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Committee Secretary
Joint Standing Committee on Treaties
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TRADE IN LEGAL SERVICES UNDER CHAPTER 10 (CROSS BORDER TRADE IN SERVICES) OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

The Law Council of Australia is pleased to make this submission to assist the Committee's inquiries into matters arising from the Trans-Pacific Partnership Agreement (TPP), tabled on 9 February 2016.

This submission will deal exclusively with issues in relation to trade in legal services under Chapter 10 (Cross Border Trade in Services) of the TPP. The Law Council's Intellectual Property Committee will lodge a separate submission, addressing the meaning and effect of Chapter 18 of the TPP (the Intellectual Property (IP) Chapter).

Long term benefits of TPP ratification in relation to trade in legal services

In relation to trade in legal services, the Law Council considers that the TPP provides a good platform for deeper and more meaningful market access reforms that TPP parties could adopt into the future. In particular, Annex 10-A (Professional Services) includes specific recognition that "transnational legal services that cover the laws of multiple jurisdictions play an essential role in facilitating trade and investment and in promoting economic growth and business confidence".

Annex 10-A also includes a commitment by TPP parties to consider certain matters in the development of regulations to enable the practice of foreign law. The list of matters for consideration is substantially based on the Law Council's *Best Practice Principles for the Practice of Foreign Law and Transnational Law Practice*. A copy of the Best Practice Principles is **enclosed**.

This commitment is particularly valuable as it provides guidance to TPP parties when reviewing rules governing the practice of foreign law as well as a mutually agreed framework for TPP parties to assess the quality of regulatory developments affecting the scope of practice by foreign lawyers.

The TPP also creates a Professional Services Working Group (PSWG). Although it is not uncommon for trade agreements to establish working groups, it is nevertheless very positive to see the creation of a working group in this multi-party agreement specifically focussed on implementation and enhancement of professional services commitments under the TPP. The creation of this working group, in addition to the explicit recognition of the importance of transnational legal services, and agreement to a framework to guide further developments to legal services market access mean that the TPP Chapter on Cross Border Trade in Services has the potential to drive on-going improvements to the

regulation of foreign lawyers. This welcome inclusion provides for the TPP to be a 'living-agreement' and a treaty-level framework to continue to drive improvements across TPP parties on the liberalisation of transnational trade in legal services.

Although the TPP, perhaps because of the complicated nature of multi-party negotiations, does not immediately reduce the noodle-bowl effect of overlapping obligations under the range of trade agreements to which Australia is already a party, it can be hoped – at least in relation to legal services – that the TPP can begin to bring a level of conformity to the regulation of foreign lawyers between TPP parties. There is also potential for TPP parties to provide a level of leadership to non-TPP parties in the development of their foreign lawyer regulatory systems. For example, Korea's foreign lawyer regulations are closely modelled on those developed and adopted by Japan. Should Japan further open its legal services market, in line with the guiding principles contained in the TPP's Professional Services Annex and as a useful initiative under the PSWG, it is likely that this will in-turn influence the development of less burdensome regulatory conditions for the practice of foreign law in Korea.

Immediate effects of TPP ratification in relation to trade in legal services

An immediate benefit of the TPP in relation to trade in legal services is the inclusion of a right to provide legal services on a fly-in, fly-out basis into most TPP countries, including a first-time commitment of this kind by Canada to Australia, and the inclusion of eight additional US states not covered by the Australia-United States Free Trade Agreement or General Agreement on Trade in Services under the WTO.

The inclusion of legal services market access commitments by Malaysia is also welcome. This is especially the case given that Malaysia's earlier trade agreements with Australia (the *Malaysia-Australia Free Trade Agreement* and the *Australia-ASEAN-New Zealand Free Trade Agreement*), do not include specific market access commitments in legal services. The Law Council welcomes Malaysia's inclusion of a ratchet mechanism under legal services which will ensure that any future enhancements to the scope of practice permitted for foreign lawyers in Malaysia will automatically become bound as treaty-level commitments under the TPP.

The TPP also includes significant clarifications to the scope of legal practice permitted to foreign lawyers by Vietnam.

In summary, the Law Council's view is that the TPP's provisions on Cross Border Trade in Services will provide significant benefits to the Australian legal profession on an ongoing basis. The Professional Services Annex has the potential to shape the development of rules governing the practice of foreign law that are consistent with the market access objectives of the Australian legal profession across all TPP countries, especially over the medium to long term.

Yours sincerely



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Best Practice Principles for the Regulation of Foreign Lawyers and Transnational Law Practice¹



Recalling the International Bar Association's resolution *on the general principles for the establishment and regulation of foreign lawyers* (June 1998); the International Legal Services Advisory Council's *six guiding principles for achieving the liberalisation of international trade in legal services* (July 1998); and the important role these principles continue to have on influencing the liberalisation of transnational trade in legal services,

Recognising that the availability of fully integrated transnational legal services covering the laws of multiple jurisdictions play an essential role in facilitating trade and investment across national borders and promoting economic growth and business confidence,

Recognising the requirement for domestic (host country) and foreign lawyers to work together to provide fully integrated transnational legal services,

Acknowledging that there are mutual benefits for both foreign lawyers and the domestic legal profession through knowledge and expertise transfer and exposure to international best practice, and that regulation should be sufficiently flexible to permit the free flow of knowledge and expertise between foreign lawyers and the domestic profession,²

Recognising that transnational legal services invariably involve a complex mix of local and foreign law with the extent of that mix subject to constant change during a transaction, and that it is unrealistic to identify and define a boundary between local and foreign law in such transactions,

Accepting that demand for transnational commercial and business legal services is client driven and such clients are invariably well-informed and sophisticated international and domestic corporations and that foreign lawyers providing these legal services do not seek to provide domestic consumer legal services in areas such as family law, wills and probate, personal injury or criminal law,

Recognising that the extent of consumer protection measures imposed on foreign lawyers engaged in providing fully integrated transnational legal services should therefore be appropriately tempered, and

Recognising that countries will progressively adopt foreign lawyer regulatory systems that are suitable to their individual circumstances;

¹ The Principles reflect the long-standing approaches of the International Bar Association (*IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers*, 6 June 1998) and discussions held at the APEC Legal Services Workshop in Singapore (30-31 July 2009). The initial version of these Principles were developed in 2012 with input from the Law Council of Australia and the legal profession by a high level public-private sector consultative forum established by the Australian Government to provide advice on international legal and related services issues (the International Legal Services Advisory Council).

² Consistent with the International Bar Association *Resolution of the IBA Council on transfer of skills and liberalisation of trade in legal services*, 16 October 2008.

It is proposed that the following regulatory principles are used to guide the implementation of viable and hospitable systems for the regulation of foreign lawyers and transnational law practice:

1. Regulation of foreign lawyers and transnational law practice should be based on the following overarching objectives:
 - a. **Quality assurance:** foreign lawyers may be required to submit to the local ethical, conduct and disciplinary standards that are no more burdensome than requirements on domestic lawyers
 - b. **Public interest – consumer protection:** rather than minimum residency requirements, foreign lawyers may be required to disclose to clients their status as a foreign lawyer and may also be required to maintain professional indemnity insurance or, alternatively, disclose to clients that they do not have such insurance
 - c. **Public interest – consumer service:** regulations and processes should be designed to encourage and facilitate the efficient and effective availability of fully integrated transnational commercial legal services
 - d. **Transparency:** foreign lawyer regulations should be clear and publicly available
 - e. **Fairness:** regulations should be fair, uniformly applied, no more burdensome than requirements on domestic lawyers and based on objective criteria where restrictions, if any, are justifiable for quality assurance and in the public interest.
2. Regulatory framework should provide flexibility to permit foreign lawyers and domestic (host country) lawyers to work together by entering into fee-sharing arrangements or other forms of professional or commercial association.
3. Formal recognition of an entitlement by foreign lawyers to practise the law of their home jurisdiction should be on the basis of and to the extent that they are entitled to practise law in their home jurisdiction.
4. Regulatory framework should accommodate the relevant professional mobility and modes of service delivery requirements - transnational legal services are provided on a temporary fly-in, fly-out basis; through the use of telecommunications technology (telephone, video conference etc); by establishing a commercial presence; and, in most instances, through a combination of fly-in fly-out and one or both of the other modes.
5. Foreign lawyers should have the right to prepare and appear in commercial arbitration, conciliation and mediation proceedings and provide services as Arbitrators, Conciliators and Mediators where qualified to do so.
6. Respecting host country customs or general usage conventions, foreign lawyers should be permitted to use the firm name of their choice.