
Review of bilateral and regional trade agreements

Productivity Commission

Supplementary Submission

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Introduction

1. This submission supplements the submission by the Law Council of Australia (Law Council) to the Productivity Commission in response to its Issues Paper on 'Australia's Bilateral and Regional Trade Agreements.' This submission identifies specific barriers to the export of legal services for Australian lawyers and law firms and has been prepared by the International Trade and Business Focus Group of the International Law Section of the Law Council.
2. The Law Council notes that in addition to this submission, the International Legal Services Advisory Council has prepared legal services market profiles for a number of countries. The profiles – some of which are a little out of date – identify barriers that must be addressed in order to practise law in the jurisdictions in questions. see:- http://www.ilsac.gov.au/www/ilsac/ilsac.nsf/Page/Projects_by_Country

Barriers to the export of legal services

3. Australian law firms have a strong interest in developing their practices outside Australia, particularly in Asia. Australian law firms are equipped with the skills, capacity and knowledge to take advantage of a multitude of opportunities in Asia and particularly in the Southeast Asian region. Additionally, many existing foreign and domestic clients of Australian firms are eager to sustain growth in Asian markets.
4. A number of Australian firms already have established a presence in China, Hong Kong, Singapore, Vietnam and Indonesia and others have established relationships to facilitate access to those markets. Expansion into other markets in the region is likely.

Context

5. Provision of access to foreign professional services is a complex issue. Each country has its own regulatory framework and professional bodies, which unsurprisingly often focus on protecting their members own interests.
6. The legal services sector in Asia is diverse in terms of the level of regulation, sophistication and degree of control by government. Australia, Hong Kong and Singapore have very similar systems whereas India and Malaysia, whilst having a system based on the common law English system, have very different systems. Differences between Australian and overseas legal systems are no more evident than in China and Vietnam where private law firms did not exist 20 years ago.
7. It is also necessary to note that it took nearly a hundred years from Federation for Australian states and territories to agree to reforms to allow a lawyer from one state to practice law in another state without needing to seeking admission in that state. Today national firms still cannot operate under a single national professional indemnity insurance policy and despite harmonisation efforts there is no single national Legal Professional Act to facilitate seamless national practice.
8. Barriers to exporting legal services in our region are many and varied. Some are transparent while others are more subtle.

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9. What we would call barriers are often justified on consumer protection grounds such as:
- (a) to ensure service providers have the relevant skills and that they are qualified in the jurisdiction in question;
 - (b) to ensure that the service provider can be held to account by local regulators; and
 - (c) to ensure there is adequate insurance in the event of negligence.
10. Examples of barriers include:
- foreigners precluded from completing local bar requirements and obtaining a local practising certificate;
 - foreign law firms being required to have a foreign lawyers licence;
 - in some jurisdictions there is no provision for a foreign lawyers licence or, if there is, they are extremely difficult and time consuming to obtain notwithstanding time frames contained in local laws;
 - where there are laws providing for licensing of a foreign law firm, a foreign lawyer with no relationship with a foreign law firm cannot be licensed to set up a firm which practices only in the foreign jurisdiction;
 - even if a foreign law firm licence is obtained, often there will be a separate requirement for a business licence with requirements and obligations much greater than simply registering and obtaining another set of approvals;
 - restrictions on operating structures such as partnership/incorporation and size of firm;
 - without a foreign lawyers licence and a business licence, it may not be possible to open and operate a bank account;
 - without a licence foreign staff cannot obtain a work visa and numbers of foreign staff granted visas may be limited;
 - prohibition on employing qualified local lawyers with a local practising certificate;
 - ill defined prohibition on practising local law and heavy penalties if there is a breach;
 - prohibition on joint ventures/mergers with local firms for the purpose of sharing profits/fees;
 - prohibition on co-location and sharing office space;
 - restriction on using firm name - this was experienced by some Australian firms in Hong Kong some years ago and has since been resolved;
 - a requirement that there be a resident chief representative in-country for a minimum period (eg. China 90 days) with the relevant authorities having the right to approve or reject the nominated chief representative;
 - restrictions on business promotion, advertising and marketing;

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- requiring operational reports on fees, clients and types of matters, all of which may involve disclosing confidential commercial information;
 - a requirement to hire staff from specified agencies rather than from the general labour market; and
 - opposition from professional bodies seeking to protect market share of local firms.
11. These kinds of barriers to the export of legal services can lead to a variety of actions to circumvent barriers in ways that are either undesirable or risky. For example, in number of jurisdictions some foreign lawyers will call themselves consultants and claim not to be operating as a foreign law firm even though they are plainly selling legal services. This is particularly so in the case of small legal services providers who are operating only in the foreign jurisdiction and not a branch of a foreign law firm.
 12. It is somewhat hypocritical when advocating for "the rule of law" to be established and applied in a jurisdiction, for any profession, especially the legal profession, to then ignore or flout the law.
 13. Perhaps most significantly such an approach is high risk for those working without approval. If there is a move to enforce the barriers, those foreigners working under the guise of consultants are at risk of detention, deportation and/or other penalties.
 14. For well known law firms there also would be significant damage to reputation if a foreign office was found to be unlawfully established or operating unlawfully.
 15. The Law Council considers that there is considerable incentive for work to be undertaken to remove barriers to the export of legal services. In the Law Council's experience, this has been best achieved through direct negotiation with stakeholders in the relevant jurisdiction rather than through preferential trade agreements. The Law Council recognises that preferential trade agreement can provide a platform for direct negotiations and welcomes such opportunities as and when they arise.
 16. In negotiating the removal of barriers to the export of legal services, the Law Council recognises Australia must also ensure that its legal services market is accessible to lawyers of the country with whom the preferential trade agreement is being negotiated.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- 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 of the Australian Capital Territory
- Law Society of the 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 Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.