

Australia and the Opening of Markets for Legal Services: A Look Back and a Look Forward

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The material contained is not given as legal advice and should not be relied upon as legal advice. It is educational material relating to the general issue of international trade in legal services.

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From a notable South Australian, Justice Andrew Wells

- People should tell what they know and not wait until they have something ground breaking and original before they share their knowledge.
 - Andrew Wells, Judge of the Supreme Court of South Australia, 1970-1984
- From my memory of the Preface to his book An Introduction to the Criminal Law
- This presentation draws on Law Council submission to DFAT on Trade In Services Agreement available at <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/submissions/Pages/submissions.aspx> or at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2807 - Trade in Services Agreement Submission.pdf>

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- What are the ways in which lawyers want to provide legal services across national borders?
- What laws prohibit lawyers from providing legal services across national borders?
- What has been done to remove the legal barriers to providing legal services across national borders? What could be done?

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What are the ways in which lawyers want to provide legal services across national borders?

- Cross Border provision of service: Lawyers stay in their country and client stays in their country – use telephone, fax, email, post, skype, teleconference
- Consumption abroad – client moves to the country of the lawyer to receive the service
- Commercial presence – lawyer establishes a place of business in the country of the clients
- Presence of natural persons – lawyer does not establish a place of business but supplies the service by going to the clients' country temporarily

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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 2nd 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.

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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 an 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 from the practice of the law (otherwise than as permitted by the Act or authorised by the Society) (23(3)(b))

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Eg., Victoria and New South Wales

- Legal Profession Uniform Law in Schedule 1 of the *Legal Profession Law Application Act 2014* (Victoria)
- Section 10(1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity”.
- Penalty: 250 penalty units or imprisonment for 2 years , or both.
- 210(3) Exception for entities declared by the Uniform Rules to be exempt.

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Eg., Japan

- *Attorney Act* , (Act No 205 of 10 June 1949) translation available at <http://www.nichibenren.or.jp/en/about/us/regulations.html>
- Article 72 No person other than an attorney or a Legal professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters; provided, however, that the foregoing shall not apply if otherwise specified in this act or other laws.
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- Article 74 (1) No person who is not an attorney or a Legal Professional Corporation shall, for profit, use a designation or reference indicating that he/she or it handles legal consultations or provides other legal services.

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Eg, India

- *Advocates Act 1961* (25 of 1961)
- S29 Subject to the provisions of this Act and any rules made thereunder, there shall, as from 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.”

There is variation in what is covered by a prohibition on unauthorised / unlicensed practice of law

- 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 non-litigious 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 <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1022381.pdf>)
- 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 <http://ssrn.com/abstract=2435984>

What about other variables ?

- Does the *host* jurisdiction prohibit an unauthorised person – who is licensed to practise in another jurisdiction (*foreign jurisdiction*) – from:
 - advising in non-litigious matters on law of the foreign jurisdiction?
 - from acting as an adviser on matters of international law?
 - from acting as legal adviser in an arbitration where the applicable law is not law of the host jurisdiction? or as legal representative in the arbitration ?
 - Doing so through the establishment of a place of practice?
 - Doing so without establishing a place of practice?
 - Employing lawyers authorised to practice in the home jurisdiction?
 - Sharing profits with lawyers authorised to practice in the host jurisdiction

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Eg: The *AK Balaji* case in India

- *Lawyers Collective v Bar Council of India*, decision of Mumbai High Court, 16 December 2009 that the *Advocates Act* prohibition on unauthorised practice of law prohibited legal services in relation to non-litigious matters.
- *Balaji v Government of India*, decision of Madras High Court, 21 February 2012 that the *Advocates Act* prohibition on unauthorised practice of law does not prohibit foreign lawyers from operating on a fly in fly out basis to advise clients and participate in international arbitration proceedings in India.
- 4 July 2012, Supreme Court granted leave to appeal with an interim order saying that the *Advocates Act*
 - Did prohibit foreign lawyers from practising in India,
 - Did not prohibit foreign lawyers from flying-in flying-out to advise clients and conduct arbitration proceedings in India.
- The appeal is continuing (as at 20 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 XVIII prohibition 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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GATS Article XVI:2

- In sectors where market access commitments are undertaken, Members “shall not maintain or adopt”
- (a) limits on number of services suppliers whether as numerical limits or in form of economic needs tests
- (b) limits on total value of services transactions or assets whether as numerical limits or through an economic needs test;
- (c) limits on total quantity of service output whether as numerical limits or through an economic needs test;
- (d) limits on the number of persons that can be employed in a sector or by a supplier whether as numerical limits or through an economic needs test;
- (e) restrictions as to the type of legal entity
- (f) limitations on foreign capital in percentage limits on foreign shareholding or total value of individual or aggregate foreign investment.

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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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Australia - 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: Home country law, including public international law (CPC 861*)	1) None 2) None 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 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	3) Joint offices involving revenue-sharing between foreign law firms and 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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What did other WTO Members commit to?

- approx 60 Members included an entry for legal services in their Schedule of Specific Commitments
- About 40 Member countries did not, including:
 - Republic of Korea, Mexico, India
 - Some ASEANS: Singapore, Indonesia and The Philippines
 - Some Latin American: Brazil, Bolivia, Peru, Paraguay, Uruguay
- So 40 countries remaining free to require foreign lawyers to obtain a full practising certificate to practise any kind of law in their territory.

USA's GATS commitments on legal services

- There is a commitment on foreign and international law but it does not apply to 35 out of the 50 states, so US committed to permit foreign lawyers to practice foreign law in 15 of 50 states.
- Out of those 15 states,
- Almost all apply a form of limited licensing require foreign lawyers to be registered
- But most of those do not require the registration for persons not regularly practising as a foreign practitioner in the State
- 2 states where US reserved right to permit practice of foreign law only if person resident in the state
- Some of those states allow a registered foreign lawyer to employ a local practitioner or to enter into partnership with a local practitioner (Alaska, California, Connecticut, Florida, Georgia, Illinois, New Jersey, New York, Oregon, Texas, Washington,
- BUT 35 states reserving the right to require lawyers to obtain a local practising certificate in order to be able practice foreign or international on any basis, whether through commercial establishment or fly-in fly-out.

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Legal services under GATS : European Community (as it was called in 1995)

- Lists foreign and international law in its schedule but the qualifications and limitations are complicated
- Germany: limits practice to persons admitted to Bar Association (which in effect excludes any incorporated practice)
- France: limited to specific types of entities under French law providing for the regulated profession
- Denmark: allows only fully licenced Danish legal practitioners
- Greece - fly-in, fly-out practice limited to Greek nationals
- Luxemburg – reserved right to prohibit fly-in fly-out practice

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Legal services under GATS: others

- **Malaysia:**
- A very narrow commitment to allowing a foreign law firm to establish a corporation in federal Territory Labuan to provide legal services to offshore corporations established in Labuan
- **Thailand:**
- Listed host country legal services and home country legal services BUT reserves right to limit foreign lawyers to operating through owning up to 49% of a Thai law firm
- **Switzerland:**
- Has a listing for legal services relating to foreign or international law but reserves control over grant of entry and stay visas

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Why so little liberalization achieved under 1995 GATS commitments?

- Largely because countries had a statute that required full licensing and they had never modified their statute to separately deal with the practice of foreign or international law
- So it was difficult to convince members to open to foreign lawyers practising foreign and international law without raising political sensitivities related to amending their regulation of the practice of host country law.

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1998 IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers

- Distinguishes between Full Licensing and Limited Licensing
- Full Licensing for regulation of practice of host country law – requiring a foreign supplier to be admitted as a local lawyer
- Limited Licensing for regulation of practice of home country law (excluding appearing in courts or advising on host jurisdiction law) – requiring a foreign supplier to satisfy less onerous conditions (including being in good standing in home country, compliance with ethics, insurance)

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International Legal Services Advisory Council

- Was an Australian body operating within the Attorney General's Department from 1990 until abolished by the Attorney Generals department in 2013
- Advised on promoting export of Australian legal services

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1998 ILSAC Six Principles for Liberalization

- 1. formal recognition of rights of foreign lawyers to practice home country law and international law without the host country imposing additional limitations
- 2. formal recognition of rights of foreign lawyers to establish a commercial presence without restrictions on number of firms, layers, offices, firm name
- 3. formal recognition of right of foreign lawyers to enter into fee-sharing or other forms of commercial association with local law firms and lawyers
- 4. that the right to practice local law be granted on the basis of knowledge, ability and professional fitness only – determined objectively in a transparent process
- 5. formal recognition of a foreign law firm to employ local lawyers
- 6. formal recognition of the right of foreign lawyers to prepare and appear in an international commercial arbitration.

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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.

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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: (CPC 861, excluding Chinese practice)	1) None 2) None 3) Foreign law firms can provide legal services only in the form of representative offices. [expired words] Representative offices can engage in profit-making activities. [expired words] Business scope of foreign representative offices is only as follows: [see below] The representatives of a foreign law firm shall be ... [see below] 4) Unbound except as indicated in the horizontal section.	1) None 2) None 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. 4) Unbound except as indicated in the horizontal section	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 between both parties.

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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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Australia's Negotiating Proposal for Legal Services S/CSS/W/67 of 28 March 2001

- Sets out the 6 ILSAC Principles (Ambitious!)
- Stresses Limited Licensing – that a limited license rather than a full license be available to enable foreign lawyers to practise home-country, third-country or international law
- Proposes that nationality and residency requirements should be eliminated.

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Australia's Negotiating proposal on Legal Services S/CSS/W/67 of 10 July 2001

- Supported IBA statement
- Proposing that Members distinguish between Full Licensing for Host country law and Limited licensing for practice home country, third-country or international law
- That Members should commit not to require full admission as a local practitioner to practice home country, third country and international law
- Supporting an approach to granting limited licenses that is less onerous than for full licence.
- Going further than the IBA Statement in 3 ways:

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Australia's proposal of July 2001 going beyond IBA in 3 ways

- 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.

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Australia proposal 2002 on classification of legal services

- Set out a number of categories of legal services
- To help make it possible for WTO Members to limit practice of host country law to local practitioners but still be able to commit to liberalization in other areas

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ILSAC Australian Legal Services Export Development Strategy 2003-2006

- One of the key strategies was to encourage a greater number of trading partners to adopt a limited licensing system for foreign lawyers.

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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.

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Australia as joint proposer of Friends of Legal Services Joint Statement 24 Feb 2005

- 11 WTO members including the EC as 1 jointly propose
- categories to be used for further scheduled commitments under GATS
 - Host country law
 - Foreign country law
 - International law
- And
 - Legal advisory services
 - Legal representation services
 - Legal arbitration and conciliation / mediation services

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26 May 2005 Australia's revised GATS offer in the WTO negotiations

- Gave two separate commitment
- One for legal practice relating to host country law
- One for Legal practice relating to foreign law or international law – which included an undertaking not to require a full practising certificate for this category of legal services

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Australia's 2005 offer - 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: Legal advisory and representational services in domestic law (host country law)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	

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Australia's 2005 Offer - 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: Legal advisory services in foreign law and international law and (in relation to foreign and international law only) legal arbitration and conciliation/mediation services	1) None 2) None 3) 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 SA . 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	Limited Licence only is required: Only registration with limited licence is required, rather than full admission/ licence, in order to provide [see next page] 3) Joint offices involving revenue-sharing between foreign law firms and Australian law firms are permitted in NSW, Vic., Qld., Tas., WA, ACT and NT . subject to the foreign law firms satisfying certain requirements including in relation to liability, standards of conduct and professional ethics.

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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.)

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Australian proposal 6 Sept 2005 on Domestic Regulation of legal Services

- Suggesting development of disciplines for qualification and licensing requirements 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

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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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Negotiated access under discriminatory agreements

- Australia New Zealand CER Protocol on Services of 1998
- Australia Singapore FTA in force 2003
- Thailand Australia FTA in force 2005
- Australia USA FTA in force 2005
- Australia Chile FTA in force 2009
- ASEAN Australia NZ FTA in force 2012
- Malaysia – Australia FTA in force 2013
- Korea Australia FTA in force 2014
- Japan Australia EPA in force 2015
- China Australia FTA signed June 2015 not in force

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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 2nd offer offering more liberalization
- No consensus on amendments to GATS rules in areas of subsidies or temporary safeguard protection against large increases in imports
- 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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Chapter on Trade in Cross- Border Services

- Can have clause like
- GATS Article XVI:2 – prohibition of certain types of restrictions,
- GATS Article XVIII – prohibition of derogations from national treatment
- GATS Article XVI:1 - treatment no less than specified in a Schedule
- Operating on a positive list basis to those sectors listed in a Schedule in the same form as the Schedule under the GATS.
- or
- Can have provisions operating on a negative list basis applying to all sectors except those listed in Schedules:
 - one Schedule of excluded measures; and
 - A 2nd Schedule for excluded sectors
- Or
- A mixture with a one or more obligations operating on a positive list basis and one or more obligations operating on a negative list for one or more obligations

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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

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Australia New Zealand Closer Economic Relations agreement (CER)

- The relationship with New Zealand is a special case.
- The two countries have created an integrated market for legal services going far beyond anything done under any other trade agreement.
- It provides for mutual recognition of qualifications

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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

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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."

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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 requirement

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

Australia United States FTA 2005

- Negative list structure
- US inserted a qualification excluding the agreement from any sub national measure regulating legal services
- So the US did not give any commitment to provide Australian lawyers with access to the US market going beyond its WTO commitments.

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Chile Australia FTA 2009

- Negative list basis.
- Australia excludes the market access to extent necessary to be able to require that foreign legal advisers can only join a law firm in SA as a consultant, and may not employ local lawyers or enter into partnership with local lawyers .
- Chile excludes the MFN, market access and national treatment rules from practice of Chilean law but not from application to “foreign legal consultants who practise Australian or international law.”

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Note Chile FTA Exemption clause is indicative of standard exemption clause – it contains a “ratchet” clause

- Articles 9.3 (national treatment), 9.4 (MFN), 9.5 (market access) and 9.6 (local presence) do not apply to
- (a) any existing non-conforming measures as set out in its schedule to Annex I
- ... or
- “(c) an amendment to any non-conforming measure referred to in para (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.3, 9.4, 9.5 or 9.6.”
- Articles 9.3, 9.4, 9.5 and 9.6 do not apply to any measure that a party adopts or maintains with respect to sectors, sub-sectors or activities as set out in its Schedule to Annex II.

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ASEAN Australia NZ FTA 2012

- chapter on services chapter does not deal with supply through movement of natural persons which is covered by a separate chapter on movement of Natural Persons
- No MFN clause
- Otherwise similar structure to the GATS
- Market access and national treatment provisions applying on a positive list basis to sectors listed in the Member’s Schedule
- Each of the 12 countries give a Schedule of Commitments
- Australia’s schedule entry on legal services is the same as in its 2005 offer in the WTO negotiations

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ASEAN Australia NZ FTA 2012 (cont'd)

- Nothing at all on legal services from: Brunei, Myanmar, Indonesia, Laos, The Philippines,
- Nothing beyond the existing WTO commitments from Malaysia,
- Nothing from Singapore – but obligations under Aust Sing FTA continue
- Thailand – lists foreign and international law, unbound on cross border supply but no restrictions on supply through commercial presence
- Cambodia
- For commercial presence for practice of foreign or international law, no restrictions as long as not practising Cambodian law
- Vietnam
- Commitment to permit foreign lawyers to establish a commercial presence, to practise foreign and international law; also to employ Vietnam practitioners or enter into a partnership with Vietnamese law partnerships so as to be not to able to consult on Vietnamese law but not to represent clients in courts.

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Malaysia Australia FTA 2013

- Structure similar to GATS with positive list schedules
- But DFAT website links to Schedules of Specific Services Commitments not working (on 30 Aug 2015)

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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

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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.

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Japan Australia EPA 2015 (JAEPA)

- 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.

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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 Part 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

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Proposed ChAFTA: China's proposed obligations

- On a Positive list basis
- Repeats the content can of China's Schedule under the GATS
- Which allows foreign lawyers to set up representative offices which can practise limited scope of law including foreign and international law
- But cannot employ local lawyers or have partnerships with Chinese lawyers
- But adds an additional commitment as follows:

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ChAFTA – China's additional commitment

- 1. "In accordance with Chinese laws, regulations and rules, Australian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") may enter into contracts with Chinese law firms in the FTZ. Based on such contracts, these Australian and Chinese law firms may dispatch their lawyers to each other to act as legal counsels.
- This means Chinese law firms may dispatch their lawyers to the Australian law firms to act as legal counsels on Chinese law and international law, and Australian law firms may dispatch their lawyers to the Chinese law firms to act as legal counsels on foreign law and international law. The two sides shall cooperate within their respective business scope."
-
- 2. "In accordance with Chinese laws, regulations and rules, Australian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") are permitted to form a commercial association with Chinese law firms in the Shanghai FTZ. Within validity of this commercial association, the two law firms of each side respectively have independent legal status, name, financial operation, and bear civil liabilities independently. Clients of the commercial association are not limited within the Shanghai FTZ. Australian lawyers in this type of commercial association are not permitted to practise Chinese law."

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The future

- RCEP – Regional Comprehensive Economic Partnership Agreement
- Trade in Services Agreement
- Trans Pacific Partnership

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Regional Comprehensive Economic Partnership agreement ('RCEP')

- Singapore
- Malaysia
- Thailand
- The Philippines
- Brunei
- *Indonesia*
- Cambodia
- Myanmar
- Vietnam
- Laos
- Australia
- New Zealand
- Japan
- Republic of Korea
- China
- *India*

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RCEP prospects for further liberalization

- Those countries already distinguishing between practice of host country law and foreign or international law:
- Australia, NZ, Singapore, China, Japan, Korea, Vietnam, Cambodia
- These countries may put pressure on the others, particularly India, Indonesia and the Philippines
-
- Those countries already allowing a foreign lawyer to employ a local lawyer or partner with a local lawyer – only Australia, NZ, Vietnam (China only in the SFTZ)
- May not be enough pressure to lead others to liberalize in this respect
- Similarly those with liberal rules regarding fly in fly out may not have adequate weight in negotiation to press others to relax rules on fly in fly out

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Trade in Services Agreement ('TiSA')

- Subset of 23 WTO Members (including EU of 28 members as 1) = 51 members
- DFAT briefings indicate that it will have a positive list for the market access rules and a negative list for exclusions from national treatment (with ratchet clause)
- Australia has lodged a proposal on regulatory disciplines to avoid licensing requirements that are more restrictive than necessary to achieve a legitimate regulatory objective, i.e, no residence requirements.
- Australia would be pressing for countries to distinguish between full licensing for practice of host country law and limited licensing for practice of foreign and international law – depends a lot on whether the US is ready to press for limited licensing within the US.

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Trans Pacific Partnership

- New Zealand, Chile, Singapore, Brunei plus
- Australia, USA, Mexico, Vietnam, Peru, Canada, Malaysia, Japan
- Don't know the structure of the obligations
- Parties treat draft texts as confidential and no leaks of chapter on services
- But Korea US FTA might be a guide – it is on a negative list basis
- Position of US is critical – again Korea US FTA is a guide – there, the US gave commitments regarding practice of foreign law or international law in 7 states which remain unbound in the US GATS schedule but excluded other sub national regulation from the obligations.

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IBA Global Regulation and Trade in Legal Services Report 2014

- Is the most update publication on the state of play in liberalization of legal services around the world
- http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Committee/The_Regulation_of_Interational_Legal_Services.aspx
- Click through to searchable database at http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx

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Any Questions?

- 1. ...
- 2. ...
- 3. ...

