3 June 2015

Law Council
OF AUSTRALIA

Ms Angela MacRae
Commissioner
Australian Services Exports
Productivity Commission
Locked Bag 2, Collins Street
MELBOURNE VIC 8003

By email: services.exports@pc.gov.au

Dear Ms MacRae

Barriers to Services Exports – Productivity Commission Issues Paper

Thank you for inviting the Law Council of Australia to comment on the Productivity Commission's Issues Paper on Barriers to Export Services.

As you will be aware, the Law Council of Australia has been pleased to assist the Productivity Commission by providing a considerable amount of background research on the issues relating to the legal export of services and the impediments faced by the Australian legal profession in providing services overseas.

I take this opportunity to make some additional points.

Australia's regulation of legal services

Australia provides reasonably liberal terms of market access for foreign suppliers of legal services in the Australian market.

Australia provides access on terms under which:

a. a distinction is made between the:

   i. supply of legal services relating to Australian (host) country law for which foreigners must meet the same requirements as nationals to obtain a full practising certificate; and

   ii. supply of legal services relating to foreign country law for which foreigners are not required to obtain a full practising certificate and are subject to a less onerous registration requirement;

b. there are no quantitative limitations, either in numerical form or in any form of economic needs test, on the number of suppliers or the number of foreign suppliers that may supply any kind of legal service on host country law or on the number of suppliers that may supply any kind of legal service on foreign country law. Neither are there any quantitative restrictions on the value of legal service transactions or assets, legal service operations or service output, or the total number of employees or the number of employees any supplier may employ;

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c. foreign suppliers of foreign country law do not have to satisfy residency requirements to supply legal services relating to home country or third country law:
    i. on a "fly in/fly out" basis; or
    ii. through a commercial presence in Australia;

d. foreign suppliers of foreign country law can supply legal services relating to home country or third country law on a "fly in/fly out" basis for up to 90 days per year without:
    i. having to obtain an Australian practising certificate; or
    ii. having to register as a registered foreign lawyer in Australia;

e. foreign suppliers of foreign country law can supply legal services relating to foreign country law by establishing a commercial presence in Australia if they are registered as a registered foreign lawyer in Australia; and

f. suppliers of legal services relating to foreign country law may (except in South Australia) operate in partnership or other profit sharing arrangement with local lawyers provided that those qualified in foreign country law or a particular foreign country supply legal services relating to foreign country law of that country and only those holding Australian practising certificates supply legal services related to Australian (host) country law.

It is the Law Council's submission that Australia should seek commitments from other countries that would require them to provide terms of access that equal or reflect most of the major characteristics of the market access terms that Australia provides to non-nationals.

The Law Council has supported Australia seeking such liberalization in multilateral negotiations in the World Trade Organisation, in plurilateral negotiations, and in bilateral negotiations. Although the practical position may be that liberalization may be achieved earlier in bilateral or plurilateral negotiations, the Law Council would still like to see as many members of the World Trade Organization as possible support our approach to liberalization with a distinction between regulation of the practise of home country law and regulation of foreign or international law.

The Law Council would like to see bilateral and plurilateral negotiations reach an outcome of more general support for this position in multilateral negotiations in the WTO. To this end, it has previously requested the Australian government to request in non-WTO negotiations that potential FTA partners endorse Australia's proposals in the WTO (eg. See Law Council submission on the Proposed Australia-China FTA).

We have argued for liberalization of the following aspects of regulation of legal practice:

1. Ability to practise foreign or international law on a temporary Fly – in – Fly – out (FIFO) basis

Globally, lawyers frequently travel to another country to provide legal services without establishing a long term commercial presence in that country. Typically, such travel arises when a client from outside the host country requests the foreign lawyer to travel with the client to attend negotiations or business meetings in the other country. Occasionally, such travel could arise where the foreign lawyer is invited by a client in the host country to visit the host country to provide advice about foreign law to the client in the host country. There has been a longstanding tolerance of such visits by almost every country in the world. Such visits are regularly accomplished by persons on Tourist Visas or short-term Business Visitor Visas.

Australia has taken the approach of modifying the regulations of the legal profession so that a foreign lawyer visiting Australia to provide legal services limited to foreign country law or

international law is permitted to provide that legal service:

- without having to qualify as an Australian legal practitioner; and
- without having to register as a foreign lawyer or to establish any form of longer term commercial presence in Australia, provided that they do not spend more than 90 days in Australia in any 365 day period.

FIFO is an ability which should be widely available in of Australia's key trading partners but this is not always the case, for example in Thailand. In Indonesia, there are no rules allowing temporary practise by foreign lawyers. Even Korea which has made commitments to allow joint venture law firms has not committed to amending its law to provide that the general prohibition on supplying legal services without a licence does not apply to persons temporarily entering the jurisdiction to provide advice on the law of a jurisdiction where they are licensed to practice.

In the Law Council's view, the only restrictions on FIFO should be that the lawyer has a current practicing certificate in the resident state and that a reasonable time limit is imposed to ensure that the visit is indeed a temporary activity.

2. Ability to practise foreign or international law through the establishment and maintenance of a commercial presence in the relevant country

The Law Council has asked, in respect of the situation where lawyers wish to practise foreign or international law on a permanent rather than temporary basis, that other countries do not require such practitioners to obtain the ordinary practicing certificate that applies to the practice of home country law. One way to achieve that result is for trading partners to commit to providing for a separate system of licensing of those practitioners whose business would be limited to the practise of foreign or international law. Our submissions have been in line with International Bar Association positions which acknowledge that any limited licensing system still needs to provide for regulation of appropriate ethical conduct.

3. Avoidance of the placing of unnecessarily restrictive conditions on granting limited licences to foreign lawyers establishing an maintaining a commercial presence to practise foreign or international law

In multilateral, plurilateral and bilateral negotiations, the Law Council has supported the Australian Government seeking that trading partners do not attach unnecessarily restrictive conditions to granting limited licences for foreign lawyers establishing or maintaining a commercial presence for the practise of foreign or international law. We have supported the Australian Government in asking that foreign lawyers:

- do not have to meet minimum residence requirements,
- do not have to satisfy requirements about having practised in the home country for a minimum duration;
- do not have to limit their practice to a particular location or office in the host country.

4. Commercial Association Arrangements

In several trading partners, there are restrictions on Australian law practices forming commercial associations with local lawyers. In Australia, the position is that in five of the six States (as well as the two Territories) a foreign registered lawyer may form a partnership or incorporated legal practice with an Australian lawyer or law practice. Under that arrangement, Australian lawyers and foreign lawyers are each allowed to provide legal services only in relation to the laws of the jurisdictions in which they are entitled to practise.

The Law Council supports Australia in its negotiations seeking rights for Australian law practices to freely enter into commercial associations with overseas law practices in all relevant jurisdictions remains an important feature for the liberalisation of the legal services sector.

5. Limited licences

In some States limits are placed on the number of foreign lawyers that can work in a firm and on the role that the lawyers can assume in the firm including limits on equity. For example, Korean has proposed that foreign firms must establish joint venture law firms (JVLF) under its Phase 3 of its Free Trade Agreements. A JVLF would be similar to a law firm but the principals are required to be foreign and Korean law firms, not individual partners. This is a new legal entity. They propose that the principals should not be foreign law consultant offices but head offices of foreign law firms.[1]

In some trading partners, there are similar limits such as foreign lawyers

- must be employed by an national law firm (i.e. a partnership);
- may not employ local lawyers;
- may not provide services in some other form of commercial association with local lawyers; and
- may not establish a commercial presence to offer advisory services in foreign and international law. [2]

6. Right to Qualify and Practice domestic Law

The Law Council is concerned about foreign laws which prohibit foreign nationals from sitting for legal qualification exams and which prohibit foreign nationals from becoming legal practitioners in foreign jurisdictions.

In Australia, any person regardless of nationality may be admitted as a local practitioner if they meet the qualification requirements. There is no citizenship requirement and no residency requirement. Admission as an Australian legal practitioner does not convey a right to a visa to enter or work in Australia, but such persons are eligible to apply for a range of visas, including short-term business visitor's visas, sponsored employment visas and permanent residency visas.

The Law Council has a long standing policy that the right to practise local law should be on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through transparent processes.

7. The proposals made by Australia in the Doha Round of WTO negotiations

Australia has made a number of proposals in the Doha Round of WTO negotiations:

a. "Communication from Australia – Negotiating Proposal on Legal Services" S/CSS/W/67 dated 27 March 2001.

This document incorporated six principles set out in the instrument adopted by ILSAC in July 1998 titled "Principles for Liberalisation of Trade in Legal Services" (ILSAC, 20 July 1998) and stressed the desirability of Members making separate commitments relating to:

i. legal services relating to host country law for which WTO Member countries ought to be able to require foreign suppliers to obtain a host country practising certificate; and
ii. legal services relating to home country law, third country law or international law for which WTO Member countries ought not to require foreign suppliers to obtain a

[1] Draft Republic of Korea's *Foreign Legal Consultants Act* amendments.
[2] For example, Indonesia.

host country practising certificate but instead ought to provide for an easier to obtain limited licence;

b. "Communication from Australia – Negotiating Proposal for Legal Services – Revision", S/CSS/W/67/Suppl./Rev.1, dated 10 July 2001.

This document provided further elaboration on the desirable approach to limited licensing for the practice of foreign law and international law. It incorporated suggested guidelines on criteria for the grant of a limited licence (drawing on criteria set out in the International Bar Association, 1998 Statement of General Principles for Establishment and Regulation of Foreign Lawyers) and on the conditions that can be imposed on foreign legal practitioners (also drawing on the 1998 IBA statement).

c. "Joint Statement on Legal Services in the WTO Negotiations on Trade in Services" by Australia and 10 other WTO Members (including the EU and known as the "Friends of Legal Services Group") TN/S/W/37, S/CSC/W/46, 24 February 2005. See **Attachment A.**

d. "Communication from Australia – Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors" S/WPDR/W/34, dated 6 September 2005. See **Attachment A** for more details on the above 2005 proposals in the WTO, TN/S/W/37 and S/WPDR/W/34.

The Law Council continues to support Australia's position on the liberalisation of the legal services market is in line with the proposals made by Australia in the Doha Round of WTO negotiations.

8. Provincial regulations

One important impediment to liberalisation is that in some federal states, the relevant regulation of the legal profession is at provincial level rather than national level, then the WTO or FTA commitments have to cover provincial regulation, not exclude it from the treaty rules. This is particularly problematic in terms of access to the legal services market in the USA where in brief State bar associations are responsible for:

- setting the standards for admission to legal practice;
- promulgating and enforcing rules of ethics that govern lawyer conduct;
- establishing areas of legal specialisation;
- administering programs of continuing legal education; and
- complaints and disciplinary handling systems.

Please contact me if you would like any further information or clarification.

Yours sincerely



MARTYN HAGAN
SECRETARY GENERAL

Attachment A: Joint Statement on Legal Services in the WTO Negotiations on Trade in Services

1. By way of background on 24 February 2005, Australia and 10 other WTO Members (informally known as the 'Friends of Legal Services' group) submitted a Joint Statement on Legal Services in the WTO Negotiations on Trade in Services. (WTO, Council for Trade in Services, Special Session, Committee on Specific Commitments, Communication from Australia Canada, Chile, the European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States, Joint Statement on Legal Services, TN/S/W/37, S/CSC/W/46, 24 February 2005.

   Among other points, the 2005 Friends of Legal Services Joint Statement recorded that where a Limited Licensing system is used, Members' WTO Schedules should indicate clearly the range of services which is covered by a Limited Licence. The Joint Statement included agreed definitions which could be used by Members in writing their Schedules of Commitments:

   a. Different categories of law:
      i. Domestic law (host country law);
      ii. Foreign law (rendering unnecessary the terms 'home country law', and 'third country law' used in the earlier Proposals);
      iii. International law.

   b. Different types of legal services:
      i. Legal advisory services;
      ii. Legal representational services;
      iii. Legal arbitration and conciliation/mediation services;
      iv. Legal services.

2. These proposals included some particular aspects of the Law Council's views about the recognition of rights to practice foreign law and international law:

   a. the scope of foreign law and international law legal services which foreign lawyers are permitted to provide should include:

      i. advising "on the effect of host-country law, if the giving of that advice is necessarily incidental to the practice of home-country law, third-country law or international law and the advice is expressly based on advice of a host-country practitioner not employed by the foreign practitioner" and agreeing that the Member be permitted to exclude foreign lawyers from advising on host country law;
      ii. providing legal services (including appearances) in relation to international commercial arbitration;

   b. the modes of services through which foreign lawyers are permitted to offer foreign law and international law legal services should facilitate all modes of service as far as possible, in particular including:

      i. Through a commercial presence by obtaining a limited licence as set out above (without limiting conditions); and

      ii. on a "fly in/fly out" basis without establishing a commercial presence (i.e. in the scheme of the GATS, supply under Mode 4, through the temporary presence of natural persons), without prior registration as a foreign legal practitioner in the host jurisdiction;

c. foreign lawyers be able provide legal services in a manner which serves the demands of clients seeking international legal services. This means that "clients demanding international legal services can obtain a broad range of legal services from a common provider across different jurisdictions". Therefore, foreign law practices holding a limited licence to practice foreign law and international law should be able to:
    i. employ local lawyers; and
    ii. form commercial associations with local lawyers and law practices.

3. On 6 September 2005, Australia submitted the 2005 Regulatory Disciplines Proposal which, among other things, set out the criteria that ought to be applied when utilizing a Limited Licensing system for practitioners of foreign law and international law. (WTO, Committee on Domestic Regulation of the Council on Trade in Services, "Communication from Australia – Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors" W/W/PDR/W/34, dated 6 September 2005).

Attachment B: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies 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 the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies.
The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- 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
- The Tasmanian Bar Inc
- The Large Law Firm Group
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 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 2014 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

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