodies across Australia develop and promote an 'Australia Inc' approach through a shared understanding of the profession's international market access interests.

Australian legal and related services suppliers seek a right to:

i) Establish a commercial presence (through branch office or other legal presence with a right to establish one or more commercial presences as provided to local lawyers) and, where a commercial presence has been established, the option to use the firm name used in Australia respecting local customs or usage in the host country;

ii) Provide legal services covering the laws of multiple jurisdictions in respect of which the Australian legal service provider or employees of the Australian legal service provider are qualified to advise;

iii) Have the option of entering into commercial association with local lawyers and law firms, with the freedom to negotiate fee and profit sharing arrangements;

iv) Provide legal services on a fly-in/fly-out basis, without mandatory residency or registration requirements;

v) Include secondments and similar exchange programs to and from the host country;

vi) Prepare and appear in arbitrations, conciliations and mediations as well as provide services as Arbitrators, Conciliators and Mediators; and

vii) Free movement of professionals (non-burdensome visa conditions and processes), as both independent service providers and intra-corporate transferees.

Transnational Practice Division
Law Council of Australia

January 2016

ESSENTIAL FEATURES OF THE REGULATION OF THE PRACTICE OF FOREIGN LAW IN AUSTRALIA

Law Council OF AUSTRALIA

Objective of Regulations

To encourage and facilitate the internationalisation of legal services by providing a framework for the regulation of the practice of foreign law by foreign lawyers as a recognised aspect of legal practice in Australia

Practice without registration

Foreign lawyers are entitled to practise foreign law on a fly-in, fly-out basis without registration in Australia for up to 90 days in any 12 month period.

Practice as an Australian-registered foreign lawyer

The right to practise as an Australian-registered foreign lawyer is available on the basis of the foreign lawyer's right to practise law in one or more foreign jurisdictions and is facilitated by a simple and transparent registration process. Australian-registered foreign lawyers are subject to the same professional, ethical and practice standards as Australian lawyers practising Australian law.

Form of practice

Foreign lawyers may choose any form of practice that is available to the Australian legal profession, including:

- on a fly-in, fly-out basis,
- by establishing an office,
- as a sole practitioner,
- as an employee of either a law practice or an Australian-registered foreign lawyer, and
- in commercial association with other foreign lawyers and/or local lawyers.

Scope of practice

Foreign lawyers are not entitled to practise local law; however foreign lawyers are entitled to provide:

- legal services in relation to the law of a foreign country(s) where the lawyer is authorised to practise,
- legal services in relation to arbitration, mediation or other forms of consensual dispute resolution, and
- together with a local lawyer, joint legal services covering both foreign and local law.

February 2016

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Best Practice Principles for the Regulation of Foreign Lawyers and Transnational Law Practice[1]

Law Council OF AUSTRALIA

Recalling the International Bar Association's resolution *on the general principles for the establishment and regulation of foreign lawyers* (June 1998); the International Legal Services Advisory Council's *six guiding principles for achieving the liberalisation of international trade in legal services* (July 1998); and the important role these principles continue to have on influencing the liberalisation of transnational trade in legal services,

Recognising that the availability of fully integrated transnational legal services covering the laws of multiple jurisdictions play an essential role in facilitating trade and investment across national borders and promoting economic growth and business confidence,

Recognising the requirement for domestic (host country) and foreign lawyers to work together to provide fully integrated transnational legal services,

Acknowledging that there are mutual benefits for both foreign lawyers and the domestic legal profession through knowledge and expertise transfer and exposure to international best practice, and that regulation should be sufficiently flexible to permit the free flow of knowledge and expertise between foreign lawyers and the domestic profession,[2]

Recognising that transnational legal services invariably involve a complex mix of local and foreign law with the extent of that mix subject to constant change during a transaction, and that it is unrealistic to identify and define a boundary between local and foreign law in such transactions,

Accepting that demand for transnational commercial and business legal services is client driven and such clients are invariably well-informed and sophisticated international and domestic corporations and that foreign lawyers providing these legal services do not seek to provide domestic consumer legal services in areas such as family law, wills and probate, personal injury or criminal law,

Recognising that the extent of consumer protection measures imposed on foreign lawyers engaged in providing fully integrated transnational legal services should therefore be appropriately tempered, and

Recognising that countries will progressively adopt foreign lawyer regulatory systems that are suitable to their individual circumstances;

---

[1] The Principles reflect the long-standing approaches of the International Bar Association (*IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers*, 6 June 1998) and discussions held at the APEC Legal Services Workshop in Singapore (30-31 July 2009). The initial version of these Principles were developed in 2012 with input from the Law Council of Australia and the legal profession by a high level public-private sector consultative forum established by the Australian Government to provide advice on international legal and related services issues (the International Legal Services Advisory Council).

[2] Consistent with the International Bar Association *Resolution of the IBA Council on transfer of skills and liberalisation of trade in legal services*, 16 October 2008.

It is proposed that the following regulatory principles are used to guide the implementation of viable and hospitable systems for the regulation of foreign lawyers and transnational law practice:

1. Regulation of foreign lawyers and transnational law practice should be based on the following overarching objectives:

    a. **Quality assurance:** foreign lawyers may be required to submit to the local ethical, conduct and disciplinary standards that are no more burdensome than requirements on domestic lawyers

    b. **Public interest – consumer protection:** rather than minimum residency requirements, foreign lawyers may be required to disclose to clients their status as a foreign lawyer and may also be required to maintain professional indemnity insurance or, alternatively, disclose to clients that they do not have such insurance

    c. **Public interest – consumer service:** regulations and processes should be designed to encourage and facilitate the efficient and effective availability of fully integrated transnational commercial legal services

    d. **Transparency:** foreign lawyer regulations should be clear and publicly available

    e. **Fairness:** regulations should be fair, uniformly applied, no more burdensome than requirements on domestic lawyers and based on objective criteria where restrictions, if any, are justifiable for quality assurance and in the public interest.

2. Regulatory framework should provide flexibility to permit foreign lawyers and domestic (host country) lawyers to work together by entering into fee-sharing arrangements or other forms of professional or commercial association.

3. Formal recognition of an entitlement by foreign lawyers to practise the law of their home jurisdiction should be on the basis of and to the extent that they are entitled to practise law in their home jurisdiction.

4. Regulatory framework should accommodate the relevant professional mobility and modes of service delivery requirements - transnational legal services are provided on a temporary fly-in, fly-out basis; through the use of telecommunications technology (telephone, video conference etc); by establishing a commercial presence; and, in most instances, through a combination of fly-in fly-out and one or both of the other modes.

5. Foreign lawyers should have the right to prepare and appear in commercial arbitration, conciliation and mediation proceedings and provide services as Arbitrators, Conciliators and Mediators where qualified to do so.

6. Respecting host country customs or general usage conventions, foreign lawyers should be permitted to use the firm name of their choice.