



Australian Government



Chairman
The Hon Sir Laurence Street AC KCMG QC

ILSAC Submission on Legal Services

to the

Department of Foreign Affairs and Trade

in respect of
a possible

Australia-Republic of Korea Free Trade Agreement

January 2009

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International Legal Services Advisory Council (ILSAC)

The International Legal Services Advisory Council (ILSAC) is a part-time voluntary advisory body established by the Australian Government to advise the Attorney-General and other Ministers on matters relating to enhancing the international presence and improving the international performance of Australia's legal and related services. It is chaired by the Hon Sir Laurence Street AC KCMG QC and has 20 senior members and representatives drawn from the private and public sectors. Detail of ILSAC's membership, function and activities are available at www.ilsac.gov.au.

What Australian lawyers seek in a free trade agreement with the Republic of Korea

As Australia's sixth-largest trading partner, the Republic of Korea (Korea) is an important market for trade-enabling service providers. Korea is a relatively untapped market of significant interest to Australian law firms due to its increasingly sophisticated economy with an active export-oriented corporate sector, well established financial sector, strong investment in infrastructure and well established business regulation and competition enforcement. The finance and insurance sectors are of particular interest to Australian corporations.

In a free trade agreement with Korea, Australian law firms seek:

1. A right for Australian licensed lawyers to enter Korea and provide legal advisory services regarding the laws of any jurisdiction in which they are licensed and public international law as 'foreign lawyers' on a fly-in, fly-out basis and through representative or branch offices of Australian law firms, without being required to meet a minimum residency requirement.
2. A right for Australian lawyers and law firms to establish law firm offices in Korea.
3. A right for Australian lawyers and law firms to enter into cooperative agreements with Korean law firms (to deal with cases where domestic and foreign legal issues are mixed) whether through partnerships, joint ventures or other forms of voluntary commercial association, with freedom to employ local lawyers and enter into profit sharing arrangements.
4. A right for Australian lawyers to prepare and appear in arbitration, conciliation and mediation proceedings.
5. A right to use own firm name or a firm name of their choice, respecting customs or general usage conventions in Korea.

Collaboration between Australian and Korean firms is essential to provide integrated legal services in matters where domestic and foreign legal issues are mixed. Under the pending free trade agreement with the US, Korea has agreed to provide staged improvements for commercial association to the US and Australia seeks, at a minimum, the same opportunities with no later start date than that given to other trading partners.

Korea's legal services sector

Korean-licensed lawyers

With a population of around 50 million people and around just 7,000 lawyers,¹ the undersized legal services market is inadequate to meet the legal needs of the cross-border corporate sector. The profession is focussed primarily on advocacy work and the number of high quality commercial practitioners with cross-border expertise is an even smaller subset. The supply of local lawyers is limited with the permitted number of new lawyers capped at 1,000 per year.²

Lawyers must be registered with the Korean Bar Association in order to practise law. Membership of the Korean Bar Association is made up of attorneys in private practice, law firms, joint law offices and 14 local bar associations. The Korean Bar Association has several Special Committees including a Committee for Research on the Liberalisation of Legal Services.³

Foreign-licensed lawyers

Korea's legal market is closed to foreign lawyers and law firms. Korea does not permit foreign law firms to establish offices nor work in commercial association with local law firms. Only a *byeon-ho-sa* (Korean-licensed lawyer) registered with the Korean Bar Association may supply legal services in Korea. However, in practice, around 400 'foreign legal consultants' are estimated to be working within Korean law firms, accounting firms or as in-house counsel.⁴ A small number of US and UK law firms, along with a few Australian firms, provide a limited amount of fly-in, fly-out commercial legal advisory services to both government and private sector enterprises from offices in the region, predominantly Hong Kong or Tokyo.

¹ Legal500, 'South Korea Legal Market Overview', <http://www.legal500.com/c/south-korea/south-korea-overview/legal-market-overview>.

² Brian C Rupp & Jae En Kim, 'Korean Legal Services Set to Open Up' The National Law Journal, 26 February 2008, paragraph 15.

³ Korean Bar Association, http://www.koreanbar.or.kr/eng/01_03.asp.

⁴ Brian C Rupp & Jae En Kim, 'Korean Legal Services Set to Open Up' The National Law Journal, 26 February 2008, paragraph 1.

Proposed Foreign Legal Consultants legislation

In response to multilateral negotiations, in November 2006 Korea drafted the Foreign Legal Consultants Bill proposing to provide partial and conditional market access to foreign lawyers. It proposes a role for the government in approving 'foreign legal consultants' prior to registration with the Korean Bar Association.

The Bill proposes to allow persons who are licensed to practise law in a foreign jurisdiction and who have at least three years relevant experience in that jurisdiction to apply for qualification as a foreign legal consultant in Korea. Such a consultant will be permitted to establish an office and is required to stay in Korea for a minimum of 180 days per year; will not be allowed to hire local lawyers nor collaborate in any form of partnership, joint venture or commercial association with local lawyers/law firms.⁵ Due to the 180 days minimum residency requirement, the Bill, if passed, has the potential to jeopardise the current informal arrangement for the provision of mode three (fly-in, fly-out) services.

There is no rational reason to justify the proposed requirement of three years practising experience. As Australian-licensed lawyers are regulated by Australian regulators to provide services in Australian law, it would be unnecessary for Korea to impose additional conditions for the practise of Australian law. Comparatively, Korean lawyers are eligible to practise Korean law in Australia on the basis of holding a Korean practising certificate/licence and being of good standing in their home jurisdiction. Australia has no additional requirements for foreign lawyers to satisfy for eligibility to practise.

Neither the experience requirement nor the residency requirement benefits the legal services market or the legal profession in Korea. The requirements could be more relevant for lawyers seeking admission as a domestic Korean lawyer rather than foreign lawyers. Rather than facilitate international trade, the requirements create conditions incompatible with efficient international business. These unnecessarily burdensome requirements do not appear to be included in the trade agreement with the US and Australia should ensure they are excluded from any possible free trade agreement between Australia and Korea.

There has been debate in Korea over the appropriate title for foreign lawyers. Korea's position is that foreign lawyers should only be referred to as 'foreign legal consultants' on the basis that the public could be confused as to whether a foreign lawyer is licensed to provide domestic legal services. Other countries in the region including Hong Kong and Japan permit foreign lawyers to use the term 'lawyer' through the title 'foreign solicitor' or 'foreign lawyer.' While Australia prefers the term 'foreign lawyer,' the focus of

⁵ European Union Chamber of Commerce in Korea, Trade Issues and Recommendations 2007, <http://trade.eucck.org/site/2007/en/trade12.htm>.

negotiations should be on securing a meaningful level of market access including the right to work in commercial association with Korean lawyers.

Barriers to practising foreign law in Korea

Although informal arrangements exist through which foreign lawyers work in Korean law firms, accounting firms, as in-house counsel or through fly-in, fly-out arrangements without any legislative underpinning, it is not currently possible for foreign law firms to service the market at an appropriate level. Hence, the key barriers to practising foreign law in Korea are:

- Lack of regulatory certainty on the right for foreign lawyers/law firms to enter Korea for the purpose of providing legal services in foreign law.
- Foreign law firms are prohibited from establishing foreign law firm offices.
- Foreign lawyers/law firms are prohibited from entering into voluntary commercial association with local lawyers/law firms through partnerships, joint ventures or other forms of association.

In negotiations, Australia could attempt to alleviate sensitivity on Korea's side by explaining that foreign legal practitioners are predominately concerned with providing legal advisory services that facilitate the cross-border commercial, trade, and investment activity of their corporate clients. Representational services in Korean courts and the practise of domestic Korean law is not an area of interest to Australian law firms.

Korea's proposed legal services commitments under the Korea-US FTA (KORUS) (not yet ratified)⁶

KORUS was signed on 30 June 2007 but has not yet been ratified. The agreement provides:

- US law firms may open foreign legal consultant (FLC) representative offices in Korea when the free trade agreement enters into force
- US licensed attorneys may provide legal advisory services regarding the laws of the jurisdiction in which they are licensed and public international law as FLCs
- Staged improvements for commercial association:
 - no later than two years after entry into force, US FLC representative offices may enter into cooperative agreements with Korean law firms to deal with cases where domestic and foreign legal issues are mixed, and share profits

⁶ http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Draft_Text/Section_Index.html.

- no later than five years after entry into force, US law firms may establish joint ventures with Korean law firms. Such joint ventures may employ Korean-licensed lawyers as partners or associates.

Australia's legal services sector

Australia has autonomously liberalised its legal services market creating a hospitable limited licensing scheme consistent with the 'Statement of General Principles of the Establishment and Regulation of Foreign Lawyers' adopted by the International Bar Association. Foreign legal practitioners qualified and licensed to practise the law of a jurisdiction other than Australia may gain a limited licence to provide legal advisory services through a none-burdensome registration process with a State or Territory professional body. Registration as a foreign lawyer involves:

- establishing that the foreign lawyer is duly qualified and registered to engage in legal practice in one or more foreign countries and is not an Australian legal practitioner
- satisfying requirements as to probity and good professional standing, and
- a declaration to clients of whether they maintain professional indemnity insurance.

Foreign lawyers and law firms have a right to practise foreign law and a right to enter into partnership or other forms of voluntary commercial association with other foreign legal practitioners or Australian legal practitioners, without limitation on the number and type of such associations. Fly-in, fly-out legal practice, without the requirement to register as a foreign lawyer, is permitted for an aggregate duration of 90 days in any twelve month period. Foreign lawyers also have the option of seeking admission as an Australian legal practitioner. Australia has no nationality or citizenship requirement for legal practitioners, no residency requirements, and no quantitative or geographic limitations for admission or establishment of offices.

Progressive liberalisation has produced substantial benefits for Australian and foreign lawyers and law firms in Australia including more transparent regulation. Regulatory change has stimulated competitiveness and innovation. Opening the market for foreign lawyers and law firms has expanded Australia's legal services sector and international trade in legal services, and provided additional opportunities for Australian law firms and lawyers with Australian lawyers now keenly recruited in overseas jurisdictions, including by UK and US law firms to work in those jurisdictions and Asia.

Bilateral trade between Australia and Korea

The Republic of Korea is Australia's fourth-largest export market with goods and services exports of \$14.3b. It is Australia's sixth-largest trading partner overall, with total two-way trade of \$20.4b. In the services sector, Australian exports amounted to \$1.9b. Education related travel amounted to more than half of all services exports at just over \$1b.⁷

Korea is Australia's seventh-highest source country for overseas law students with 456 Korean students enrolled in Australian law schools in 2007.⁸ On completion of their Australian law degree Korean students often work for a time in Australian law firms.

Korea ranks 12th as a destination for Australian investment abroad, with a total investment stock of \$6.9b in 2006. Korean stock of investment in Australia reached \$5b in 2006, more than ten-times its value in 2001. Growing exports of Australian financial services include infrastructure finance, banking and management advice.⁹

The role of legal services in trade and investment

Legal services are essential for trade and investment. Their vital role supporting and facilitating business forms a critical part of the infrastructure that underpins commercial transactions. Legal services enable economic and commercial activity by defining rights and responsibilities and processes for dispute resolution where commercial conflicts arise. Commercial legal services are typically categorised as *producer* (or intermediate or trade-enabling) services provided in the form of advice to corporate clients and financial institutions. These producer legal services form the core in delivering the level of certainty and assurance required for commercial, trade and investment decisions.

Along with other business services like accountancy and information technology, legal services are increasingly traded internationally. As cross-border business transactions increase, the availability of fully integrated legal services covering the laws of multiple jurisdictions is critical to sustainability and growth of international trade and investment. Corporations, financial institutions and other clients involved in cross-border commercial transactions seek legal *advisory* services covering the laws of jurisdictions in which the transaction spans. Foreign lawyers are, therefore, not interested in providing *consumer* legal services, which are typically final services such as those relating to family law, wills and personal injury. Nor are foreign legal practitioners usually interested in obtaining a

⁷ All figures quoted are for the year 2007-08. Department of Foreign Affairs and Trade, Republic of Korea Fact Sheet, <http://www.dfat.gov.au/geo/fs/rkor.pdf>.

⁸ Statistic provided by the University Statistics Unit within the Department of Education, Employment and Workplace Relations.

right of audience to represent clients in the courts of host jurisdictions, other than a right to appear in international commercial arbitration.¹⁰ Foreign legal practitioners are predominately concerned with providing legal advisory services that facilitate cross-border commercial, trade and investment activity of their corporate clients.

Globalisation of legal services and legal practice in the 21st Century

Law firms around the world are internationalising as their clients pursue opportunities in a rapidly globalising marketplace. The nature of legal services as a key business input has been transformed with the emergence of borderless commerce and client demand for multi-jurisdictional advice. The importance to international trade and investment of a regulatory framework that facilitates the ready provision of trans-national legal services and service suppliers is paramount.¹¹ Such systems are seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment. Australia's approach to the liberalisation of legal services has been influenced by ILSAC's Principles for the Liberalisation of Trade in Legal Services.¹² An increasing number of countries are establishing regulatory frameworks, guided by similar principles, to facilitate international trade in legal services.

Multilateral developments

Australia has made a significant and positive impact internationally by promoting the liberalisation of trade in legal services through the World Trade Organisation's General Agreement on Trade in Services (GATS). Australia's role in legal services negotiations under the WTO has been supported by Australia's own legal services commitments under the Uruguay Round and recent offers under the Doha Round of negotiations. Australia chairs the Friends Group on Legal Services under the GATS and is recognised as a leader in promoting the liberalisation of trans-national trade in legal services.

Korea has not made any commitments on legal services under the GATS. However, Korea has made an offer under the Doha Round of negotiations. While the offer has not been made public, it is noted that it does not provide for a viable level of market access and is based very much on Korea's proposed foreign legal consultant legislation discussed above.

⁹ Department of Foreign Affairs and Trade, 'Towards a Possible Australia-Republic of Korea FTA', <http://www.dfat.gov.au/geo/rok/fta/index.html>.

¹⁰ WTO, 'Legal Services: Background note by the Secretariat' S/C/W/43, 6 July 1998, paragraph 4.

¹¹ WTO, 'Communication from Australia: Negotiating Proposal for Legal Services' S/CSS/W/67, 27 March 2001, paragraph 2.

¹² Australian Government, Attorney-General's Department, 'International Legal Services Advisory Council Fifth Triennial Report' 2004-2007, page 17, attached.

Regional and bilateral developments

The Asia Pacific Economic Cooperation (APEC) recently approved Australia's proposed APEC Legal Services Initiative, to be implemented in 2009. This initiative has been widely supported by APEC Members and aims to increase the level of transparency of the regulation of foreign lawyers across APEC economies and build confidence within APEC economies by identifying the benefits and addressing any concerns associated with the mobility of lawyers across borders. As an APEC Member economy, Korea will be encouraged to participate in activities involved in the initiative.

Australia has free trade agreements with New Zealand, the US, Thailand, Singapore and Chile and is in various stages of negotiations with Malaysia, China, the Gulf Cooperation Council, Japan and collectively with the ten members of ASEAN. The improved mobility of legal professionals has been a key aspect of these negotiations.

The Republic of Korea has concluded free trade agreements with the United States (not yet ratified), Chile, Singapore, the European Free Trade Association (Iceland, Norway, Liechtenstein and Switzerland) and ASEAN (excluding Thailand). It is currently negotiating preferential trade agreements with the EU, Canada, Mexico, India and Japan, and conducting free trade agreement-type studies with China, the Gulf Cooperation Council and Russia. It recently concluded non-government free trade agreement studies with MERCOSUR,¹³ New Zealand and Australia.¹⁴



¹³ Brazil, Argentina, Paraguay, Uruguay and Venezuela.

¹⁴ Department of Foreign Affairs and Trade, Republic of Korea Country Brief, 2008.

Appendix A

International Legal Services Advisory Council

Appointed members, ILSAC VI

1 July 2007—30 June 2010

Chairman

The Hon Sir Laurence Street AC KCMG QC

Deputy Chairman

The Hon Andrew Rogers QC, Sydney

ILSAC Members

Dr David Bennett AC QC, Sydney

Professor Duncan Bentley

Pro Vice-Chancellor, Curtin Business School, Curtin University Of Technology, Perth

Professor Michael Coper

Robert Garran Professor and Dean of Law, Australian National University, Canberra

Mr John Denton

Partner & Chief Executive Officer, Corrs Chambers Westgarth, Melbourne

Mr Jim Dunstan

Executive Partner - Asia, Allens Arthur Robinson, Hong Kong

Mr Glenn Ferguson

Managing Partner, Ferguson Cannon Lawyers, Maroochydore

Dr Gordon Hughes

Partner, Blake Dawson, Melbourne

Mr David Krasnostein

Head, Global Private Equity, MLC; Chief General Counsel, National Australia Bank, Melbourne

Ms Bronwyn Lincoln

Partner, Freehills, Melbourne

Mr Russell Miller AM

Partner, Minter Ellison, Canberra

Mr Robert Milliner

Chief Executive Partner, Mallesons Stephen Jaques, Sydney

Ms Kerry Ryan

Partner, Deacons, Sydney

Professor David Weisbrot AM (*co-opted member*)
President, Australian Law Reform Commission, Sydney

Mr Brian Wilson
Consultant, Clayton Utz, Sydney

Attorney-General's Department

Mr Ian Govey
Deputy Secretary

Mr Iain Anderson (alternate)
First Assistant Secretary

Department of Foreign Affairs & Trade

Mr Tim Yeend
First Assistant Secretary

Mr Brett Hackett (alternate)
Assistant Secretary

Australian Trade Commission (AUSTRADE)

Ms Cheryl Scott
National Manager – Education and Business Services

Australian Agency for International Development (AusAID)

Mr Murray Proctor
Deputy Director-General

Mr Daniel Rowland (alternate)
Law & Justice Advisor

Department of Education, Employment and Workplace Relations; Australian Education International (AEI)

Mr Colin Waters
Group Manager International

Mr Scott Evans (alternate)
Branch Manager

Appendix B

Principles for the Liberalisation of Trade in Legal Services

Bearing in mind the general principles set out in the General Agreement on Trade in Services (GATS) of MFN (non-discrimination between countries), national treatment (non-discrimination between domestic and foreign entities), and transparency, as well as the other matters provided for, and the four modes of delivery for a services described in the Agreement, the following guiding principles appear particularly relevant to achieving liberalisation of trade in legal services:

1. Formal recognition, on reasonable terms, of the right to practise home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (eg, a minimum number of years of professional experience or a refusal to recognise concurrent practice rights where the foreign lawyer's home country is a federal jurisdiction).
2. Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.
3. Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.
4. The right to practise local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through a transparent process.
5. Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.
6. Formal recognition of the right to prepare and appear in an international commercial arbitration.

International Legal Services Advisory Council (ILSAC)
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Australia
20 July 1998