

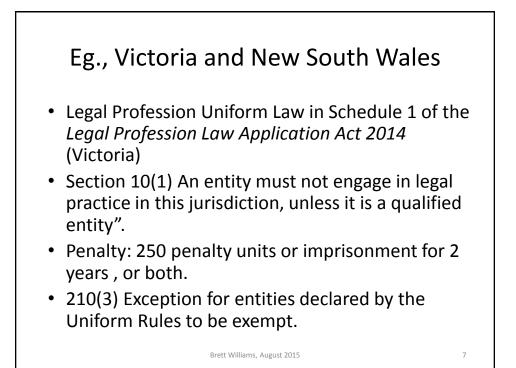


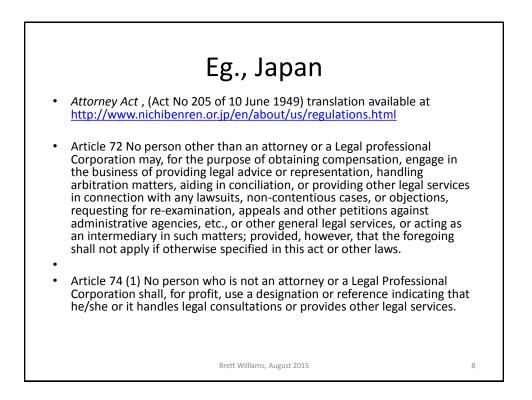
### Different ways of servicing a client that needs legal services relating to the laws of more than one jurisdiction?

- Client may engage directly two different law firms for services relating to laws of two different countries
- Client may engage one law firm which provides services relating to law of Country A and engages a 2<sup>nd</sup> law firm to supply services on law of country B
- Client may go to one law firm in which principals provides services relating to law of country A and employed legal practitioners provide services relating to law of country B (where they are licensed to practice law)
- Client may go to one law firm in which some partners can provide services relating to law of country A and some partners can provide services relating to law of country B.

Brett Williams, August 2015

### What laws prohibit lawyers from providing legal services across national borders? Eg. South Australia Legal Practitioners Act 1981 a amended (SA), section 21(1) "A natural person must not practise the profession of the law, or hold himself or herself out, or permit another to hold him or her out, as being entitled to practise the profession of the law unless the person -- Is a local legal practitioner Is an interstate legal practitioner." S21(3a) "A person will not be taken to be practising the profession of the law by reason only of the fact that the person provides legal advice or legal services relating to the law of a place outside Australia." S23 creates offences (with maximum penalties of \$10,000) - Holding out un unqualified person as entitled to practise the profession of the law (23(2)) Permitting or aiding an unqualified person to practise the profession of the law (23(3)(a)) Entering into an agreement or an arrangement with an unqualified person under which the unqualified person is entitled to share in the profits arising form the practice of the law (otherwise than as permitted by the Act or authorised by the Society) (23(3)(b)) August 2015 6

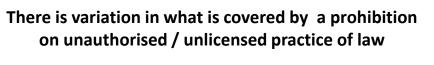




### Eg, India

- Advocates Act 1961 (25 of 1961)
- S29 Subject to the provisions of this Act and nay rules made thereunder, there shall, as form the appointed day, be only one class of persons entitled to practise the profession of law, namely advocates.
- S32 "Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."

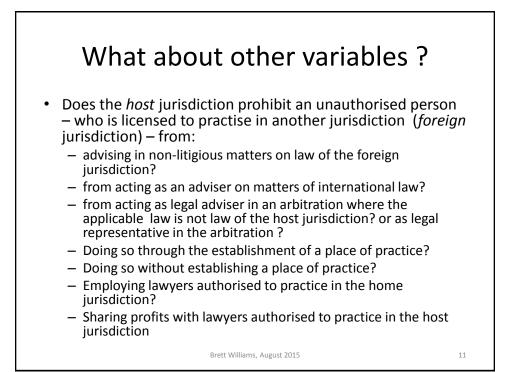
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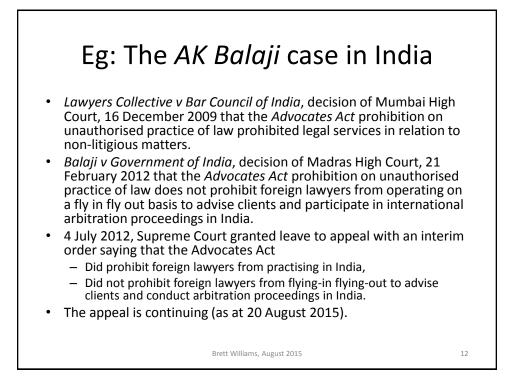


- Prohibits unlicensed persons from acting as counsel in litigious matters in domestic courts
- Does it prohibit an unlicensed person from acting as an adviser on local law litigious matters?
- Does it prohibit an unlicensed person from acting in relation to nonlitigious matters of local law including:
  - preparing instruments related to non-litigious matters under domestic law
  - Giving advice related to non-litigious matters under local law
- In NSW see ACCC v Murray [2002] FCA 1252 (other case referenced at Law Society of NSW brochure on Unqualified practice at <u>https://www.lawsociety.com.au/cs/groups/public/documents/internetcon</u> <u>tent/1022381.pdf</u>
- Around the world, see Laurel S. Terry, "Putting the Legal Profession's Monopoly on the Practice of law in a Global Context" (2014) Fordham Law review Vol 821 also at <u>http://ssrn.com/abstract=2435984</u>

Brett Williams, August 2015

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# What can be done to remove the legal barriers to providing legal services across national borders? Unilateral change Negotiated change through international legal obligations: Multilaterally through the WTO General Agreement on Trade in Services Bilaterally in Discriminatory Trade Agreements (FTAs, EPAs) Plurilaterally in Discriminatory Trade Agreements (eg. Aust-NZ-ASEAN FTA, and proposed TiSA, TPP, RCEP) Anything in between: softer influence guiding the path to unilateral reform without international legal obligations

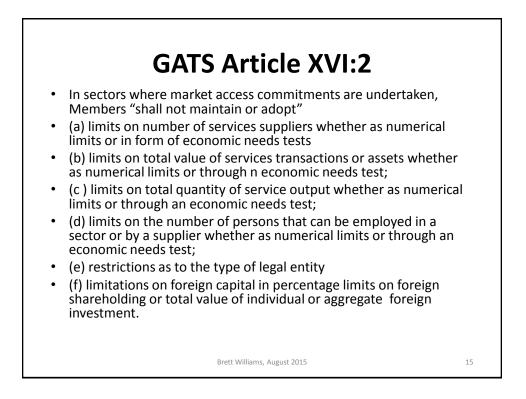
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### WTO General Agreement on Trade in Services, in force 1 January 1995

- For Sectors listed in a Member's Schedule of Commitments:
- Article XVI:2 Prohibition on certain types of restrictions except as qualified by entries in the Schedule of Commitments
- Article XVIIIprohibition on derogations from national treatment except as qualified by entries in the Schedule of Commitments
- Article XVI:1 prohibition on treatment less favourable than undertaken in the Schedule
- Article VI prohibition of licensing or qualification requirements which:
  - Could not have been reasonably expected at time of grant of the Specific commitment AND
  - are
    - Not based on objective and transparent criteria OR
    - More burdensome than necessary to ensure the quality of the service, or
    - In the case of licensing procedures, not in themselves a restriction on the supply of the service.
- For all sectors, regardless of whether listed in the Schedule of Commitments
- Article II Most-favoured nation rule (with an exception for preferential measures listed in an Annex on Article II exemptions)

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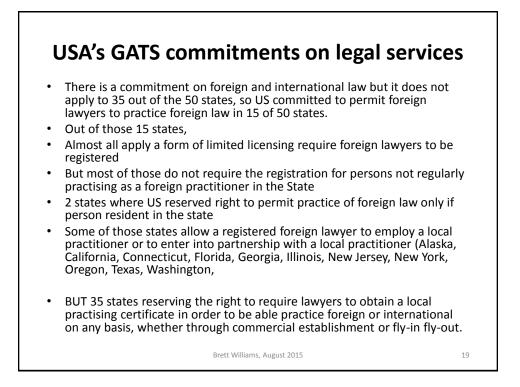
### In reviewing commitments on legal services, particularly legal services relating to foreign and international law

- The Article XVI:2 prohibition on certain types of restrictions; and
- The Article XVII prohibition on derogations from national treatment
- Do not apply to:
- Any legal services if the entire legal services sector is omitted from the Member's schedule
- Some legal services sub-sectors if there is an entry for legal services but the description of the sub-sector excludes some fields
- Supply by particular modes of services if there is an entry for a particular subsector of legal services but the schedule is marked Unbound for that particular mode of supply.
- What did Australia commit to?

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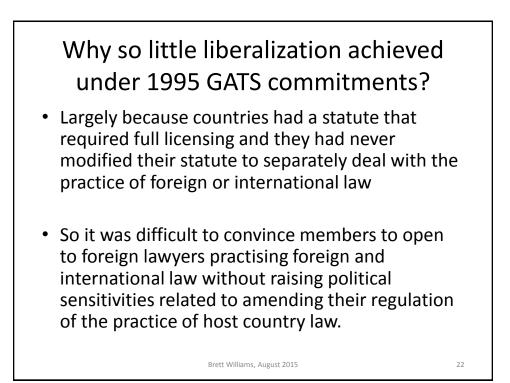
practising foreign law may only join a local law firm as an employee or as a consultant and may partnership with orrevenue-sharing between foreign law firms and Australian law firms and permitted in NSW, Vic., Qld., & Tas. subject to the foreign law firms satisfying certain	Australia - Schedule of Specific Commitments Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons					
Home country law, including public international law2) None2) None2) None2) None3) Joint offices involving practising foreign law 			National			
in relation to liability,	Home country law, including public international law	<ul> <li>2) None</li> <li>3) Natural persons practising foreign law may only join a local law firm as an employee or as a consultant and may not enter into partnership with or employ local lawyers</li> <li>4) Unbound except as indicated in the</li> </ul>	<ul> <li>2) None</li> <li>3) None</li> <li>4) Unbound except as indicated in the</li> </ul>	Australian law firms are permitted in NSW, Vic., Qld., & Tas. subject to the foreign law firms satisfying certain requirements including in relation to liability, standards of conduct and professional ethics.		

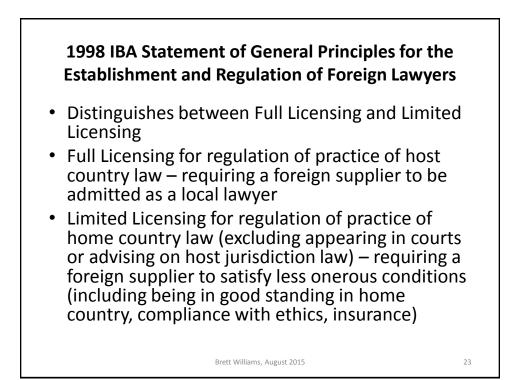




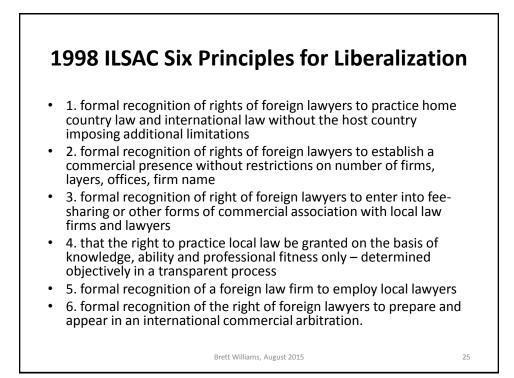


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Australia as a demandeur on legal services in negotiation of accession of new members to the WTO

- Especially:
- Negotiation on accession of China from 1986 to 2001
- Negotiation on accession of Cambodia in 2004, Vietnam in 2007.

Brett Williams, August 2015

China - Schedule of Specific Commitments Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons				
Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments	
a) Legal services:	1) None 2) None	1) None 2) None		
(CPC 861, excluding Chinese practice)	<ul> <li>3) Foreign law firms can provide legal services only in the form of representative offices.</li> <li>[expired words]</li> <li>Representative offices can engage in profit-making activities. [expired words]</li> <li>Business scope of foreign representative offices is only as</li> </ul>	3) All representatives shall be resident in China no less than six months each year. The representative office shall not employ Chinese national registered lawyers outside of China.		
	<ul> <li>follows: [see below]</li> <li>The representatives of a foreign law firm shall be[see below]</li> <li>4) Unbound except as indicated in the horizontal section.</li> </ul>	<ul><li>4) Unbound except as indicated in the horizontal section</li></ul>	27	

### China's GATS Schedule - Qualifications of Mode 3 supply through commercial presence - continued

- Business scope of foreign representative offices is only as follows:
- a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices;
- b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work;
- c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;
- d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;
- e) to provide information on the impact of the Chinese legal environment.
- Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed 28 between both parties.

### China's GATS Schedule - Qualifications of Mode 3 supply through commercial presence - continued

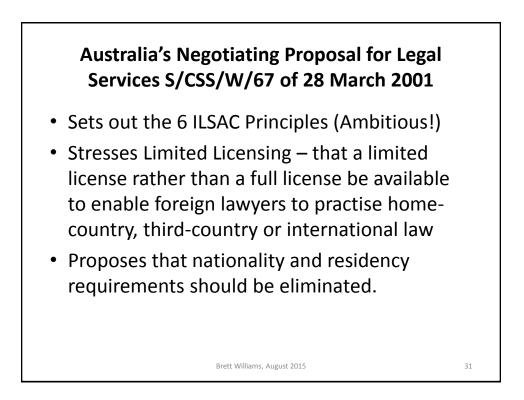
• The representative of a foreign law firm shall be practitioner lawyers who are members of the bar or law society in a WTO member and practiced for no less than two years outside of China. The Chief representative shall be a partner or equivalent (eg., member of a law firm of a limited liability corporation) of a law firm of a WTO member and have practiced for no less than three years.

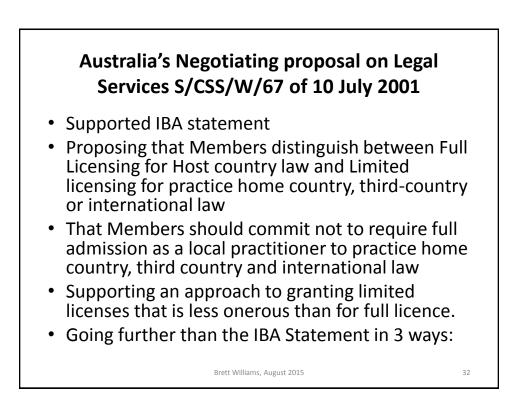
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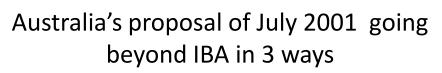
## New WTO negotiations commenced in 2001 including negotiation under the GATS

- From 2001 proposals on modifications to rules, on techniques for across the board methods of liberalisation
- From 2001 WTO members submitted new draft offers (i.e draft revised Schedule of Commitments)
- From 2005 some WTO members submitted better offers

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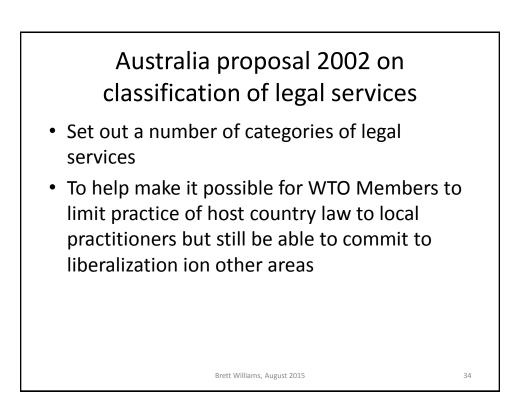






- That Members permit foreign lawyers to give advice on host country law in a limited way: the advice is necessarily incidental to practice of foreign law and is expressly based on advice from a home country practitioner
- That Members permit foreign lawyers to provide legal services in relation to international arbitration (including appearances
- That Members permit foreign lawyers to practice foreign or international law on a fly in fly out basis without having to obtain a limited licence in the host jurisdiction.

Brett Williams, August 2015





### Sept 2003 IBA resolution on terminology for legal services for the purposes of international trade negotiations

- Also prepared to facilitate negotiations
- Adopted most of the categories in the Australia proposal
- One difference was that Australia allowed for a separate category of certification of legal documents but IBA defined advisory services (host country law) as including verification of documents.





ector or Sub ector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
a) Legal services: Legal advisory and representational rervices in domestic aw (host country aw)	<ol> <li>1)None</li> <li>2) None</li> <li>3) None</li> <li>4) Unbound except as indicated in the horizontal section.</li> </ol>	<ol> <li>None</li> <li>None</li> <li>None</li> <li>Unbound except as indicated in the horizontal section</li> </ol>	

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
a) Legal services:	1)None	1) None	Limited Licence only is
Legal advisory services in foreign	2) None	2) None	required: Only registration with limited licence is
law and international			required, rather than full
law and (in relation	3) Natural persons	3) None	admission/ licence, in order
to foreign and	practising foreign		to provide [see next page]
international law	law may only join a		3) Joint offices involving
only) legal	local law firm as a		revenue-sharing between
arbitration and	consultant and may		foreign law firms and
conciliation/mediatio	not enter into		Australian law firms are
n services	partnership with or		permitted in NSW, Vic., Qld.,
	employ local		Tas., WA, ACT and NT.
	lawyers in SA.		subject to the foreign law
			firms satisfying certain
	4) Unbound except	4) Unbound	requirements including in
	as indicated in the	except as	relation to liability, standards
	horizontal section.	indicated in the	of conduct and professional
		horizontal	ethics. 40
		section	

### In Australia's 2005 WTO offer, the additional commitment was:

- Limited Licence only is required: only registration with limited licence is required, rather than full admission/licence, in order to provide:
- (a) legal advisory services in foreign law, where licensed in the relevant foreign jurisdiction(s);
- (b) legal advisory services in international law; or
- (c) legal arbitration and conciliation / mediation services in relation to foreign and international law.
- By contrast, a Full Licence is required for (a)(i) above (legal advisory and representational services in domestic law (host-country law), for which full admission is required; i.e. practitioners must satisfy admission requirements, including qualification requirements, applicable to domestic legal practitioners.)

### Australian proposal 6 Sept 2005 on Domestic Regulation of legal Services Suggesting development of disciplines for qualification and licensing requirement s including That for purposes of legal services in foreign and international law foreign lawyers not be required to meet requirements for a full license but should qualify for a limited licence if

- Licensed and in good standing in home jurisdiction
- Of good character and reputation
- Submits to the Code of Ethics
- Carries liability insurance or other security which is no more burdensome than is required of fully licensed practitioners

Brett Williams, August 2015

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### Aug 2006 release of Australian Model Legal Profession Bill

- Which included provision for:
- Allowing foreign lawyers to establish a place of business to practice foreign or international law by registering as a foreign legal practitioner
- Allowing foreign lawyers to practice foreign or international law on a fly in fly out for up to 90 days per year without being registered as a foreign legal practitioner

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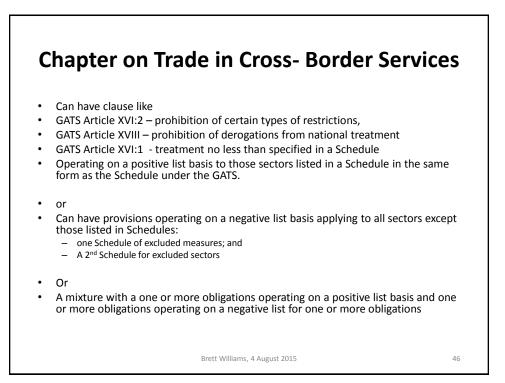
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### Lack of progress in negotiations under GATS as part of WTO Doha Round of Multilateral Trade negotiations

- Negotiations commenced in 2001
- Some members did not lodge an offer
- (others did but did not make it public)
- Some of those have made a 2<sup>nd</sup> offer offering more liberalization
- No consensus on amendments to GATS rules in areas of subsidies or temporary safeguard protection against large increases in imports

Brett Williams, August 2015

- Lack of agreement on services was one of the factors leading to failure to conclude Doha Round in July 2008
- Little evidence of progress since then.



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# Most follow the negative list approach so you are looking for:

- MFN clause
- Market access clause
- National treatment clause
- Exception clause referring to:
- Schedule of non-conforming measures
- Schedule of excluded sectors, sub-sectors or activities

Brett Williams, August 2015



### Singapore under Aust-Sing FTA 2003

- No MFN clause
- Market access
- National treatment
- Schedule of non-conforming measures excludes NT rule from Legal Practitioners Act 1981 (SA) with the same reference as is in Australia's GATS schedule
- Annex II schedule of non-conforming measures excludes market access rules and domestic regulation rules from any regional law relating to practice of Australia law

Brett Williams, August 2015

Aust Singapore FTA 2002 cont'd Schedule excludes the NT rule from:

- "South Australia
- A person may practice law in South Australia only if he or she is resident in Australia. A person is not taken to be practising the profession of the law if he or she is only providing legal advice or services relating to the law of a place outside Australia. Foreign natural persons practising foreign law may only join a local law firm as a consultant and may not enter into partnership with or employ local lawyers in South Australia.
- A company that is a subsidiary of a foreign law firm is not permitted to obtain a practising certificate and is not permitted to share profits with any other company or firm."

### Australia – Singapore FTA 2003 cont'd Singapore commitments

- Excludes the market access and NT obligations to the extent necessary for Singapore to limit Australian lawyers practice of Australia, international law or third country law by
- requiring registration of firms as a foreign law firm
- Requiring registration of foreign lawyers working in foreign firms to register as foreign lawyers
- Allowing foreign firms to employ Singapore lawyers but only to practice Australian law not Singapore law
- Allowing registered foreign lawyers to advise on or appear in arbitration (unless the applicable laws is the law of Singapore in which case they can advise but not appear unless appearing jointly with a Singapore lawyer)
- Also limited commitment on practice on Singapore law in case of joint venture law firms between Australian and Singapore law firms in the fields of banking and finance law and corporate law subject to minimum experience of Australian partners and residency requi9rement

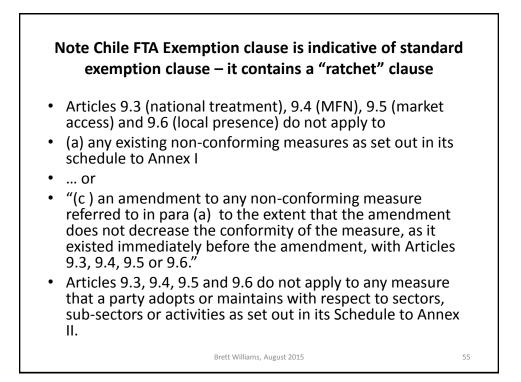
Brett Williams, August 2015

Thailand Australia FTA 2005
• Neither Australia not Thailand gave each other any market access on legal services over and above what they were committed to under WTO commitments

Brett Williams, August 2015

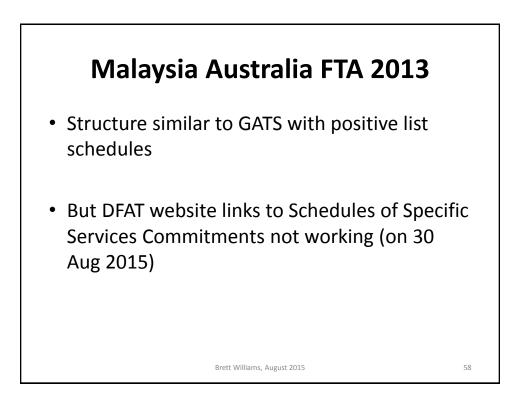












### Korea Australia Free Trade Agreement 2014

- Recall 1995 GATS schedule contained no commitment on legal services
- But June 2005 new offer of GATS Schedule contains a listing of foreign and international law which would commit Korea to allow foreign lawyers to have representative office with foreign lawyers who reside in Korea 180 days per year but not allowing them to employ Korean lawyers or have any commercial association with Korean lawyers

Brett Williams, August 2015

**KAFTA 2014 (cont'd)** Structured on a negative schedule basis Obligations on market access, national treatment apply unless exempted

- But contains a positive undertaking to allow:
- 1. Australian lawyers to establish foreign legal consultant offices to practise as foreign legal consultants in foreign or international law;
- 2. From 2016, to allow foreign legal consultant offices to enter into cooperative agreements with Korean law firms to deal with case where domestic and foreign legal cases are mixed and to share profits from such cases
- 3. From 2019, to allow Australian law firms "subject to certain requirements" to establish joint venture firms with Korean law firms but Korea may impose restrictions on the equity share,
- The obligations do not prohibit Korea from prohibiting fly in fly out practice by foreign lawyers of foreign and international law.

Brett Williams, August 2015

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- Negative list structure
- Obligations on market access, national treatment and MFN are subject to exclusion lists
- Australia's Annex 6
- Contains usual exclusion covering South Australia but no other exclusion
- Japan's Annex 6
- Contains a reservation for the requirement that a person supplying legal advisory services on foreign law must be registered as a foreign lawyer, must establish an office, and must reside in Japan for 180 days per year.
- The obligations do not prohibit Japan from prohibiting fly-in fly-out practice of foreign or international law by foreign lawyers other than those registered as foreign legal consultants and meeting the 180 residence requirement.

Brett Williams, August 2015

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### Proposed China Australia FTA signed June 2015 Australia's services obligations are on a negative list basis • (In 2014, SA has amended its legal Practitioners Act to allow a foreign lawyer to be a partner in an incorporated legal practice) Australia's list of exclusions in Pat A of Schedule has no specific • reference to any exemption for legal services Australia list of exclusions in Part B of Schedule includes : "Australia reserves the right to adopt or maintain any measure at the regional level of government that is not inconsistent with Australia's Revised Services Offer of 31 May 2005 in the World Trade Organization Doha Development Agenda negotiations (WTO Document - TN/S/O/AUS/Rev.1). Appears to cover any SA measure that prohibited a foreign lawyer from employing Brett Williams, August 2015 62

















