



Law Council
OF AUSTRALIA

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Senator Bridget McKenzie
Sub-Committee Chair
Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Senator McKenzie

Inquiry into Australia's Trade and Investment Relationship with the United Kingdom

The Law Council of Australia is pleased to have the opportunity to provide this brief submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade. The United Kingdom (UK) is Australia's equal-second largest export destination for legal services (around 13.5% in FY2010-11). Continental Europe accounts for a further 13.5% of Australian legal services exports.

Trade and investment cannot take place in a legal vacuum. Legal services are an essential enabler of international trade and investment because of the role that lawyers play in identifying and mitigating risk. This is especially important in the context of unprecedented legal uncertainty arising from the UK's exit (Brexit) from the European Union (EU). In the absence of these services, trade and investment is inherently more prone to dispute, unnecessary expense and failure. Maintaining a practical level of market access for lawyers is therefore a vital aspect of any trade and investment relationship, particularly, as in this case, when the trading partner is as important to Australia as the UK.

There are currently no significant barriers to trade in legal services between Australia and the UK. Underpinning this high quality market access in both countries are clear regulatory frameworks that facilitate the availability of foreign legal services combined with the flexibility for local and foreign lawyers to work together to jointly provide multi-jurisdictional legal services to clients.

Australian and UK lawyers enjoy comprehensive access into each other's markets to provide foreign law legal services; to enter into commercial association; and to work with local and other foreign lawyers to provide advice covering the laws of multiple jurisdictions.

While trade agreements remain important as they lock-in market access and thus provide a level of ongoing assurance to establish a presence, the Law Council does not expect that the current level of access for Australian lawyers into the UK will be diminished as a result of Brexit or that this access could be significantly expanded by the conclusion of a bilateral agreement with the UK.

The wider impact of Brexit - including immediate uncertainty about its consequences for the UK, continental Europe and global trading partners - is likely to significantly alter the regulatory landscape for international businesses operating in the UK and Europe. In effect, the Brexit process has introduced new risks that must be evaluated and effectively dealt with to keep current business arrangements on foot and to support new ventures. The continued

availability of legal services covering the laws of multiple jurisdictions will be absolutely essential if these risks are to be managed effectively by businesses.

Although English law has been the law of choice underpinning much of transnational trade and investment, Brexit will likely increase the need for advice covering Australian, English and third country law.

For example, Australian lawyers can, working together with UK lawyers from currently assist clients to set up companies in the UK. Such companies can currently trade without unnecessarily restrictive barriers in the European Union (EU) single market.

Australian lawyers are also presently able to work with UK lawyers to assist Australian companies based and operating in the EU, even though company law has never been harmonized in the EU. This is possible because the single market allows limited companies to be set up under the laws of England & Wales even if they are based, for example, in Germany, France or Italy.

For example, it is possible to establish a company, say "ABC Limited", under English company law based in Paris (instead of a ABC SARL - société à responsabilité limitée). This procedure relies on the freedom of establishment principle and is currently widespread in practice. It allows the governance of Australian subsidiaries based in the EU or in the Republic of Ireland according to the company law of England & Wales and not to engage with the rather different continental European Civil law.

As Prime Minister, Theresa May, acknowledged in her Article 50 notice to the President of the European Council on Wednesday 29 March 2017:

"We also understand that there will be consequences for the UK of leaving the EU: we know that we will lose influence over the rules that affect the European economy. We also know that UK companies will, as they trade within the EU, have to align with rules agreed by institutions of which we are no longer a part - just as UK companies do in other overseas markets."

It is therefore a concern that, as a consequence of Brexit, Australian lawyers could no longer be in a position to recommend that their clients set up in the United Kingdom under the laws of England & Wales. This would be due to uncertainties about post-Brexit trading rules and potentially substantial tariff structures when seeking to trading with the EU and its 440,000,000 consumers.

In the face of this uncertainty, and in order to effectively respond to whatever new trade and investment relationships are created post-Brexit, it is more important than ever that clients continue to have access to high quality legal services covering the laws of multiple jurisdictions. These services will be essential in managing risks and resolving disputes that arise as people continue to conduct business in an environment characterised by rapid trade policy development and regulatory change.

The major benefit for legal services under any trade agreement with the UK will be the opportunity to conclude a trade agreement that properly recognises the importance of legal services. This would require forward looking commitments that create a framework for ongoing improvements to local regulatory regimes, meaningful mechanisms for dealing with behind the border barriers and commitments to free movement of legal services providers across all four modes of service supply. The importance of the trade-enabling role of multi-jurisdictional legal services in facilitating two-way trade and investment cannot be overstated.

In addition to 'standstill' market access commitments from both parties, a trade agreement between Australia and the UK should ideally incorporate text on best practice regulation of multi-jurisdictional legal services into the main body of the agreement. The direct benefit of

these provisions would be the clear demonstration of how far-reaching legal services commitments can be meaningfully incorporated into trade agreements. Importantly, such a commitment is likely to set the tone for high level practical market access and positively influence the UK's legal services negotiations with other trade partners.

The UK's post-Brexit legal services trade policy will also be important in the context of future trade and investment opportunities for Australia with third countries. The UK will soon become deeply engaged in negotiating new trade frameworks, both as part of its withdrawal from the EU and subsequently to establish trade relationships outside the EU, especially in Asia. On the basis that bilateral services outcomes will become 'multilateralised' over time and with the existence of 'most favoured nation' treatment for Australia in trade agreements with many key trading partners, it is in the interests of Australian legal services providers that the UK is well equipped for these negotiations and that it is able to promote high quality trade agreements in the region.

The final post-Brexit position for UK legal services providers may also have an impact on the Australian legal profession in the context of a possible trade agreement between Australia and the EU. This is because the upper limits for Australian legal services outcomes under any trade agreement between Australia and the EU are likely to be no greater than the level of access enjoyed by UK lawyers into the EU. If access for UK lawyers is reduced to the same level of access given to non-EU partners (including Australia) under the EU's scheduled GATS commitments, it may be difficult for Australia to obtain legal services commitments from the EU that go significantly beyond this point.

Should the Committee have any questions about the matters raised in this submission, Mr Arjuna Nadaraja, Director Transnational Practice can be contacted on [redacted] or by email to [redacted]

Yours sincerely

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