22 September 2015

Ms Angela MacRae
Commissioner
Australian Services Exports
Productivity Commission
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By email: services.exports@pc.gov.au

Dear Ms MacRae

Draft Report on Barriers to Growth in Services Exports

In addition to previous input provided on 3 June 2015 to the *Barriers to Growth in Services Exports* issues paper and previous background research provided to the Productivity Commission on the issue of international market access for legal services, the Law Council is grateful for the opportunity to make the following further comments on the Productivity Commission's draft report on Barriers to Growth in Service Exports.

Chapter 4: Domestic barriers to service exports

Although the draft report identifies Australia's foreign investment framework and investment in infrastructure as potential domestic barriers to investment, the Law Council considers that there are a range of regulatory barriers that impact on investment in the legal services sector.

Regulation of the legal profession

Responsibility for the regulation of lawyers rests with Australia's state and territory governments. As a consequence, the development of regulation of the legal profession has been shaped by the varied histories of legal, economic and social life in each jurisdiction. In 2009, the Council of Australian Governments appointed the National Legal Profession Reform Taskforce to make recommendations and propose draft legislation the aim of creating a system of regulation to fully implement a truly national legal profession. This initiative resulted in the Legal Profession Uniform Law.

The objectives of the Legal Profession Uniform Law are "to promote the administration of justice and an efficient and effective Australian legal profession by:

- providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession
- ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services

- enhancing the protection of clients of law practices and the protection of the public generally
- empowering clients of law practices to make informed choices about the services they access and the costs involved
- promoting regulation of the legal profession that is efficient, effective, targeted and proportionate, and
- providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained."[1]

Although New South Wales and Victoria have both implemented the Legal Profession Uniform Law, other state and territory jurisdictions maintain their own systems of regulation for the legal profession. The Law Council's position is that all states and territories should fully implement the Legal Profession Uniform Law. Achieving a truly uniform system of regulation for the Australian legal profession would provide a springboard for legal services providers in Australia by removing unnecessary compliance costs and making it easier for firms to establish offices across a number of states and territories.

The unresolved inconsistencies between jurisdictions also represent potential barriers to foreign investment. This is because laws regulating the provision of legal services under Australian law also apply to foreign lawyers who want to establish businesses in Australia to provide advice on foreign and international law.

The need for unified regulation of legal practice in Australia is especially critical in the context of international trade negotiations. Being able to present a single set of requirements, which are no more burdensome than necessary, for the practice of law throughout Australia would place Australia in a stronger position at the negotiating table and make Australia a more attractive destination for investment in legal services.

Available business structures for Australian law firms

The limited liability partnership has become a common and preferred business structure in many countries and jurisdictions. Limited liability partnerships, which combine the benefits of limited liability with the flexibility of partnerships, provide a business vehicle for law firms and other professions that supports growth and investment.

Limited liability partnerships are already available in a number of jurisdictions, in which the Australian legal profession would wish to expand and compete, including:

- the United States of America
- the United Kingdom
- China
- India
- Canada
- Singapore

[1] See Legal Services Council, *Uniform Law Objectives (*18 August 2015), <http://www.legalservicescouncil.org.au/Pages/uniform-law/objectives.aspx>.

- Malaysia
- Japan, and
- Hong Kong

Since their inception in the US in response to the 1988/89 “savings & loans crisis”, limited liability partnerships have become one of the internationally preferred business vehicle for professions, including the legal profession. In the context of law practices, limited liability partnerships are the predominant form of business structures used by the major global law firms with operations, affiliations or alliances in Australia. The absence of limited liability partnerships as an available form of entity for Australian law practices, coupled with the federal and state impediments to transitioning an Australian law practice from one business structure to another, has required the adoption of complex and inefficient business structures for the Australian operations of most major global law firms.

As a consequence, Australian law firms are at a competitive disadvantage when compared to law firms established in countries such as the United States of America and the United Kingdom. The availability of limited liability partnerships would enable Australian law firms to more readily form new business relationships and join existing networks across global markets.

Paragraph 5.6: Request for further evidence on international barriers

There are a number of general types of barrier to practicing law in a foreign jurisdiction. These were listed in Australia’s communication to the World Trade Organisation in the Doha round of WTO negotiations (**Attachment A**). For each type of barrier, the Law Council has included examples of where this barrier has acted to restrict the export of Australian legal services.

Restrictions or prohibitions on the establishment of foreign law firms
Restrictions or limitations on joint ventures between local and foreign firms
Restrictions on profit sharing by local and foreign firms
Limited or no recognition of qualifications
Restrictions on the practice of home-country law and third-country law

These five restrictions are often found together within inhospitable systems of regulations for foreign lawyers. This is because the regulation of the legal profession in a particular foreign country will often not include any distinction between the practice of local and foreign law. In these legal systems, the practice of law means, exclusively, the practice of local law. Foreign lawyers are regarded as not being properly qualified to practise law in that country, whatever their qualifications in the law of one or more foreign jurisdictions. In these places, foreign lawyers must either gain admission as local lawyers or be regarded as providing services of a strictly non-legal nature.

This can be seen in Thailand where only Thai nationals are permitted to practise law and foreigners are not permitted to practise either Thai or foreign law, regardless of their qualifications. However, there are certain foreign law firms or individuals who (consistent with Thai law) provide legal services via a Thai majority-owned joint venture company or secondment to a Thai majority-owned law firm. Foreign lawyers who provide legal services do so under various descriptions (none of which mention law or legal services), the most common being a “business consultant”.

Similarly, the practice of foreign law in India falls outside the definition of legal practice under its regulation of the legal profession. As only those practicing local law are entitled to establish law firms, foreign legal service providers use the workaround of providing legal services on a fly-in, fly-out basis. There is no scope for Australian law firms to establish a commercial presence in India. As well as preventing Australian lawyers from sharing profits with Indian counterparts, this restriction on establishing a commercial presence undermines the effective and efficient practice of foreign law in India.

A solution to this would be for India to recognise the practice of foreign law as distinct from the practice of local law. This would permit foreign lawyers to practise on this basis, including by establishing a commercial presence in collaboration with local lawyers.

Under Indonesian law, Australian lawyers are not able to enter into partnerships, joint ventures or other forms of commercial association with Indonesian law firms. Australian lawyers practicing in Indonesia, other than on a fly-in, fly-out basis must be employed as a legal consultant by a local law firm. This framework prevents Australian law firms from establishing firms to exclusively practice Australian law or enter into joint ventures with Indonesian lawyers. The requirement for foreign lawyers to practise as a consultant employed by a local firm also means that foreign lawyers cannot be equal partners with Indonesian lawyers and that foreign lawyers cannot practice under the name of their firm.

A range of consequences flow from the non-recognition of foreign law, including prohibitions on establishing a law firm to practise foreign law, establishing joint ventures with local lawyers and sharing profits with local lawyers. In a practical sense, the non-recognition of foreign law also encourages foreign lawyers to find workarounds in order to provide the legal services that their clients demand.

While these workarounds may be sufficient to enable Australian lawyers to provide services in a range of foreign countries, the Law Council's view is that providing advice on foreign law through workarounds could have negative implications for the rule of law. In particular, there is a legitimate concern that foreign lawyers, by operating on the basis that they are not providing legal advice, may also leave aside the ethical and professional standards and duties that lawyers are obliged to uphold in the course of their work. Even where this is not the case, the perception that a section of the legal profession is not bound by the rule of law could contribute to damaging confidence in the profession as a whole.

Restrictions on employing local lawyers

Under Singapore's regulations for foreign lawyers, the number of lawyers practicing Singapore law in a 'qualifying foreign law practice' must not exceed four times the total number of lawyers registered to practise foreign law as part of that practice.

Australian law service providers in China must operate through 'registered offices' and are not permitted to employ Chinese lawyers. However, once an Australian registered office has been established for three years, it may enter into contracts with Chinese law firms to mutually dispatch lawyers to each other's offices to provide legal advice. In addition, registered offices are only permitted to be established in a particular geographic location; the China (Shanghai) Pilot Free-Trade Zone.

Numerical ceilings on foreign law firms and foreign lawyers

Indonesia, Malaysia and Singapore are examples of countries that have restrictions on the number or percentage of foreign lawyers who may be employed by a local law firm (Indonesia) or in special joint venture structures specifically for the purpose of practicing local and foreign law (Malaysia and Singapore).

In Indonesia, only one foreign lawyer may be employed for every four Indonesian lawyers employed in a firm, with a maximum of five foreign lawyers employed by any one Indonesian law firm. An Indonesian law firm with only three lawyers may employ a single foreign lawyer.

Malaysian regulation creates three avenues to practise for foreign lawyers in Malaysia. These are: practice as a foreign lawyer employed by a Malaysian law firm, establishment of an International Partnership with a Malaysian law firm, or as a Qualified Foreign Law Firm. The QFLF category has been created for a specific purpose (to support Malaysia's International Islamic Finance Centre initiative) and firms must be able to demonstrate experience in international Islamic finance in order to apply for this category of registration. Only five QFLF licences are available for the entire Malaysian legal sector.

Australia's experience is that Singapore also uses a quota system for the various licences that permit some form of commercial association between foreign and local law firms. However, these quotas are note generally made known in an official and transparent way. For example, Singapore allows a Qualifying Foreign Law Practice (QFLP) to practise Singapore law through Singapore admitted partners or employees. However, no Australian firms, and only 10 large international firms overall, from have been granted a licence to establish a QFLP in Singapore. The most recent of QFLP licences were granted on 1 April 2013. Out of 23 applications, only four licences were granted.

Unreasonable restrictions on licensing

Australian lawyers can register as 'foreign legal consultants' in Japan, however a requirement of registration is that the person resides in Japan for at least 180 days per year. This restriction prevents Australian lawyers from practicing Australian law in Japan on a fly-in/fly-out basis. This mode of practise is important because it allows law firms to flexibly provide high-quality legal services to clients. For example, fly-in/fly-out allows law firms to bring together ad hoc teams of lawyers with expertise in the required area or areas of law rather than having to keep particular lawyers stationed in a country in advance of being required to provide advice.

In addition, Japanese legal profession legislation treats each member state of a federation as a separate jurisdiction. This means that lawyers who have not spent a continuous period of two years in their home jurisdiction (e.g. New South Wales) will not meet the minimum 'home jurisdiction' experience requirements for registration as a foreign lawyer. For example, a lawyer admitted to the NSW Supreme Court who has practised Australian and English law in the United Kingdom since 1995, but has practised in NSW for less than two years would not meet Japan's minimum experience requirements for registration as a foreign lawyer.

Lack of transparency in regulatory processes and systems

China's registration requirements for foreign lawyers and the establishment of registered offices are onerous. Applications to establish a registered office must include a range of certified and translated documents. These documents will be considered by the provincial judicial administration department within three months. The judicial administration department of the State Council, with the advice of the provincial authority, must then make a decision about the application within six months (i.e. not more than 9 months after the initial application). There are instances where, over the last five to 10 years, the initial registration of individual lawyers has taken up to 18 months, with six to 12 months not being unusual.

Reasons must be given if an application is rejected, however the discretion whether to issue a licence or not is at large and not guided by any particular requirements (aside from ensuring documentary requirements are met and the timeframes described above).Once permitted to establish an office, the foreign lawyer must register before providing legal services and must re-register annually in order to continue providing these services.

Registered offices must also annually submit a range of documents to the provincial judicial administration department for the purpose of enabling supervision by that authority. These includes proof of registration, documents detailing the legal services provided and referred to Chinese law firms, financial statements, changes in foreign and local staff and employee's residency information.

Registration can be revoked for a large number of reasons, ranging from failure to properly submit documents on time to endangering China's State security, public security or the administration of public order. Recent crackdowns on the legal profession in China give an indication of the possible range of interpretation available in relation to these provisions.

Onerous visa procedures

Difficult and bureaucratic requirements for registration as a lawyer, and long delays in obtaining permission to practise can compound difficulties in obtaining the required work visa to practise as a foreign lawyer, especially (as in China and Japan) when a person must be physically present in a jurisdiction in order to become registered as a foreign lawyer..

For example, during these extensive periods where a foreign lawyer's registration is pending, there could be considerable uncertainty about that person's right to work in compliance with their visa conditions.

While Australian lawyers are able to work in Indonesia on a fly-in/fly-out basis, they must obtain a business permit which enables them to enter Indonesia to follow up on a business opportunity. However, this does not equate to a work permit.

In order to work in an Indonesian law firm, a foreign lawyer must make an application through the Ministry of Law and Human Rights. The process is complicated and lengthy. The prospective employing law firm must lodge an application with the Minister. The Minister must then obtain a written recommendation from the Bar Association in respect of each lawyer applying for a work permit. Each foreign lawyer seeking to work in Indonesia

must also pay, in advance, a fee equal to $100USD multiplied by the number of months that they intend to work in Indonesia.

Draft Recommendation 9.2: Mutual recognition arrangements

Mutual recognition arrangements apply differently to the legal services sector because of the distinction between domestic and foreign law. Essentially, unlike other professional service sectors, the requirements for the practice of local law include knowledge of certain areas of knowledge that are specific to each country (constitutional law is an example). For this reason, mutual recognition of foreign legal qualifications, and granting rights to foreign lawyers to practise domestic law on the basis of foreign qualifications, is not practical. However, there is a possibility to 'mutually recognise' the right to practise foreign laws.

Under the Legal Profession Uniform Law, recognition of a foreign lawyer turns on whether the foreign lawyer "is properly registered or authorised to engage in legal practice in a foreign country by the foreign registration authority for the country".[2]

Subject to satisfying domestic regulatory requirements (incorporating academic qualifications or skills/experience; practical legal training and good character requirements), foreign lawyers may also apply to be admitted as Australian legal practitioners (local lawyers) on the basis of qualifications obtained outside Australia.

Recognition as a foreign lawyer

The Australian approach to recognition of foreign lawyers emphasises that the practice of foreign law and local law are separate fields of knowledge and it is this fact that makes recognition as a foreign lawyer a worthwhile proposition.

Recognition as a foreign lawyer does not, in contrast to other service sectors, entail recognition that the foreign lawyer's qualifications are equivalent to local qualifications. Legal training, despite a trend towards incorporating international and comparative law subjects, is inherently focussed on preparing a student to practise in a particular jurisdiction. Legal training in the law of a foreign jurisdiction is not intended to prepare a person to practise Australian law.

Similarly, legal professionals have duties to the court *in the jurisdiction where they are admitted to practise* to uphold certain ethical and professional standards. A person practicing foreign law in Australia owes this duty to the court in the foreign country where they are admitted to practise law, rather than to the court in Australia.

While these differences may be considered shortcomings in terms of the practice of Australian law, the reality is that lawyers who practice foreign law complement and increase the range of legal services that are available in the Australian marketplace. As set out in the Legal Profession Uniform Law, the objective of recognising foreign lawyers:

> …is to encourage and facilitate the internationalisation of legal services by providing a framework for the regulation of the practice of foreign law in this

[2] This is the definition of "foreign lawyer" given by the *Legal Profession Uniform Law* (NSW), s6.

jurisdiction by foreign lawyers as a recognised aspect of legal practice in this jurisdiction.[3]

Recognition as an Australian legal practitioner (local lawyer)

At best, where a foreign lawyer seeks to practise Australian law as a local lawyer, mutual recognition arrangements may provide a pathway for the recognition of part of the qualification due to the existence of country-specific qualification requirements that all countries maintain for the practice of domestic law.

The Trans-Tasman Mutual Recognition Arrangement (TTMRA), agreed between Australia and New Zealand in 1996, provides a noteworthy exception to this general principle. Under the TTMRA, a person who is entitled to practise a profession in Australia is also automatically entitled to practise that profession in New Zealand and vice versa.

However, foreign lawyers not entitled to practise in New Zealand can apply to be admitted as Australian legal practitioners on the basis of qualifications obtained outside Australia. To become an Australian legal practitioner, a foreign lawyer must demonstrate that they have completed a legal qualification that is substantially equivalent to Australian legal qualifications in terms of minimum duration, areas of study, skills, practice areas and values.

Recent changes to Australia's Uniform Practice Rules, which currently apply in New South Wales and Victoria, further increase the scope for recognition of overseas trained legal professionals by permitting:

- recognition of relevant experience in lieu of having legal qualifications with strict equivalence to Australian legal qualifications, and
- conditional admission to practise (for example, to be permitted to practise only within their area of expertise).

In addition to the information provided above, the Productivity Commission may wish to consider the submission made by the International Legal Services Advisory Council to the Productivity Commission's 2010 Report on Bilateral and Regional Trade Agreements. A copy of this submission, which discusses barriers to trade in legal services, is provided at **Attachment B**.

Yours sincerely

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[3] *Legal Profession Uniform Law* (NSW), s58