

**By email**

The Committee Secretary  
House of Representatives Standing Committee on  
Economics, Finance and Public Administration  
Department of House of Representatives  
Parliament House  
CANBERRA ACT 2600  
**By email: [efpa.reps@aph.gov.au](mailto:efpa.reps@aph.gov.au)**

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Dear Sir

**Inquiry into Australia's service industries**

We refer to the letter dated 5 June 2006 from the Inquiry Secretary, Mr McGowan, in relation to the inquiry into the direction of Australia's service industries. We are pleased to make this submission to the inquiry.

**Overview of our current services**

Mallesons Stephen Jaques is a leading international commercial law firm which focuses on advising major corporations and financial institutions primarily in Australia and Asia. The firm has over 900 lawyers backed by shared services and support staff, including technology, know how, information and research specialists.

We have offices in Sydney, Melbourne, Perth, Brisbane, Canberra, Hong Kong (a separate partnership), Beijing and London (a separate partnership) and an associated office in Port Moresby.

The London office was established in the late 1970s. The firm established its Hong Kong office (which is a separate partnership) in 1989 and Beijing office (which is a representative office of the Australian partnership) in 1993. The firm also established an "in association" relationship with Posman Kua Aisi Lawyers of Port Moresby, Papua New Guinea in 1995.

We are currently a significant exporter of legal services. Our Australian partnership provides legal services to clients in and outside Australia and practises Australian and English law. Services are provided from Australia and also on a "fly in fly out" basis. The Hong Kong office practises Hong Kong, English and Australian law and the London office, English and Australian law.

In response to client demand, the firm increased its Hong Kong office capability in 2002 when a number of the firm's most experienced partners were relocated to Hong Kong. In 2004, the firm strengthened its Beijing resources by taking on some lawyers and support staff from the former

local office of Denton Wilde Sapte. Later in 2004, Mallesons merged with the Hong Kong/mainland China corporate boutique firm of Kwok & Yih. We are now one of the law firms used by Chinese companies listing on the Hong Kong Stock Exchange, and we now have an increased capability to advise clients doing business in Hong Kong (including on aspects of Hong Kong law). Mallesons is today one of the top ten largest firms in Hong Kong and gaining significant market share in Asia. Kwok & Yih has an office in Shanghai. Mallesons is currently applying for a licence in Shanghai in its place.

## **Potential to expand export of our services**

As our Australian clients increase their offshore activities, it is important that we are able to follow them and be able to provide legal services they require. The ways in which this is currently achieved include provision of advice from Australia, “fly in fly out”, forming associations with local partnerships or through an overseas office of the firm (such as our Beijing office).

There are a number of barriers which affect us in exporting legal services. Examples are listed below.

- **Barriers to entry:** many countries (eg India and Malaysia) restrict any involvement of foreign law firms other than on a limited fly in fly out basis.
- **Structural issues:** many countries (eg Hong Kong) prohibit sharing of profits between local lawyers and overseas lawyers. It can also be a requirement that the local partnerships operate independently. This effectively means that any office established in those jurisdictions must be an independent local partnership.

Other jurisdictions (eg mainland China) require local offices to be a branch of the firm in the home country (rather than an independent partnership or a branch of another associated partnership).

Some jurisdictions (eg Singapore) also:

- prohibit partnership or associations between foreign qualified and local lawyers;  
or
- impose residency requirements on the local representatives or partners.

These rules therefore dictate the structure which can be adopted in relation to establishment of an overseas office rather than the choice which best suits commercially.

- **Ease of doing business:** different jurisdictions have different rules as to when registration of overseas lawyers is required (eg some expressly allow a time period for

fly in fly out work when registration is not required). Some also have onerous visa requirements.

Most jurisdictions restrict the practice of local law to lawyers entitled to practise there. However, there can be differences in approach as to what is meant by the practice of local law. For example, one of the ways in which Australian commercial lawyers can add value is by assuming overall responsibility for project managing large projects (with assistance from local lawyers on local aspects). Desirably there should be a uniformity of approach so that it is clear that such project management (including drafting letters or documents for local sign off) is not practising local law.

- **Use of name:** generally it is not necessary to obtain approval to use or change the name of a law firm in Australia. Some overseas jurisdictions require an application to be made overseas for approval for use of a name or change in name. While it is accepted that each jurisdiction should be able to restrict use of a name which is misleading or deceptive or unlawful in that jurisdiction, if submitted approvals should not be required for all names or name changes.
- **Taxation:** foreign clients in some jurisdictions are required to deduct withholding tax when paying our invoices (sometimes as much as 20%) on the basis that the fees for services are royalties. In some jurisdictions tax is remitted on proof that we do not have a branch in that jurisdiction. However, there are difficulties in the process of claiming these monies back from the relevant authorities and thus this tax can impact on our profitability in working with overseas clients.

Some jurisdictions (eg China) also impose taxation on all revenue invoiced in a jurisdiction even if relating to work done outside the jurisdiction (eg in different offices of a firm).

Both these issues mean there can be double tax.

- **Billing in foreign currency:** as clients do business globally and become more sophisticated we may be asked to bill them in a foreign currency (say, US dollars). Some overseas jurisdictions do not allow billing in foreign currencies, and we would like to be able to bill in any currency, including Australian when outside Australia.
- **Remittance of profits:** jurisdictions, such as Australia and the UK, allow remittance of profits after payment of local tax. Some jurisdictions, Asian in particular, do not. Law firms should be able to remit profits, even outside of the relevant jurisdiction, in the same way as local businesses can give profits to their owners without impediments.
- **Disclosure obligations:** our ability to share the risk of a transaction and propose competitive fee arrangements based on our client's requirements is limited by our disclosure obligations under the legal profession legislation in each jurisdiction (unlike

the US). The “sophisticated client” exceptions, and the recent amendments to remove the 25% cap on conditional cost agreements under the new Model Laws in Australian jurisdictions relating to commercial matters, have provided more flexibility, but it would help if foreign government departments and foreign public authorities were also included as “sophisticated clients” (in the same way as Australian government departments and public authorities are included).

Promotion of Australia as a governing law for international transactions could also assist in expanding the market for Australia legal services offshore. Usually US or English law is selected in part because the firms advising on the transactions are US or UK based. However, there is no reason why Australia could not be chosen and this would provide the opportunity for Australian lawyers to be involved.

You may be aware of the report “Australian Legal Services Export Development Strategy 2003 to 2006” prepared by ILSAC (of which our Chief Executive Partner, Robert Milliner, is a member) which contains other examples of export barriers and is available on the website of the Attorney-General’s Department.

## **Benefits of export expansion**

Our presence in Asia attracts instructions for the performance of services in Australia including to clients located offshore. It has been important in building our international reputation and our ability to compete with international firms and strengthens our position in the domestic market.

The market for commercial legal services in Australia is a small and competitive one. To retain key Australian clients in the long term, Australia law firms need to be able to offer not only legal services in Australia but also offshore as more and more of our clients expand their business offshore. Also as Australian organisations move offshore, offshore law firms will compete to provide services to them, including in Australia.

In addition to the economic growth benefits, we can offer the same experience (locally and internationally) to young lawyers joining Mallesons. This ability to offer global careers is important as it assists with attraction and retention of people and skills and offsets some of the issues arising from the current “brain drain” to UK and US based law firms.

Thank you for the opportunity to make this submission. Please contact Robert Milliner on (02) 9296 2111 if you have any queries about the information we have provided above.

Yours faithfully

[Sgd] Mallesons Stephen Jaques