

COMMUNICATION FROM AUSTRALIA

Negotiating Proposal for Legal Services

Revision

The following communication has been received from the delegation of Australia to replace the previous supplement (S/CSS/W/67/Suppl.1) with the request that it be circulated to the Members of the Council for Trade in Services.

1. This paper elaborates on Australia's Negotiating Proposal for Legal Services¹ by setting out a description of the 'Limited Licensing' concept and the role it can play in meeting the requirements of legal practitioners and law firms interested in providing international legal services. Australia reserves the right to submit further and more detailed proposals in relation to legal services at a later date.

I. LIMITED LICENSING CONCEPT - DEFINITION

2. The limited licensing concept can be defined as a regulatory approach that permits foreign legal practitioners and foreign law firms to practise their home-country law, third-country law (where qualified) and international law in a host country, without having to satisfy the more burdensome requirements in relation to gaining a right to practise host-country law.

3. The International Bar Association (IBA) definition is:

*Regulation of Foreign Lawyers as practitioners of foreign law for the limited purpose of permitting them to practice the law of their home jurisdiction in the host jurisdiction without examination or full admission to the host bar.*²

II. BACKGROUND

4. As identified in Australia's proposal,³ a prerequisite for the limited licensing approach is the recognition of the existence of separate categories of laws: home-country, host-country, third-country

¹ World Trade Organisation 'Communication from Australia: Negotiating Proposal for Legal Services' S/CSS/W/67 (27 March 2001).

² International Bar Association 'Resolution on the General Principles for the Establishment and Regulation of Foreign Lawyers' adopted by the Council of the IBA in Vienna on 6 June 1998. For the purpose of the resolution, the IBA definition of 'home jurisdiction' includes "a person licensed or otherwise authorised to practice law in a given country, or internal jurisdiction thereof".

and international law, as distinct bodies of law. By using these distinctions in their GATS commitments, Members have demonstrated that the categories of home-country law, host-country law, third-country law and international law more accurately reflect the reality of international trade in legal services.⁴

5. For a prospective foreign legal practitioner, a lack of regulatory provisions recognising these categories of law in a host jurisdiction means that the foreign practitioner is usually required to meet admission criteria for the practice of host-country law in order to practise home-country law. This is unnecessarily burdensome because, in effect, a foreign lawyer is required to obtain a 'full licence' when he or she may require only a licence to practise home-country law, third-country law and/or international law, not host-country law.

6. Legal practitioners involved in providing international legal services are, in the main, interested in providing 'producer' (intermediate) services concerned with commercial transactions and not 'consumer' services, which are typically 'final' services (eg, family, matrimonial, estate, personal injury and similar personal legal services). Nor are foreign legal practitioners usually interested in obtaining a right of audience in the courts of host jurisdictions, other than a right to appear in international commercial arbitration. Generally, a foreign legal practitioner's main interest is in providing advisory legal services in home-country law, third-country law and international law.⁵ Accordingly, a limited licence scheme provides access for foreign practitioners to a country without intruding into the primary domain (practise of host-country law) of that country's practitioners. There are also flow-on benefits for host-country practitioners: eg, from providing supporting or complementary advisory services in host-country law and from international commercial arbitration being conducted in the host country.

III. LIMITED LICENSING – ESSENTIAL FEATURES

7. A regulatory system adopting the limited licensing concept should aim for the following outcomes:

- formal recognition, under a transparent regime, of the right of a foreign legal practitioner to practise home-country law, international law and, where appropriately qualified, third-country law; and
- the right to practise the foreign legal practitioner's home-country law, third-country law and international law in partnership or in other forms of voluntary commercial association with other foreign legal practitioners or host-country legal practitioners, without limitations on the number and type of such associations.

IV. LIMITED LICENSING – AUSTRALIAN MODEL

8. Australia has a federal system of government and the legal profession is regulated at the State and Territory level. States and territories in which foreign legal practitioners have shown the most interest, a hospitable and comprehensive limited licensing regulatory system (granting the rights mentioned above) is in place. The principle purpose of the implementing legislation in those jurisdictions is:

³ World Trade Organisation 'Communication from Australia: Negotiating Proposal for Legal Services' S/CSS/W/67 (27 March 2001) at paragraphs 7 - 8.

⁴ World Trade Organisation 'LEGAL SERVICES: Background Note by the Secretariat' S/C/W/43 (6 July 1998) at paragraph 17.

⁵ World Trade Organisation 'LEGAL SERVICES: Background Note by the Secretariat' S/C/W/43 (6 July 1998) at paragraph 24.

*... to encourage and facilitate the internationalisation of legal services and the legal services sector by providing a framework for the regulation of the practice of foreign law in the State by foreign-registered lawyers as a recognised aspect of practice in the State.*⁶

9. Four Australian jurisdictions (Victoria, New South Wales, the Northern Territory and Australian Capital Territory) have implemented legislation which ensures the following rights, additional to those identified in Paragraph 7:

- on a ‘fly-in, fly-out’ basis (Mode 4), foreign legal practitioners have the right to practise home-country law, international law or third-country law without registration as a foreign legal practitioner;⁷ and
- foreign legal practitioners have the right to provide legal services (including appearances) in relation to international commercial arbitration.⁸

10. Mode 4-type access identified above is of interest to legal practitioners generally, and particularly to practitioners from developing nations, as it does not require the high costs associated with establishing a commercial presence.⁹

11. The hospitable and comprehensive limited licensing scheme in Australian jurisdictions is consistent with the ‘Statement of General Principles of the Establishment and Regulation of Foreign Lawyers’ adopted by the IBA. The IBA is of the view that a limited licence should be granted, permitting the practice of foreign law if the foreign legal practitioner:

- is licensed or authorised to practise law by, and in good standing with, his or her Home Authority;
- has satisfied reasonable minimum practice requirements;
- is a person of good character and repute;
- agrees to submit to the Code of Ethics, or its equivalent, of the Host Authority;
- carries liability insurance or bond indemnity or other security consistent with local law and which, if applicable, is no more burdensome than required by the Host Authority of fully licensed lawyers; and
- consents to local service of legal process.¹⁰

12. To protect the public, the IBA is of the view that a host country may impose certain conditions on foreign legal practitioners. They would operate to prohibit foreign legal practitioners from appearing in local courts or providing advice on host-country law or third-country law when not qualified, and would require the foreign practitioners to make reasonable disclosure to inform the public of their status as foreign practitioners.

⁶ Legal Profession Act 1987 (NSW) Section 48ZF; Legal Practice Act 1996 (Vic) Section 63F.

⁷ Legal Profession Act 1987 (NSW) Section 48ZH; Legal Practice Act 1996 (Vic) Section 63I.

⁸ Legal Profession Act 1987 (NSW) Section 48ZS; Legal Practice Act 1996 (Vic) Section 63U.

⁹ World Trade Organisation ‘LEGAL SERVICES: Background Note by the Secretariat’ S/C/W/43 (6 July 1998) at paragraph 25.

¹⁰ International Bar Association ‘Resolution on the General Principles for the Establishment and Regulation of Foreign Lawyers’ adopted by the Council of the IBA in Vienna on 6 June 1998.

13. The approach commended by Australia and discussed at paragraphs 8 to 11 above, is consistent with the IBA's recommended conditions. In addition, the Australian approach allows foreign practitioners to advise on the effect of host-country law, if the giving of that advice is necessarily incidental to the practice of home-country law, third-country law or international law and the advice is expressly based on advice of a host-country practitioner not employed by the foreign practitioner.

14. In the Australian jurisdictions which have adopted a comprehensive limited licensing regulatory system, public interest and consumer protection aspects are addressed during the registration process by an assessment of the applicant's fame and character prior to registration as a foreign legal practitioner. This assessment is generally made on the basis of whether the practitioner is, amongst other aspects, subject to any disciplinary proceedings, any criminal or civil proceedings or to any special conditions in the home or the relevant third-country. The practitioner is also required to consent to the local authority exchanging information, about the practitioner, with the home/third country registration authority. Subsequent to registration, foreign legal practitioners are subject to the same disciplinary action in relation to professional, ethical and practice standards applicable to local practitioners in the relevant Australian jurisdiction.

V. VOLUNTARY COMMERCIAL ASSOCIATION

15. As identified at the second dot point in paragraph 7 above, the ability to form partnerships or other forms of integrated practice relationships between host-country and foreign legal practitioners is an important element of providing more comprehensive international legal services. This ensures that clients demanding international legal services can obtain a broad range of legal services from a common provider across different jurisdictions.

16. A limited licensing scheme that does not provide for association between foreign and local legal practitioners, without limitations or special requirements on the number or type of such associations, would fail to fully achieve a framework that serves the needs of clients demanding international legal services. A limited licensing scheme that lacks the ability to provide for association between foreign and host-country legal practitioners is, in effect, an unnecessarily restrictive barrier to the provision of international legal services.

17. Countries that maintain a nationality requirement in relation to the provision of legal services appear to do so to protect a 'public function' performed by host-country practitioners involved in the practice of host-country law, particularly in relation to representation associated with a right of audience in the courts of host jurisdictions.¹¹ As discussed earlier, a foreign legal practitioner's main interest is in providing advisory legal services in home-country law, third-country law and international law with scope for voluntary commercial association without a need for a right of audience before the host-country courts. Even though Australia considers nationality requirements to be a trade-distorting barrier,¹² it is possible for Members to maintain such a requirement and protect 'public function' aspects, but at the same time, to provide access for foreign legal practitioners under a limited licensing scheme, as foreign practitioners would not practise host-country law nor seek a right of audience before the courts.

¹¹ World Trade Organisation 'LEGAL SERVICES: Background Note by the Secretariat' S/C/W/43 (6 July 1998) at paragraph 30.

¹² World Trade Organisation 'Communication from Australia: Negotiating Proposal for Legal Services' S/CSS/W/67 (27 March 2001) at paragraph 9.

VI. CONCLUSION

18. The limited licensing concept allows foreign legal practitioners and foreign law firms to practise their home-country law, third-country law (where qualified) and international law in a host-country without having to meet the burdensome requirements related to the right to practise host-country law. It negates the need to maintain nationality requirements and is trade enhancing. When combined with the scope to form voluntary commercial associations between foreign and host-country practitioners, it meets the needs of clients demanding comprehensive international legal services at predictable standards across different jurisdictions. It also facilitates the transfer of professional knowledge and skills.
