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# Joint Submission to the inquiry into opportunities for expanding Australia's trade and investment relations with the countries of Asia, the Pacific and Latin America

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## **Joint Standing Committee on Foreign Affairs, Defence and Trade**

**27 February 2009**

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## Introduction

1. On 4 June 2008, the Minister for Trade, The Hon Simon Crean MP, announced an inquiry into *Australia's Trade and Investment Relations with Asia, the Pacific and Latin America* ('the Inquiry').
2. The Terms of Reference for the Inquiry are to examine and report on opportunities for expanding Australia's trade and investment relations with the countries of Asia, the Pacific and Latin America, with particular attention to:
  - (a) the nature of existing trade and investment relations;
  - (b) likely future trends in those relations;
  - (c) the role that these countries might play in advancing the DOHA round of multilateral trade negotiations in the WTO; and
  - (d) the role of the Government in identifying opportunities and assisting Australian companies, especially those in rural and regional areas, to maximise opportunities in these regions.
3. The Law Council welcomes the opportunity to make a submission to the Inquiry.
4. The Law Council considers that initiatives which assist the legal services sector to maximise opportunities in countries in Asia, the Pacific and Latin America should pursue the following broad objectives:
  - (a) Promotion of mutual recognition of legal educational and professional qualifications and standards;
  - (b) Concessions for Australian lawyers to practise in foreign jurisdictions (even in a limited sense);
  - (c) Removing international barriers to the establishment of wholly owned practices in overseas jurisdictions (including the right to employ locally qualified lawyers); and
  - (d) Removing barriers to allow the retention and repatriation of moneys earned in overseas markets and preserving the intellectual property and confidential information of private firms in overseas markets.
5. The Law Council's submission has been prepared by the Law Institute of Victoria with input from its other constituent bodies and sections.

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## Background

### Law Council of Australia

Through its International Strategy 2009,<sup>1</sup> the Law Council is committed to expanding Australia's trade and investment relations in Asia, the Pacific and Latin America. The Law Council has a long and constructive relationship with the Department of Foreign Affairs and Trade ('DFAT') and the International Legal Services Advisory Council ('ILSAC') to improve foreign legal services market access for providers of Australian legal services.

The Law Council and DFAT work together to promote Australian legal services on two fronts. On one front, DFAT pursues Government to Government activity, such as negotiating free trade agreements. On the second, complementary front, the Law Council pursues a profession to profession approach, using its standing as the peak legal body in Australia to foster close relations with counterpart Bars in countries of interest. In this way, by constant briefings between the Government and the Law Council, Australia can deliver a co-ordinated strategy to increase the international mobility of the Australian legal profession. For example, the Law Council is currently working closely with the legal profession and Government on initiatives to liberalise legal services markets in Malaysia, the United States, India and Japan.

The Law Council has also developed professional partnerships with international legal bodies to create opportunities for Australian lawyers and providers of legal services in foreign legal markets. These partnerships have taken the form of Memoranda of Understanding which recognise the importance of promoting mutually beneficial trade and of strengthening ties in the delivery of legal services internationally. As at 30 January 2009 the Law Council has entered 14 Memoranda of Understanding with foreign legal representative bodies in the Asia and Pacific region.<sup>2</sup>

In September 2008, the Law Council's International Law Section signed a Memorandum of Understanding with the Australian Trade Commission (Austrade), agreeing to co-operate for the benefit of their respective members. Through this partnership the Law Council and Austrade draw together lawyers interested in international trade, providing an opportunity for them to meet and discuss international trade and investment issues of importance to them and to their clients. The Law Council International Law Section-Austrade Roundtable runs seminars on international trade and investment directed mainly at medium size commercial legal practices and corporate counsel and provides a sounding board for Austrade on legal issues relevant to its business.

### Law Institute of Victoria

The Law Institute of Victoria ('LIV') is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 13,000 members. The LIV is a constituent member of the Law Council of Australia.

The International Law Section of the LIV has primary responsibility for international matters within the LIV, consistent with the LIV's International Strategy which was recently

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<sup>1</sup> Available at <http://www.lawcouncil.asn.au/> and on request.

<sup>2</sup> The China Law Society (1985 - re-affirmed 1994), Vietnamese Lawyers Association (1995), Law Society of Singapore (1996), Integrated Bar of the Philippines (1996), Korean Bar Association (1998), Taiwan Bar Association (1998), Law Society of Thailand (1998), All China Lawyers Association (1998), Japan Federation of Bar Associations (1999), Malaysian Bar Council (2000), The Fiji Law Society (2006), The Bar Association of India (2006), Perhimpunan Advokat Indonesia (2007), Papua New Guinea Law Society (2008). Additionally, the Law Council has entered into an MoU with the Supreme Court of Delaware, USA (2007).

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adopted by the LIV Council. The LIV-ILS also works on other issues associated with international law. However, for current purposes, the focus is on improving the market for legal services for Australian and Victorian practitioners.

The LIV's International Strategy builds on substantive work already undertaken by the LIV. The adoption of the International Strategy reflects the importance which the LIV places on international matters, including improving the market for the export of legal services for Victorian lawyers and law firms.

The LIV has made a number of submissions in relation to Australia's current and prospective Free Trade Agreements (FTA) and has engaged in separate consultations on the current and prospective FTA with officers of DFAT and other Government bodies including Austrade, Commonwealth Department of Industry, Tourism and Resources (AusIndustry), IP Australia and the Australian Customs Service. The LIV is also negotiating a Memorandum of Understanding with Austrade.

The LIV is a member of the Services Export Advisory Committee convened by the Victorian Government. The Victorian Government has provided funding to the LIV to assist in the pursuit of its international relationships, which has included sending legal services delegations to China and receiving similar delegations from China, leading to the conclusion of Memoranda of Understanding with the Shanghai Bar Association and the Beijing Municipal Lawyers Association.

The LIV also engages in many international legal forums with other legal representative bodies such as the International Bar Association and the American Bar Association.

The LIV participates in the "China Working Group" conducted by ILSAC, regarding negotiations for the Australia - China Free Trade Agreement.

## General Comments

The Terms of Reference of the Inquiry are to examine the role of Government in identifying opportunities and assisting Australian companies, especially those in rural and regional areas, to maximise opportunities in countries in Asia, the Pacific and Latin America.

### **Priority markets in Asia, Latin America and the Pacific**

The Australian legal profession has a strong interest in developing opportunities in legal services markets in Asia. In 2009, the Law Council will focus its international activity to improve access for Australian lawyers to legal services markets in China, India, Japan, Singapore and Malaysia. The Law Council will seek to strengthen its existing relationships and seek new opportunities in partnership with Government in key markets.

The Law Council notes that Asian markets – including India – represent a significant percentage of Australia's total export market. The Law Council submits that there is significant growth potential for the export of legal services in Asia and looks forward to the opportunity to work with the Federal Government to achieve that potential.

We recognise that Latin America has the potential to become a substantial trading partner of Australia and note that the Australia-Chile FTA will come into operation on 6 March this year. At this point in time, developing legal services market opportunities in Latin America is not a priority for the Australian legal profession. Expanding legal services market access in the Pacific is not a priority for the Australian legal profession. However, the Law

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Council believes that a strong legal system is critical to the development of trade and investment opportunities and welcomes the Federal Government's commitment to developing relations with the South Pacific and promoting trade and infrastructure development in the region. The Australian legal profession has a strong history of supporting South Pacific lawyers. The Law Council has in recent times co-ordinated this effort and elevated this commitment through the establishment of the South Pacific Bars Secretariat.

## **Review of Export Policies and Programs**

As you will be aware, the Federal Government recently released the report of the independent *Review of Export Policies and Programs* (the Mortimer Review) undertaken by Mr David Mortimer AO and Dr John Edwards. Both the Law Council and the LIV made submissions to the Mortimer Review.

The Law Council and the LIV support the findings of the Mortimer Review and urge the Government to implement its recommendations. In particular, we note the relevance to the inquiry of recommendations relating the Asia-Pacific region and to Austrade, discussed further below.

In submissions made to the Mortimer Review, the Law Council and the LIV recommended that the Federal Government develop an international legal services strategy for private sector law firms in order to maximise export opportunities for the legal services sector. It was submitted that this strategy should be developed in conjunction with the Law Council, ILSAC, DFAT, State Governments and relevant experts. The Law Council and the LIV submitted that such a strategy should:

1. Recognise that the legal services sector has an equal entitlement to benefit from government trade policy as other sectors such as trade in goods and manufactured goods; and
2. Reflect the experiences, knowledge and needs of the private sector in exporting legal services.<sup>3</sup>

The Law Council and LIV also recommended that the Government increase the level of financial assistance and other forms of support it provides to the legal sector to advance initiatives which increase the value of the Australian legal services export market.

A copy of the Law Council's submission is available from its website.<sup>4</sup>

## **Trans-Pacific Partnership Agreement**

On 20 November 2008, the Federal Minister for Trade announced that Australia will participate in negotiations for a Trans-Pacific Partnership Agreement ('TPP'). The TPP will expand on the current Trans-Pacific Strategic Economic Partnership Agreement (P4) between Brunei Darussalam, Chile, New Zealand and Singapore, which entered into force in 2006. The United States and Peru will also join the TPP negotiation.

The Law Council and the LIV note that the Mortimer Review recommended that Australia participate in the TPP as a basis for negotiating an Asia-Pacific regional trade agreement. The Mortimer Review also recommended that the Federal Government support the long-

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<sup>3</sup> Law Council submission to the Review of Export Policies and Programs, May 2008, p4.

<sup>4</sup> [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au) submission of the LIV is available at <https://www.liv.asn.au/members/sections/submissions/>

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term goal of a region-wide trade agreement in the Asia–Pacific as another means of strengthening the multilateral system.

Whilst recognising that Australia (effectively) has free trade agreements with all the current participants,<sup>5</sup> the Law Council and the LIV support the longer term goal of regional economic integration to which the TPP and APEC aspire. The Law Council believes that the TPP is a useful platform to provide the initial architecture for that goal.

The Law Council and LIV submit that the Federal Government should ensure that legal services is included in services round negotiations for the TPP.

The Law Council has considerable experience in working with Government in advancing free trade negotiations, particularly in facilitating dialogues with industry counterparts. The Australian legal profession has extensive experience in areas such as continuing professional development, specialisation, legal practice development and regulation which may be of interest to TPP negotiating partners. The Law Council and the LIV welcome the opportunity to liaise further with DFAT and/or AusAID in relation to capacity-building programs which could be offered as part of TPP negotiations, subject to Government funding.

The Law Council and the LIV note that the P4 includes a Memorandum of Understanding on trade and labour and a binding agreement on trade and the environment. We encourage the Government to support these initiatives and to include labour standards and the environment as part of the upcoming negotiations in March 2009.

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<sup>5</sup> Australia currently has bilateral FTAs with the United States, Singapore, New Zealand and Chile. The ASEAN, Australia and New Zealand Free Trade Agreement, which includes Brunei Darussalam, is expected to enter into force in mid-2009.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

# Review of Export Policies and Programs

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Secretariat, Review of Export Policies and Programs  
Department of Foreign Affairs and Trade

May 2008



## Background

The Law Council welcomes the opportunity to make a submission to Australia's Review of Export Policies and Programs ('Review') and thanks the Federal Government for presenting this opportunity.

The Law Council of Australia's International Law Section ('ILS') has primary responsibility for the Law Council's international affairs, consistent with its international strategy. A key element of the Law Council's international strategy is 'to develop international opportunities for the practising profession.'

The ILS has made a number of submissions in relation to each of Australia's current and prospective Free Trade Agreements ('FTA') and has consulted with officers of DFAT and other Government bodies including, Austrade, AusIndustry, IP Australia and the Australian Customs Service in relation to current and prospective FTAs.

In recent years, the Law Council has sought to improve the market for the export of legal services for Australian lawyers and law firms. In seeking improved access to foreign markets for Australian lawyers, the Law Council has developed close relationships with the Department of Foreign Affairs and Trade ('DFAT') and the International Legal Services Advisory Council ('ILSAC').

The Law Council has received support and funding from the Federal Government to pursue initiatives in the United States, China, Malaysia and Singapore and also capacity building initiatives in the South Pacific.

In addition to its work with the Federal Government, the Law Council is an active member of international legal forums and is a member of the International Bar Association, LawAsia, and the Commonwealth Lawyers Association. The Law Council is also a member of the Australian Services Roundtable and a number of Law Council members represent the interests of the legal profession as members of ILSAC.

Developing strong relationship with international legal bodies is important to creating opportunities for Australian lawyers in foreign legal markets. The Law Council's commitment to improving the export market for Australian legal services is reflected by the strong relationships it has developed with international legal bodies and in the 13 Memoranda of Understanding it has entered into with foreign legal representative bodies.<sup>1</sup>

The comments below are a brief summary of the views of the Law Council. The Law Council believes that the Review is an important opportunity to provide for the continued improvement in Australian legal services trade. The Law Council looks forward to the opportunity to make further contributions to the Review.

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<sup>1</sup> The China Law Society (1985 - re-affirmed 1994), Vietnamese Lawyers Association (1995), Law Society of Singapore (1996), Integrated Bar of the Philippines (1996), Korean Bar Association (1998), Taiwan Bar Association (1998), All China Lawyers Association (1998), Japan Federation of Bar Associations (1999), Malaysian Bar Council (2000), The Fiji Law Society (2006), The Bar Association of India (2006), Perhimpunan Advokat Indonesia (2007), Supreme Court of Delaware, USA (2007). In addition to this the International Law Section has signed a memorandum of understanding with the International Law Section of the State Bar of California, USA (2007).

## General Observations

1. Services are a vital segment of the world and the Australian economy. The importance of services to Australia's future economic growth has been detailed in a number of other submissions to the Review and the Law Council endorses those submissions.
2. The Law Council also recognises that services represent a considerably smaller proportion of exports revenue compared to domestic gross domestic product ('GDP'). Accordingly, there seems to be significant merit in adopting measures which support increases in the export of services as this could deliver more immediate benefits.
3. Within the services economy, legal services represent a significant proportion of domestic GDP and make a similarly significant contribution to exports. According to the *2004-5 ILSAC Survey of Australian Export Market for Legal Services* ('ILSAC Survey'), total export income from legal services was \$543 million.
4. The Law Council shares the views of ILSAC and others that Australian Bureau of Statistics ('ABS') data collection measures do not adequately capture the value of services (domestic and exported). The Law Council believes that while considerably more accurate than ABS data; the ILSAC Survey nevertheless represents an under-estimation of the value of legal services.
5. Notwithstanding the value of services (including legal services), the Law Council is of the view that the services agenda has not achieved adequate attention and support in trade negotiations, whether at the World Trade Organisation ('WTO'), through Plurilateral Conventions, regional trade blocs or through Australia's FTA agenda. Services are consistently consigned to "third" ranking status behind negotiations in agricultural and non-agricultural market-access ('NAMA') products.
6. This is reflected clearly in Australia's recent FTAs which only deliver very limited advancement on services and a series of commitments to work on improving access. For example, the Australia-United States ('AUSFTA') does not include substantial provisions relating to 'professional services'. Rather, the Annex to the AUSFTA chapter on services establishes a Working Group on Professional Services to support profession-led initiatives to further mutual recognition on licensing and certification of professional services suppliers, such as legal practitioners.
7. The effect of this has been that while limited gains have been made for legal services over time under completed FTAs (ie. AUSFTA and SAFTA), those gains have been relatively minor and the international growth of Australian legal services has been impeded.
8. The Law Council believes that this approach has continued in negotiations for proposed FTAs such as for the ASEAN-Australia-New Zealand FTA and the Australia-China FTA where services (including legal services) seem unlikely to secure any marked improvements due to Australia's lopsided focus on agriculture and NAMA.
9. As a result of the relative lack of access afforded in trade negotiations, any exports of Australian legal services have largely been the product of the efforts

of individual Australian legal firms through their own efforts and investments. It should be noted that those levels of investment only rarely secure reimbursement or other financial support from Government.

10. The export of legal services come from a number of sources, but is predominantly derived from Australian firms providing legal services overseas for Australian clients, in Australia for overseas clients, and establishing offices overseas.
11. Additionally, it is worth noting that a significant level of Australian legal services are provided through various aid programs overseas which are sponsored by both Government and non-government organisations ('NGOs'). The Review should not overlook the value of that work, particularly in terms of capacity-building of legal professions and legal infrastructure in the South-Pacific region.
12. The Law Council welcomes the support which has been provided by the Federal and State Governments through DFAT and other bodies. In particular, Legal Services Missions conducted by the Federal Attorney-General have proved to be extremely effective in stimulating negotiations to reduce market barriers to the practice of foreign law by Australian lawyers.
13. The work of bodies such as ILSAC has been invaluable to the advancement of the Law Council's international activities and the Law Council welcomes the permanent status which has now been afforded to ILSAC.

## Recommendations

The Law Council makes the following recommendations:

- (i) That the ABS be provided with additional resources to enable it to better measure and capture the value of services (including legal services) which are exported and that the ABS revise its charter to raise the priority of capturing such information.
- (ii) That the Government develop an international legal services strategy for private sector law firms in conjunction with the Law Council, State and Territory Law Societies and Bar Associations, ILSAC, DFAT, State Governments and relevant experts. Such a strategy should:
  - a. Recognise that the legal services sector has an equal entitlement to benefit from Government trade policy as other sectors such as trade in goods and manufactured goods.
  - b. Reflect the experiences, knowledge and needs of the private sector in exporting legal services.
- (iii) The Government should revise its priorities in trade policy both at the WTO and in other fora so that services are given equal standing to other sectors. In particular the Government should:
  - a. Acknowledge that the interests of Australia's services industries must be properly considered, documented and pursued in each of those fora at the outset.
  - b. Acknowledge that despite the challenge of reaching agreement in services round negotiations, it is often more difficult to advance services



## **Attachment A**

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### Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

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- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

# Law Council of Australia International Strategy 2009

## Strategy 1

Improve access to overseas markets for Australian lawyers

Direct activity to improving legal services market access in Asia, particularly in China, India, Japan, Singapore and Malaysia.

Develop international focus groups – China, Indonesia, Singapore, South Korea, India, Thailand, Japan and Malaysia.

Under the US Legal Services Initiative, seek to conclude legal services market access negotiations with Delaware and advance progress in Georgia and California.

## Strategy 2

Develop institutional linkages for the Law Council

Engage and reaffirm Memoranda of Understanding (MOU) with peak legal bodies and where desirable seek to enter MOU with other peak legal bodies.

Engage with international delegations from professional associations and foreign governments at the Law Council Secretariat.

Provide leadership to IBA, LAWASIA, Commonwealth Lawyers' Association and POLA to support strategies 1, 3 and 4.

Arrange promotional functions at international conferences to promote Australian lawyers.

Present a strong international program for participants of the 2009 Australian Legal Convention.

## Strategy 3

Promote and uphold the rule of law

Provide specialist advice to Government and international bodies on rule of law and human rights issues.

Promote the observance of international human rights and the rule of law.

Develop and manage the Law Council's Human Rights Observer Panel.

## Strategy 4

Engage in international capacity building activities

Seek external funding through AusAID and other available resources to fund international capacity building initiatives.

Co-convene the Australia-China Legal Professional Development Program.

Continue the development of the South Pacific Bar Secretariat.

Participate in needs evaluation missions.

Provide assistance to the Timor Leste legal profession.

## Strategy 5

Participate in policy formulation by Government

Actively work with the Attorney-General's Department, in particular with ILSAC, and the Department of Foreign Affairs and Trade.

## Strategy 6

Work with Law Council constituent bodies to implement the International Strategy

Manage the international work being conducted by the Law Council and its constituent bodies.

Provide opportunities for constituent bodies' input in international activities.

Invite constituent bodies to join the Law Council in international delegations and visits.