Law Council
OF AUSTRALIA

Discussion Paper:

The proposed China-Australia Free-Trade Agreement: Key Issues Regarding Legal Practice in China for Australian Lawyers

Department of Foreign Affairs and Trade (DFAT)

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Executive Summary

The Law Council is grateful for this opportunity to provide comments to the Department of Foreign Affairs and Trade (DFAT) in relation to the Australian legal profession's priorities under the proposed Free Trade Agreement (FTA) between Australia and China.

The Law Council of Australia seeks rights for Australian lawyers to practise law in China which are no more burdensome or restrictive than the rights which Chinese lawyers currently have in Australia. To achieve this, the Law Council seeks changes or amendments in China to provide:

- a right for Australian lawyers to form partnerships with Chinese legal practitioners in China;
- a right for Australian law practices in China to:
    - employ Chinese legal practitioners without suspension of their practising certificates;
    - practise Chinese law – provided they have at least one Chinese qualified legal practitioner director/partner;
- a right to practise foreign and international law without minimum residency restrictions or obligations; and
- a right for Australians to seek qualification and to be registered in China as Chinese legal practitioners.

Having regard to China's schedule of specific commitments under the General Agreement on Trade and Services (GATS) and China's schedule of specific commitments in each of its other FTAs, the Law Council considers that China is unlikely to agree to bind these rights in the proposed Australia-China Free Trade Agreement (ACFTA). Nevertheless, the Law Council considers that outcomes which contribute to the attainment of these rights are possible through the ACFTA.

<u>Specific Requests</u>

The Law Council considers that the development of uniform definitions in respect of legal services is of paramount importance to efforts to advance the international liberalisation of legal services. The negotiation of the ACFTA provides an appropriate opportunity to request China to support Australia's initiatives in promoting liberalisation of legal services through the WTO by signing:

- the 2005 Friends of Legal Services group 'Joint Statement on Legal Services' proposal in the WTO (*2005 Friends of Legal Services Joint Statement)*; and
- the legal services section of Australia's 2005 Proposal on the "*Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*" (*2005 Regulatory Disciplines Proposal)*.

In relation to other specific commitments on legal services under the proposed ACFTA, and in order of priority, the Law Council submits that the following requests would contribute to the reduction of barriers which confront Australian lawyers seeking to practise in China:

- China's commitments under the ACFTA should utilise the definitions in the *2005 Friends of Legal Services Joint Statement*, with the specific objective of acknowledging that the right to respond and appear for clients in arbitrations and conciliation in China is not to be treated as an area reserved for local Chinese lawyers;
- China should further liberalise its Limited Licensing rules for the practise of foreign and international law, including:
    - removal of the rule requiring practitioners holding a limited licence to practise foreign and international law to be resident in China for a minimum of 6 months per year;
    - further liberalisation of visa rules affecting lawyers taking up longer term appointment to representative offices, including freedom to move between offices, the right of short-term entry by existing partners and employees of law practices having representative offices, and improved rights of entry of non-lawyers having specialist skills related to the business of the law practice;
- China should bring its regulation of the temporary practise of foreign and international law (also known as fly-in/fly-out or FIFO) into line with its practice and permit the temporary practice of foreign law for a limited period (for example a maximum of 90 days per year);
- China should permit foreign law practices to issue PRC legal opinions and employ Chinese lawyers without requiring them to suspend their practising certificate;
- China should abolish the citizenship requirement for qualification in China as a Chinese legal practitioner.

The Law Council understands that a feature of the proposed ACFTA will be an agreement to establish a Working Group following conclusion of the ACFTA to, *inter alia,* advance mutual objectives in relation to the liberalisation of professional services including legal services. The Law Council would welcome the establishment of such a Working Group and the opportunity to engage with peak legal professional bodies in China and also with the Australian and Chinese Governments to improve practice rights for Australian lawyers and law practices in China.

Introduction

1. Since 2005, Australia has been working to conclude a comprehensive Free Trade Agreement (FTA) with China. Australia has identified high quality outcomes on services as one of its key priorities under an Australia-China FTA. Since 2009, there has been little progress towards the conclusion of the Australia-China FTA.

2. In July 2013, it was reported that the Chinese President Xi Jingping had expressed his desire for an "early conclusion" to the negotiation of the Australia-China FTA. At that time, the then Opposition Leader, Tony Abbott, expressed a strong desire to conclude the agreement within 12 months of the Federal Election.[1] The newly elected Coalition Government has reiterated that conclusion of an FTA with China is one of its top priorities.[2]

3. In relation to legal services, Australia's most recent offer was tabled in September 2008, during the Twelfth Round of Australia-China FTA Negotiations. Australia proposed the establishment of a China Commercial Association Trial (CCAT). The CCAT described an

[1] Australian Financial Review. *Rudd, Xi push for China trade deal*, 9 July 2013. Available at http://www.afr.com/p/national/rudd_xi_push_for_china_trade_deal_gjHWR0GLI3ptYNuInff0dN (viewed 16 September 2013).
[2] Xinhua. *New Analysis: New Australian Government to focus on regional economic diplomacy* http://www.globaltimes.cn/content/810420.shtml#.UjhZVT8deK4 (viewed 16 September 2013).

arrangement whereby Australian law practices and Chinese law practices could form an association in China to practise Chinese and foreign law with a number of restrictions. The Chinese response to the CCAT proposal was lukewarm. With negotiations effectively stalled, Australian law firms continued to consolidate their practices in China through strategic partnerships with Chinese law practices.

4. In December 2011, the combination of Mallesons Stephen Jaques and Chinese firm King & Wood to create King & Wood Mallesons was announced. With the announcement of further global partners to the King & Wood Mallesons' Swiss verein model,[3] it is clear that a model for facilitating commercial associations between Australian and Chinese law practices has been accepted by China.

5. On 10 September 2013, a meeting between representatives from the Law Council, DFAT and International Legal Services Advisory Council was held in Canberra. It was agreed that Australia's offers on legal services should be revised. The Department of Foreign Affairs and Trade requested assistance from the Law Council to reprioritise issues previously raised in negotiations to assist in the conclusion of the Australia-China FTA.

6. The Law Council has not previously provided a comprehensive submission regarding what Australia ought to request of China in the FTA negotiations. The Law Council notes that the Law Institute of Victoria made a submission dated 30 June 2004.[4]

7. This Discussion Paper:

   a. sets out Australia's commitments on legal professional services under the GATS and outlines the Law Council's objectives in relation to the international liberalisation of legal services;

   b. considers China's commitments and obligations in relation to legal services through the GATS and its bilateral and multilateral FTAs and notes several concerns regarding China's compliance with its existing GATS obligations; and

   c. considers desirable 'GATS plus' outcomes on legal services under the proposed ACFTA.

[3] The Australian. *Get Real on China, King and Wood Mallesons takes aim at leading law practices*. http://www.theaustralian.com.au/archive/business/get-real-on-china-king-wood-mallesons-takes-aim-at-leading-law-firms/story-e6frg97x-1226689707012# (viewed 16 September 2013).

[4] Law Institute of Victoria. *A submission from: International Law Briefing Committee and Commercial Law Section of the Law Institute of Victoria,* 30 June 2004. Available at http://www.dfat.gov.au/fta/acfta/submissions/cfta_submission_6se06.pdf (accessed 23 September 2013).

International liberalisation of legal services

8. Liberalisation of legal services markets has the following features which may develop in sequence, or together:

    - clarifying the division between “full licensing” and “Limited Licensing” to practise law whereby full licensing is not required for foreign lawyers who practise only foreign law and international law;
    - articulating the scope of foreign and international law that can be practised by a person without a full licence;
    - improving processes related to the grant of the limited licence and removing conditions that constitute obstacles which are more restrictive than necessary to maintain high standards and quality of service;
    - improving the mode of supply (in particular, the right to establish a commercial presence);
    - enhancing the ability to transfer lawyers to an office in another country (i.e. movement of natural persons, streamlined processes for the issuance of temporary business visas, etc);
    - facilitating entry to the host country to temporarily practise foreign and international law without establishing a place of business (e.g. Australia’s 90 day rule for the unregistered practise of foreign law);
    - expanding the permitted scope of practice of foreign law firms, and moving towards the right to provide clients with access to advice on host country law in addition to foreign and international law (e.g. positive/negative list approach, or permitting a foreign law practice to employ local lawyers or form commercial associations with local lawyers/law practices); and
    - permitting foreign lawyers to seek admission to practise locally (e.g. removal of citizenship restrictions on legal qualification, and progress towards the mutual recognition of legal qualifications).

9. Australia, together with other countries, has actively promoted the international liberalisation of legal services in the WTO. However, over the past 5 to 10 years, efforts to advance liberalisation of legal services in the WTO have effectively stalled.

10. Despite the stalling of progress in the GATS, the legal profession, regulators and governments have continued to actively seek to promote legal services market liberalisation on a global basis. This has included the encouragement of innovation within the profession in some countries to develop new structural models for the provision of legal services and to develop innovative practices to meet client needs within a restricted regulatory framework.

11. Activities to promote liberalisation have included the progressive unilateral liberalisation of legal services markets by many countries. Australia was one of the first countries to develop a liberalised market for legal services in the 1990s. Australia has taken a strong position in seeking to promote liberalisation internationally, particularly through the WTO. Nevertheless, the efforts of Australia and other countries have had only a minor impact in progressing consensus on legal services through the WTO.

Objectives for the liberalisation of legal services

12. The Law Council's position on the liberalisation of the legal services market is in line with the proposals made by Australia in the Doha Round of WTO negotiations:

    a. "Communication from *Australia – Negotiating Proposal on Legal Services" S/CSS/W/67* dated 27 March 2001.[5]

       This document incorporated six principles set out in the instrument adopted by ILSAC in July 1998 titled "*Principles for Liberalisation of Trade in Legal Services" (ILSAC, 20 July 1998)*[6] and stressed the desirability of Members making separate commitments relating to:

       i. legal services relating to host country law for which WTO Member countries ought to be able to require foreign suppliers to obtain a host country practising certificate; and
       ii. legal services relating to home country law, third country law or international law for which WTO Member countries ought not to require foreign suppliers to obtain a host country practising certificate but instead ought to provide for an easier to obtain limited licence;

    b. "*Communication from Australia – Negotiating Proposal for Legal Services – Revision*", S/CSS/W/67/Suppl./Rev.1, dated 10 July 2001.[7]

       This document provided further elaboration on the desirable approach to Limited Licensing for the practice of foreign law and international law. It incorporated suggested guidelines on criteria for the grant of a limited licence (drawing on criteria set out in the International Bar Association, 1998 Statement of General Principles for Establishment and Regulation of Foreign Lawyers[8]) and on the conditions that can be imposed on foreign legal practitioners (also drawing on the 1998 IBA statement).

13. On 24 February 2005, Australia and 10 other WTO Members (informally known as the 'Friends of Legal Services' group) submitted a *Joint Statement on Legal Services in the WTO Negotiations on Trade in Services*.[9] Among other points, the *2005 Friends of Legal Services Joint Statement* recorded that where a Limited Licensing system is used, Members' WTO Schedules should indicate clearly the range of services which is covered by a Limited Licence. The Joint Statement included agreed definitions which could be used by Members in writing their Schedules of Commitments:

    a. Different categories of law:

[5] WTO, Council for Trade in Services, Special Session, *Communication from Australia – Negotiating Proposal for Legal Services*, S /CSS/W/67, 28 March 2001.
[6] International Legal Services Advisory Council, *Principles for Liberalisation of Trade in Legal Services*, 20 July 1998, (available at http://www.ilsac.gov.au/GlobalLegalServicesandMarketAccess/Pages/default.aspx). (Accessed 21 September 2013).
[7] WTO, Council for Trade in Services, Special Session, *Communication from Australia – Negotiating Proposal for Legal Services – Revision*, S.CSS/W/67/Suppl.1, dated 10 July 2001.
[8] International Bar Association, *Statement of General Principles for the Establishment and Regulation of Foreign Lawyers*. (adopted by the Council of the IBA on 6 June 1998) (Available from the IBA website at http://www.ibanet.org/PPID/Constituent/Legl_Profession_World_Orgs/BIC_ITILS_Working_Group/Default.aspx (accessed 21 September 2013).
[9] WTO, Council for Trade in Services, Special Session, Committee on Specific Commitments, Communication from Australia, Canada, Chile, The European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States, *Joint Statement on Legal Services*, TN/S/W/37, S/CSC/W/46, 24 February 2005.

i. Domestic law (host country law);

ii. Foreign law (rendering unnecessary the terms 'home country law', and 'third country law' used in the earlier Proposals);

iii. International law.

b. Different types of legal services:

i. Legal advisory services;

ii. Legal representational services;

iii. Legal arbitration and conciliation/mediation services;

iv. Legal services.

14. These proposals included some particular aspects of the Law Council's views about the recognition of rights to practise foreign law and international law:

a. the scope of foreign law and international law legal services which foreign lawyers are permitted to provide should include:

i. advising "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"[10], and agreeing that the Member be permitted to exclude foreign lawyers from advising on host country law;[11]

ii. providing legal services (including appearances) in relation to international commercial arbitration;[12]

b. the modes of services through which foreign lawyers are permitted to offer foreign law and international law legal services should facilitate all modes of service as far as possible, in particular including:

i. Through a commercial presence by obtaining a limited licence as set out above (without limiting conditions); and

ii. on a "fly in/fly out" basis without establishing a commercial presence (i.e. in the scheme of the GATS, supply under Mode 4, through the temporary presence of natural persons), without prior registration as a foreign legal practitioner in the host jurisdiction;[13]

c. foreign lawyers be able provide legal services in a manner which serves the demands of clients seeking international legal services. This means that "clients demanding international legal services can obtain a broad range of legal services from a common provider across different jurisdictions".[14] Therefore, foreign law practices holding a limited licence to practice foreign law and international law should be able to:

[10] S.CSS/W/67/Suppl.1 above n. 7. At paragraph 13.
[11] The Law Council wishes to emphasise the importance of developing a set of universally agreed definitions for legal services for the purposes of the promotion of liberalisation – such as those developed in the *2005 Friends of Legal Services Joint Statement.*
[12] S.CSS/W/67/Suppl.1 above n. 7. At paragraph 9.
[13] S.CSS/W/67/Suppl.1 above n. 7. At paragraph 9.
[14] "*Communication from Australia – Negotiating Proposal for Legal Services – Revision*", S.CSS/W/67/Suppl.1, dated 10 July 2001 at para 15.

i. employ local lawyers; and

ii. form commercial associations with local lawyers and law practices.

15. On 6 September 2005, Australia submitted the *2005 Regulatory Disciplines Proposal* which, among other things, set out the criteria that ought to be applied when utilizing a Limited Licensing system for practitioners of foreign law and international law.[15]

16. The Law Council has set out its position in relation to liberalisation of legal services in a number of previous submissions;[16]

17. More recently, The Law Council has set out its position in its draft Submission to DFAT regarding the Trade in Services Agreement (TISA) negotiations – though that submission may be further refined.[17]

The Australia-China Free Trade Agreement

18. It is in the nature of a preferential trade agreement that each party will provide market access to the other without complying with the Most Favoured Nation (MFN) obligations under GATT Article I and GATS Article II. Australia and China cannot enter into the FTA unless they believe that the derogation from GATT Article I is justified by GATT Article XXIV and the derogation from GATT Article II is justified by GATS Article V.

19. As stated in previous submissions to DFAT, the Law Council considers that the proliferation of bilateral and regional FTAs has detracted from efforts to agree on multilateral liberalisation in the WTO. Bilateral and regional FTAs are justified by their supporters using a variety of reasons and the Law Council understands that each country must act in what it considers to be the best interests of its citizens. Nevertheless, every State continues to share the same obligation to advance the objectives of the WTO.

20. The Law Council wishes to see the proposed FTA contribute to, rather than detract from, efforts to agree on multilateral liberalisation on an unconditional MFN basis in the WTO. To the extent that either party to the proposed Australia-China FTA provides access under the FTA which is inconsistent with the MFN clauses in GATT Article I and GATS Article II, those commitments ought to be capable of being incorporated into commitments under the WTO and of being applied on an MFN basis to all WTO Members.

Liberalisation of legal services under the ACFTA

21. The Law Council's views on the liberalisation of legal services in China are influenced by China's existing WTO commitments on legal services other than Chinese legal practice. These existing commitments already go some way towards meeting what the Law Council regards as appropriate liberalisation.

22. The Law Council seeks rights for Australian lawyers to practise law in China which are no more burdensome or restrictive than the rights which Chinese lawyers currently have in

[15] WTO, Committee on Domestic Regulation [of the Council on Trade in Services], *"Communication from Australia – Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors"* S/WPDR/W/34, dated 6 September 2005.

[16] See for example Law Council submissions to DFAT in relation to: the proposed Australia-India Comprehensive Economic Cooperation Agreement, 30 January 2012; Law Council submissions to the Productivity Commission in relation to the *Review of bilateral and regional trade agreements,* March 2010 and 10 September 2010.

[17] Law Council Submission to DFAT in relation to the Trade in Services Agreement, 19 June 2013.

Australia. To achieve this, the Law Council seeks changes or amendments in China to provide:

- a right for Australian lawyers to form partnerships with Chinese legal practitioners in China;
- a right for Australian law practices in China to:
  - employ Chinese legal practitioners without suspension of their practising certificate; and
  - practise Chinese law – provided they have at least one Chinese qualified legal practitioner director/partner;
- a right to practise foreign and international law without minimum residency restrictions or obligations; and
- a right for Australians to seek qualification and to be registered in China as a Chinese legal practitioner.

China's WTO Commitments and obligations

23. China already owes certain obligations to Australia under the GATS regarding the supply of legal services other than the practice of Chinese law. The commitments given by China satisfy many of the Law Council's objectives as set out in the WTO proposals.

24. China has WTO obligations committing it to maintain a Limited Licensing system for the practice of foreign and international law. This system operates to permit the registered practice of foreign and international law by Australian law practices in China. However, China's WTO commitments fall short of the Law Council's objectives.

25. In its GATS schedule, China has listed commitments relating to a category which is defined as:

"(a) Legal Services (CPC 861, excluding Chinese law practice)

26. The Schedule provides:

Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or sub-sector	**Limitations on market access**	**Limitation on national treatment**	**Additional commitments**
A. Professional Services (a) Legal Services (CPC 861, excluding Chinese law practice)	(1) None (2) None (3) Foreign law practices can provide legal services only in form of representative offices. [*in Beijing, Shanghai, Guangzhou, Shenzen, Haikou, Dalian, Qingdao, Nigbo, Yantai, Tianjin, Suzhou, Xiamen, Zhuhai, Hanghou, Fuzhou, Wuhan, Chengdu, Shenyang and Kunming only*. Expired] Representative offices can engage in profit-making activities. Representative offices in China shall be no less than the number established upon the date of accession. *A foreign law practice can only establish one representative office in China.* – Expired] The	(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	

Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments
	abovementioned geographic and quantitative limitations will be eliminated within one year after China's accession to the WTO. 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 practice 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 practices, legal affairs of the country/region where the lawyers are permitted to engage in lawyer's professional work; (c) to entrust, on behalf of foreign clients, Chinese law practices to deal with the Chinese legal affairs; (d) to enter into contracts to maintain long-term entrustment relations with Chinese law practices 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 practice, as agreed between both parties. The representatives of a foreign law practice shall be practitioner lawyers who are members of the bar or law society in a WTO member and have practiced for no less than two years outside of China. The Chief representative shall be a partner or equivalent (e.g., member of a law practice of a limited liability corporation) of a law practice of a WTO member and have practised for no less than three years.	lawyers.[18]	
	(4) Unbound except as indicated in horizontal commitments.	(4) Unbound except as indicated in horizontal commitments.	

27. China acceded to the WTO on 11 December 2001. Consequently, since 11 December 2002, the geographic restrictions on market access in *italics* in the above table do not have any effect.

[18] "*Chinese national registered lawyers*", means those Chinese nationals who have obtained a lawyer's certificate and hold a Chinese practising permit and are registered to practice in a Chinese law firm. See paragraph 319, *Report of the Working Party on China's accession to the WTO,* WT/ACC/CHN/49. Available at www.mofcom.gov.cn/table/wto/04.doc (accessed 2 October, 2013).

28. Article XVI:1 requires China to accord treatment to Australian service suppliers not less favourable than provided for in the terms specified in its Schedule. The terms of China's Schedule include an undertaking that after 11 December 2002, it will not apply a rule limiting foreign firms to one representative office and it will not apply a rule limiting the location of the representative offices of foreign firms to the cities named in the Schedule. Article XVI:1 prohibits China from imposing those limitations after 11 December 2002.

29. GATS Articles XVI:2 and XVII only apply to sectors and modes listed in the Schedule and only apply to the extent qualified by any entries in the Schedule and therefore apply to "*Legal Services (CPC 861, excluding Chinese law practice).*" The notation CPC 861 refers to a category for legal services in the provisional United Nations Product Classification System.[19] The application of Articles XVI:2 and XVII is further specified by the sentence which states "*Business scope of foreign representative offices is only as follows*."

30. GATS Article XVI:2 prohibits China from applying measures restricting Australian service suppliers from supplying legal services (other than Chinese legal services) within the scope of the Scheduled commitment via a measure which is a:

    a. limitation on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test – w*ith NO exceptions, conditions or qualifications;*

    b. limitation on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications;*

    c. limitation on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications;*

    d. limitation on the total number of natural persons who may be employed in a particular service sector or who a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test – w*ith NO exceptions, conditions or qualifications;*

    e. measure which restricts or requires specific types of legal entity or joint venture through which a service supplier may supply a service – *with NO exceptions, conditions or qualifications;*

    f. limitation on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment – *with NO exceptions conditions or qualifications.*

31. Article XVI:2 also prohibits China from applying measures restricting Australian service suppliers from providing legal services (other than Chinese legal practice) through cross-

[19] See further CPCprov code 86: http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=86 (accessed 22 September 2013). The current version of the United Nations Central Product Classification System – CPC ver.2 – came into force on 31 December 2008. Under CPC ver.2. the CPC code for legal services is 821. The reference to "*Legal Services (CPC 861, excluding Chinese law practice)*" corresponds exactly to the description of a service sub-sector in the document known as W/120 (*Services Sectoral Classification List – Note by the Secretariat*, MTN.GNS/W/120, 10 July 1991) which was prepared by the GATT Secretariat to assist parties in drafting their GATS schedules.

border supply or on a consumption abroad basis (i.e. to Chinese customers visiting Australia).

32. Given the content of the Schedule, Article XVII:1 prohibits China from applying measures which accord less favourable treatment to foreign suppliers of legal services other than Chinese legal practice as compared to Chinese "*like service suppliers*", subject to the exceptions listed in the Schedule which allow China to require: (1) that foreign suppliers be resident in China 180 days per year; (2) that foreign suppliers have 2 years post admission experience; and (3) that foreign suppliers do not employ Chinese registered national lawyers.

33. The practical operation of those commitments depends on the ability of the foreign representative offices of the foreign law practices being able to bring lawyers into China to work. In China's Schedule, although it has listed the service sectors described as Legal Services (other than Chinese law practice), the application of Articles XVI and XVII to measures affecting the supply of services through the temporary presence of natural persons is qualified by the words "*Unbound except as indicated in the horizontal commitments*." This means that a Chinese measure limiting the issue of visas or other measures affecting the supply of "*legal services (other than Chinese law practice)*" through the temporary presence of natural persons could not violate Articles XVI or XVII unless it violated specific undertakings contained in the horizontal section of China's Schedule.

Horizontal Commitments

34. Included in the horizontal part of the Schedule is the following:

> *"Unbound except for measures concerning the entry and temporary stay of natural persons who fall into one of the following categories:*
>
> *a. Managers, executives and specialists defined as senior employees of a corporation of a WTO Member that has established a representative office, branch or subsidiary in the territory of the People's Republic of China, temporarily moving as intra-corporate transferees, shall be permitted entry for an initial stay of three years;*
>
> *b. Managers, executives and specialists defined as senior employees of a corporation of WTO Members, being engaged in the foreign invested enterprises in the territory of the People's Republic of China for conducting business, shall be granted a long term stay permit as stipulated in the terms of contracts concerned or an initial stay of three years whichever is shorter;*
>
> *c. Service salespersons – persons not based in the territory of the People's Republic of China and receiving no remuneration from a source located within China, and who are engaged in activities related to representing a service supplier for the purpose of negotiation for the sale of services of that supplier where:*
>
> *i. Such sales are not directly made to the general public and*
>
> *ii. The salesperson is not engaged in supplying the service: entry for salespersons is limited to a 90-day period.*

35. The practical operation of China's commitments also depend on the measures which China applies regarding licensing and qualification requirements and technical standards. In sectors where they have undertaken specific commitments, WTO Members are bound by the rule in GATS Article VI:5. This means that China may not apply licensing and qualification requirements and technical standards affecting the supply of the services sub-sector "*Legal Services (CPC 861, excluding Chinese law practice)*" which:

a. could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made; and

b. fail to meet:

i. requirements based on objective and transparent criteria, such as competence and the ability to supply the service;

ii. requirements which are not more burdensome than necessary to ensure the quality of the service; and

iii. In the case of licensing procedures, requirements which are not in themselves a restriction on the supply of the service.

36. It is likely that a WTO Panel would assess the issue of whether a requirement could have been reasonably expected at the time the commitment was made by considering both the content of a Member's Schedule and the content of laws notified to the WTO working party on the accession of China to the WTO.

China's compliance with its existing obligations in relation to legal services under the GATS

Economic needs test for additional representative offices

37. Australian law practices in China have expressed concerns to the Law Council that China's Laws restrict the opening of new representative offices of foreign law practices:

38. *Foreign Law Firm Regulations 2001*,[20] Article 7 provides:

> *"A foreign law practice applying to establish a representative office in China and post representatives thereto shall meet the following requirements:*
>
> *…(3)there is an actual need to establish a representative office in China to conduct legal services business."*

39. The *Foreign Law Firm Implementing Measures 2002* (as amended to 2 September 2004),[21] Article 4 provides:

> *"Genuine needs to establish a resident representative office in China to conduct legal services business" as provided for in Article 7(3) of the Regulations shall be determined on the basis of the following:*
>
> *(1) the socio-economic development of the place where the setting up of the representative office;*
>
> *(2) the needs for development of legal services in the place where the setting up of the representative office is intended.*
>
> *(3) the applicant's size, time of establishment, major areas of business and expertise; analysis of the business prospects for the intended representative office and the plan for future business development;*

[20] Regulations on the Administration of Resident Representative Offices of Foreign Law Firms in China (the Foreign Law Firm Regulations) *(Adopted at the 51st Executive Meeting of the State Council on December 19, 2001, promulgated by the Decree No. 338 of the State Council of the People's Republic of China on December 22, 2001, and effective as of January 1, 2002) available at* http://english.gov.cn/laws/2005-08/24/content_25816.htm

[21] *Measures of the MOJ on Implementation of the Regulations on Administration of Resident Representative Offices in China of Foreign Law Firms* (The "*Foreign Law Firm Implementing Measures*" - MOJ Order No. 73) issued with effect from 1 September 2002 and revised with effect from 2 September 2004) available from http://www.doj.gov.hk/eng/topical/pdf/setup_law_firm_e4.pdf

(4) restrictions imposed by the laws and regulations of China on the carrying out of specific activities and business of legal services.

40. The *Foreign Law Firm Implementing Measures,* also includes the following provisions:

Article 10:

… For an application to set up additional representative offices, the following requirements shall be met:

(1) the last representative office set up in China has been in operation for three years continuously;

(2) ,……"

Article 26:

"For application to relocate a representative office, the application shall be made by the foreign law practice to the judicial department (bureau) of the province, autonomous region or municipality directly under the Central Government where the intended place of relocation is located. Following scrutiny, the matter will be referred to the Ministry of Justice for approval. …"

41. A violation of WTO law can arise both when a WTO Member government acts inconsistently with an obligation and also when a WTO Member's law requires its government to act inconsistently with an obligation. The use of an economic needs test is inconsistent with some obligations under GATS Article XVI:2:

    a. GATS Article XVI:2(a) prohibits China from applying an economic needs test to applications by foreign suppliers to establish offices to supply legal services (other than China law practice);

    b. GATS Article XVI:2(b) prohibits China from applying an economic needs test to limit the assets employed by suppliers of legal services (other than China law practice);

    c. GATS Article XVI:2(c) prohibits China from applying an economic needs test to limit the number of service operations of suppliers supplying legal services (other than China law practice);

    d. GATS Article XVI:2(d) prohibits China from applying an economic needs test to limit the number of employees that a particular service supplier may employ to supply legal services (other than China law practice).

42. It appears that the operation of the economic needs test is a violation of GATS Article XVI:2. The Law Council considers this inconsistency should be raised with the Chinese government.

43. The Law Council understands that it would be normal practice to raise a question of alleged illegal conduct in informal bilateral consultations before raising it in the appropriate WTO Committee.

44. The Law Council anticipates that China will be prepared to offer commitments under the proposed Australia-China FTA which mirror the commitments it has already made to all WTO Members under the GATS. In that case, upon bringing the FTA into force, China would immediately be in breach of it by virtue of maintaining the economic needs test.

<u>The '3-year rule' for additional representative offices</u>

45. Apart from the application of the explicit economic needs test, Australian firms have also expressed concerns about the requirement under Article 10(1) of the *Foreign Law Firm*

Implementing Measures (PRC) that a foreign law practice may not open an additional representative office until its most recently established representative office has been engaged in practice for three (3) consecutive years.

46. It is arguable that the application of the 3-year rule breaches China's WTO obligations:

    a. it is an effective limit on the number of operations of a foreign supplier in violation of GATS Article XVI:2(c);

    b. if a similar rule does not apply to local Chinese law practices opening additional offices, then it may be a violation of the national treatment rule in GATS Article XVII;

    c. it is a violation of the rule in GATS Article VI:5 relating to the imposition of licensing requirements. However, a complainant would have to establish that the rule is more burdensome than necessary to achieve the quality of the service and that the 3 year rule could not reasonably have been expected of China at the time the specific commitment in the sector was made.[22]

47. The argument that China's 3-year rule violates Chinas GATS obligations is not as strong as the argument that the economic needs test violates the GATS. The Law Council considers that the inconsistency with the GATS ought to be drawn to the attention of the Chinese government. The Law Council understands that it would be normal practice to raise a question of alleged illegal conduct in informal bilateral consultations before raising it in the appropriate WTO Committee.

48. If China provides commitments under the proposed ACFTA which mirror those under the GATS, then the arguments outlined in paragraph 45 'a' and 'b' would apply to the question of whether the 3-year rule would breach the equivalent provisions in the FTA. The argument outlined in paragraph 45 'c' would not apply, since the 3-year rule would predate the FTA commitment.

Application of different tax rules for foreign and Chinese lawyers and law practices by China

49. The Law Council is concerned that any discriminatory treatment of Australian service providers would be contrary to China's obligations under GATS Article XVII. The Law Council has been advised that issues relating to different tax rules for foreign and Chinese lawyers and law practices have previously been raised by firms directly with DFAT.

50. Due to time constraints, taxation issues have not been addressed in this Discussion Paper.

[22] the relevant date is probably the date that China signed the Accession Protocol 11 November 2001.

Priorities for GATS plus commitments on legal services under the proposed ACFTA

51. The Law Council has reviewed the commitments on legal services made by China in twelve other trade agreements. The Law Council's observations are summarised in the Table annexed to this Discussion Paper at **Attachment C**. It appears that in all but two of its agreements, an entry has been inserted by China into the Services Schedule relating to legal services which corresponds exactly to the entry in China's GATS Schedule. The two exceptions are the agreements with Hong Kong and Macao.[23] In all of the other agreements, China has not made any commitments on trade in legal services that extend beyond the commitments made under the GATS.

52. In addition to considering the obligations of the Services Schedule of the proposed China – Australia FTA, The Law Council submits that it is also important to consider the likely content of the Chapter on Movement of Natural Persons and any associated Schedule entries. Specific issues in relation to the movement of natural persons are addressed below under the heading "*Commitments regarding Limited Licensing for foreign lawyers*."

53. If China made commitments under the proposed ACFTA consistent with its commitments under the GATS, then:

    a. it would have an obligation under both the GATS and the FTA not to apply a limitation on the number of service providers or service operations by using an economic needs test; and

    b. it would have an obligation under the GATS not to apply unnecessarily burdensome licensing requirements that could not have been reasonably expected on 11 November 2001, and under the FTA not to apply unnecessarily burdensome licensing requirements that could not be reasonably expected as at the date of conclusion of negotiations for the proposed China-Australia FTA. Given that the 3-year rule would pre-date the FTA, then it would not be a violation of an obligation in the FTA expressed in the same terms as GATS Article VI.

54. Having regard to China's schedule of specific commitments under the General Agreement on Trade and Services (GATS) and China's schedules of specific commitments in each of its other FTAs, the Law Council considers that China is unlikely to agree to bind the abovementioned rights in the proposed Australia-China Free Trade Agreement (ACFTA). Nevertheless, the Law Council considers that outcomes which contribute to the attainment of these rights are possible through the ACFTA.

55. The Law Council submits that the negotiation of the ACFTA provides an appropriate opportunity to request China to support Australia's initiatives in promoting liberalisation of legal services through the WTO by signing:

    a. the *2005 Friends of Legal Services Joint Statement* proposal in the WTO; and

    b. the *2005 Regulatory Disciplines Proposal* in the WTO.

56. The Law Council considers that the development of uniform definitions in respect of legal services is of paramount importance to efforts to advance the international liberalisation of legal services.

[23] It is likely that WTO+ commitments exist under the China-Taipei Comprehensive Economic Cooperation Agreement

57. In relation to other specific commitments on legal services under the proposed ACFTA, and in order of priority, the Law Council submits that the following requests would contribute to the reduction of barriers which confront Australian lawyers seeking to practise in China:

    a. China's commitments under the ACFTA should utilise the definitions in the *2005 Friends of Legal Services Joint Statement*, with the specific objective of acknowledging that the right to respond and appear for clients in arbitrations and conciliation in China is not to be treated as an area reserved for local Chinese lawyers;

    b. China should further liberalise its Limited Licensing rules for the practise of foreign and international law, including:

        i. removal of the rule requiring practitioners holding a limited licence to practise foreign and international law to be resident in China for a minimum of 6 months per year;

        ii. further liberalisation of visa rules affecting lawyers taking up longer term appointment to representative offices, including freedom to move between offices, the right of short-term entry by existing partners and employees of law practices having representative offices, and improved rights of entry of non-lawyers having specialist skills related to the business of the law practice;

    c. China should bring its regulation of the temporary practise of foreign and international law (also known as fly-in/fly-out or FIFO) into line with its practice and permit the temporary practice of foreign law for a limited period (for example a maximum of 90 days per year);

    d. China should permit foreign law practices to issue PRC legal opinions and employ Chinese lawyers without requiring them to suspend their practising certificate;

    e. China should abolish the citizenship requirement for qualification in China as a Chinese legal practitioner.

58. The Law Council understands that a feature of the proposed ACFTA will be an agreement to establish a Working Group following conclusion of the ACFTA to, *inter alia,* advance mutual objectives in relation to the liberalisation of professional services including legal services. The Law Council would welcome the establishment of such a Working Group and the opportunity to engage with peak legal professional bodies in China and also with the Australian and Chinese Governments to improve practice rights for Australian lawyers and law practices in China.

Matters of Definition of Legal Services

59. China's commitment under the GATS applies to *Legal services (CPC861) (excluding Chinese law practice)*. It is qualified by an entry restricting the business scope of foreign representative offices.

60. The sub-sector described as "*Legal services (CPC861)*" should be interpreted in the context of the description in item 861 of the Provisional CPC. China's commitment

excludes "*Chinese law practice*" from the scope of CPC861. Unfortunately, no clear definition of Chinese law practice is provided in WTO texts.[24]

61. Article 32 of the *Foreign Law Firm Implementing Measures 2002* indicates certain work that is to be regarded as "Chinese legal affairs" for the purposes of Article 10 of the *Foreign Law Firm Regulations*. Article 32 (5) refers to:

> *Pursuing on behalf of clients the procedures of registration, variation, application and recording and other procedures with China's government organs or other organisations with administrative functions pursuant to authorisation by laws and regulations.*

62. The lack of a comprehensive definition on legal services is problematic and creates areas of uncertainty, including:

    a. whether China is bound to allow foreign lawyers to represent clients, as opposed to merely advise clients, in arbitrations conducted in China; and

    b. what precisely distinguishes advice on 'the effects of the PRC legal environment' from advice in relation to 'Chinese legal services'.

63. It may be possible to avoid uncertainty as to what is covered by China's commitment in the proposed ACFTA by incorporating definitions developed by some WTO Members in the course of the WTO services negotiations.

64. The *2005 Friends of Legal Services Joint Statement,*[25] provided, inter alia, that where a Limited Licensing system is used, Members' WTO Schedules should indicate clearly what is what range of services is covered by a Limited Licence. The Joint Statement included agreed definitions which could be used by Members in writing their Schedules of Commitments:

    a. Different categories of law:

        i. Domestic law (host country law);

        ii. Foreign law;

        iii. International law;

    b. Different types of legal services:

        i. Legal advisory services;

        ii. Legal representational services;

        iii. Legal arbitration and conciliation/mediation services

        iv. Legal services.

65. Australia's draft offer of May 2005 in the WTO negotiations, offered a commitment in a sector described as:

> *"Legal advisory services in foreign law and international law and (in relation to foreign and international law only) legal arbitration and conciliation/mediation services."*

66. The draft offer included the following footnote:

[24] Although Article 32 of the *Foreign Law Firm Implementing Measures 2002* does identify certain areas of legal practice which should be considered "Chinese legal affairs."

[25] WTO, Council for Trade in Services, Special Session, Committee on Specific Commitments, Communication from Australia, Canada, Chile, The European Communities, Japan, Korea, New Zealand, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States, *Joint Statement on Legal Services*, TN/S/W/37, S/CSC/W/46, 24 February 2005.

In this section, the following terms have the meanings set out in the "Joint Statement on Legal Services" (TN/S/W/37 and S/CSC/W/46 of 24 February 2005) ("Joint Statement"), which are as shown:

"legal advisory services" – includes provision of advice to and consultation with clients in matters, including transactions, relationships and disputes, involving the application or interpretation of law; participation with or on behalf of clients in negotiations and other dealings with third parties in such matters; and preparation of documents governed in whole or in part by law, and the verification of documents of any kind for purposes of and in accordance with the requirements of law. Does not include advice, consultation and documentation services performed by service suppliers entrusted with public functions, such as notary services. (As defined at 3.A(i) of Joint Statement.)

"legal representational services" – includes preparation of documents intended to be submitted to courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of law; and appearance before courts, administrative agencies, and other duly constituted official tribunals in matters involving the application and interpretation of the specified body of law. (Footnote 1: The inclusion of representational services before administrative agencies and other duly constituted official tribunals within the context of legal services does not necessarily mean that a licensed lawyer must supply such services in all cases. The precise scope of services subject to licensing requirements is subject to the discretion of the relevant regulatory authority.) Does not include documentation services performed by service suppliers entrusted with public functions, such as notary services. (As defined at 3.A(ii) of Joint Statement.)

"legal arbitration and conciliation/mediation services" – preparation of documents to be submitted to, preparation for and appearance before, arbitrators, or mediators in any dispute involving the application and interpretation of law. Does not include arbitration and conciliation/mediation services in disputes for which the law has not a bearing which fall under services incidental to management consulting. As a sub-category, international legal arbitration and conciliation/mediation services refers to the same services when the dispute involves parties from two or more countries. (As defined at 3.A(iii) of Joint Statement.)

"domestic law (host country law)" – the law of Australia. (Derived from definition at 3.B(i) of Joint Statement.)

"foreign law" – the law of the territories of WTO Members and other countries other than the law of Australia. (Derived from definition at 3.B(ii) of Joint Statement.)

"international law" – includes law established by international treaties and conventions, as well as customary law. (As defined at 3.B(iii) of Joint Statement.)

67. Australia has incorporated those definitions into its Schedule of Commitments in both the Australia-NZ-ASEAN FTA[26] and the Australia-Malaysia FTA.[27]

68. China's 2001 WTO commitments reflect China's agreement with Australia's objective that WTO Members ought to have one system for 'Full Licensing' of lawyers and a less onerous 'Limited Licensing' system for the practice of foreign law or international law.

69. Under negotiations for the ACFTA, China should be encouraged to agree with the general approach of liberalising the practice of foreign law and international law, and to manifest its support for continuing to attempt to achieve further liberalisation of legal services relating to foreign and international law on an MFN basis through the WTO:

    a. by notifying the WTO that it endorses the *2005 Friends of Legal Services Joint Statement*; and

[26] Australia – NZ-ASEAN Free Trade Agreement (entered into force 10 January 2012). Available at http://www.dfat.gov.au/fta/aanzfta/ (date accessed 25 September 2013).
[27] Australia – Malaysia Free Trade Agreement (entered into force 1 January 2013). Available at https://www.dfat.gov.au/fta/mafta/ (date accessed 25 September 2013).

b. in its Schedule to the proposed ACFTA:

i. describing the relevant sub-sector as "*Legal advisory services in foreign law and international law (and in relation to foreign and international law only) legal arbitration and conciliation/mediation services*"; and

ii. incorporating the same definitions as set out in the *2005 Friends of Legal Services Joint Statement*.

70. The incorporation of the sector description and definitions used in the *2005 Friends of Legal Services Joint Statement* would address many of the concerns arising out of the lack of clarity over business scope restrictions for foreign law practices in China. It would have the effect that foreign lawyers could:

a. prepare documents to be submitted to arbitrators or mediators even if the arbitrator or mediator is acting pursuant to a procedure established under Chinese laws and regulations; and

b. verify documents of any kind for purposes of and in accordance with the requirements of law.[28]

Commitments regarding Limited Licensing for Foreign Lawyers

The distinction between Full Licensing and Limited Licensing

71. On 6 September 2005, Australia submitted a proposal in the WTO relating to the development of Regulatory Disciplines under GATS Article VI:4 (*2005 Regulatory Disciplines Proposal*).[29] The proposal related to both Legal services and Engineering services. Among other aspects, that proposal included provisions on transparency and predicable administration of laws. It also contained the following provision (which drew upon resolutions of the International Bar Association):

> *Where Members have a 'Limited Licensing' system, either on its own or together with a 'full licensing' system, to accommodate the provision of legal advisory services in foreign law and international law, Members shall ensure that foreign lawyers are not required to satisfy licensing requirements for a 'full licence' but would be granted a 'limited licence' permitting the practice of foreign and international law if the foreign lawyer:*
>
> *a. Is licensed or authorised to practise law by, and is in good standing with, his or her hoe regulatory authority*
>
> *b. is a person of good character and repute;*
>
> *c. agrees to submit to the Code of Ethics, or its equivalent of the host regulatory authority; and*
>
> *d. if applicable, carries liability insurance or bond indemnity or other security consistent with domestic law and which, if applicable, is no more burdensome that required by the host regulatory authority of fully licensed local lawyers.*

72. Although the proposal on its own would not require WTO Members to adopt a Limited Licensing system for the practice of foreign and international law, it sets out a useful set

[28] the *2005 Friends of Legal Services Joint Statement* qualifies this by providing that this "does not include advice, consultation and documentation services performed by service suppliers entrusted with public functions, such as notary services". This means that not all documents required to be lodged under Chinese laws would nevertheless be unlikely to be covered.

[29] WTO, Working Party on Domestic Regulation, *Communication from Australia – Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S.WPDR/W/34, 6 September 2005.

of Guidelines for those Members which choose to adopt a Limited Licensing system. In keeping with the objective that the ACFTA ought to help achieve progress in multilateral negotiations, the Law Council submits that it would be desirable for China to endorse Australia's *2005 Regulatory Disciplines Proposal*.

73. Consistent with *2005 Regulatory Disciplines Proposal*, Australia's May 2005 revised offer of a Schedule under the GATS includes the following text as an additional commitment alongside the schedule entry for "*Legal advisory service in foreign law and international law and (in relation to foreign and international law only) legal arbitration and conciliation/mediation services*":

> *Limited Licence only is required: Only registration with limited licence is required, rather than full admission/licence, in order to provide:*
>
> *Legal advisory services in foreign law, where licensed in the relevant foreign jurisdiction(s);*
>
> *Legal advisory services in international law; or*
>
> *Legal arbitration and conciliation/mediation services in relation to foreign and international law.*
>
> *(By contrast, a Full Licence is required for 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 requirement, applicable to domestic legal practitioners.)*

74. China has already made GATS commitments to implement a system of Limited Licensing and has done so under the *Foreign Law Firm Regulations 2001* and the *Foreign Law Firm Implementing Measures 2002*. In keeping with the objective that the ACFTA ought to help achieve progress in multilateral negotiations, the Law Council submits that both the Australian and the Chinese schedules pursuant to the ACFTA should contain the language set out above.

75. Incorporating both the *2005 Friends of Legal Services Proposal* and the *2005 Regulatory Disciplines Proposal* into Australia and China's Schedules under the ACFTA would help advance the objective shared by both the Australian and Chinese governments of obtaining agreement from as many WTO Members as possible that a Limited Licensing regime apply to the practice of foreign and international law.

Post Qualification Experience requirement

76. Some Australian law practices in China have expressed concern with the requirement that foreign lawyers must possess two years' post-qualification home-jurisdiction experience prior to working with a foreign law practice in China. This requirement is contained in Article 7 of the *Foreign Law Firm Regulations 2001.*[30]

77. This requirement is not inconsistent with China's WTO obligations under GATS Article XVII (the national treatment rule) or GATS Article VI (regulating licensing requirements) because China's Schedule of specific commitments under the GATS includes reservations to this effect.

[30] Article 7 of the *Foreign Law Firm Regulations 2001* provides that "*A foreign law practice applying to establish a representative office in China and post representatives thereto shall meet the following requirements: (1) …; (2) the representatives of the representative office are practitioner lawyers who are members of the bar or law society of the country where they obtain the qualifications to practice, have practiced for not less than two years outside of China, and have never been punished for a criminal offense or a violation of lawyers' professional ethics or practice discipline. The chief representative of the representative office has practiced for not less than three years outside of China and is a partner or equivalent of the said firm.*

78. Apart from the favourable treatment accorded to law practices from Macau (under an FTA), Hong Kong (under an FTA) and Chinese Taipei (under an FTA), Australian law practices have not raised any allegation that the 2-year rule is not being applied to law practices from any other country. Accordingly, an issue regarding conformity with GATS Article II is unlikely to arise.

79. All of China's FTAs other than the ones with Macao and Hong Kong contain the same words as the entry in the GATS Schedule. There is no such entry in China's FTAs with Macao or Hong Kong. This indicates that in other FTA negotiations either China has not been asked to remove this condition or China has not been willing to remove the condition.

80. It is possible that the intention of this restriction is to protect Chinese clients from receiving advice from an inexperienced foreign lawyer. Feedback from Australian law practices in China indicates that the 2-year requirement is not a significant barrier to legal practice in China because any lawyers with less experience than this can be given a 'paralegal' or a similar non-lawyer designation. In any event, under Australian legal profession rules a lawyer with less than 2-years experience would typically be unable to provide unsupervised advice to clients in any jurisdiction.

81. The Law Council submits that this is an unnecessary restriction on the practise of foreign and international law in China. Accordingly the Law Council submits that Australia should request China to omit this condition from its scheduled commitment in the proposed ACFTA.

Residency Requirement

82. Some Australian law practices in China have expressed concerns with the requirement that foreign lawyers working for a foreign law practice must reside in China for 6 months per year. This requirement may be found under Article 19 of the *Foreign Law Firm Regulations 2001.*[31]

83. This requirement by China is not inconsistent with its WTO obligations under GATS Article XVII (the national treatment rule) or GATS Article VI (regulating licensing requirements) because China's Schedule of specific commitments under the GATS includes reservations to this effect.

84. A violation under the MFN rule in GATS Article II could arise if China were not applying this rule to firms from one or more other countries and such preferential treatment were not justified under an exception – e.g. the exception for free trade agreements complying with GATS Article V.

85. The Law Council notes that all of China's FTAs, other than the ones with Macao and Hong Kong, contain the same words as the entry in the GATS Schedule relating to the 6 month residency rule.

86. The China-Hong Kong FTA contains a requirement that foreign lawyers from Hong Kong reside in the PRC for at least 2 months per year. Under the China – Macao FTA there is no residency requirement imposed on foreign lawyers from Macao. This indicates that in other FTA negotiations, either China has not been asked to remove this condition or China has not been willing to remove the condition.

[31] Article 19 of the *Foreign Law Firm Regulations* provides: "*Representatives of a representative office shall be resident in China for not less than 6 months each year, if the said representatives fail to do so, they will not be registered in the following year.*"

87. The Law Council has not identified the legislative instrument through which China applies a shorter residency requirement to representatives of Hong Kong law practices. There may be some scope for Australian law practices with a business structure which includes an entity based in Hong Kong to take advantage of the shorter residency requirement applicable to lawyers of Hong Kong law practices.

88. The Law Council submits that the imposition of a residency requirement is an unnecessary restriction on the practise of foreign and international law in China. Accordingly the Law Council submits that Australia should request China to omit this condition from its scheduled commitment in the proposed ACFTA.

Movement of Natural Persons

89. Some Australian law practices in China have indicated concerns with aspects of Chinese regulation of employee visas. These concerns include:

For lawyers:

a. Long-term visas:

i. The long (from 6-12 months) timeframe for processing work visas for Australian lawyers;

ii. The duration of available visas;

iii. The ability for lawyers to transfer between different representative offices in China.

b. Short-term visas:

i. To work for shorter periods in a representative office in China;

ii. To be seconded from one office of the foreign law practice outside of China to a representative office in China.

For non-professional legal staff:

a. Limited capacity to obtain visas for non-professional legal staff in representative offices;

Internships:

a. Other Australian law firms have indicated concerns with the difficulties in obtaining visas for Australia law students to work on internships in local Chinese law practices.

90. China has scheduled commitments regarding movement of natural persons in the GATS. There is no WTO jurisprudence interpreting a Member's schedule entry relating to movement of natural persons. More than one interpretation is plausible. The following is one plausible legal interpretation of the legal effect of the entry in China's Schedule.

91. Under its existing GATS commitments, China is obliged to apply the prohibition on using the restrictions listed in GATS Article XVI:2 and the prohibition on non-national treatment under Article XVII to measures affecting the entry and temporary stay of natural persons in three categories. Only the first category is relevant to Australian law practices in China:

a. Australian corporations which have already established a representative office in the PRC, which are seeking to transfer a "*Manager, executive or specialist defined as senior employees*" of the Australian corporation;

92. Taking into account the content of China's specific commitments on legal services and its horizontal commitments under the GATS, the Law Council submits:

    a. Article XVI:2 prohibits China from applying any numerical limits including under any economic needs test to the grant of visas to employees of the representative offices of foreign law practices.

    b. Article XVII prohibits China from according less favourable treatment to applications and the grant of visas for proposed employees of non-Chinese citizens supplying legal services compared to applications for proposed employees of Chinese nationals supplying 'like' services.[32]

    c. Article II prohibits China from according less favourable treatment to applications for and the grant of visas for proposed employees of services suppliers of any other country compared to like service suppliers of Australia (or any other WTO Member country) – unless justified by the exception for integration arrangements (FTAs) under GATS Article V.

93. Article VI:1 of the GATS requires that these measures affecting the grant of visas for employees be administered in a reasonable, objective and impartial manner.

94. Beyond those provisions, the GATS also allows resort to dispute settlement and ultimately to retaliatory sanctions in relation to any measures of a member which nullify or impair commitments, regardless of whether the measures are inconsistent with the GATS (a provision which WTO Members are usually reluctant to use as the basis for WTO dispute settlement complaints).

95. The Law Council submits that it would be desirable under the ACFTA for China's Scheduled commitments on the Movement of Natural Persons to include:

    a. reference to a class of specialist who is an Australian qualified lawyer, seeking entry as an intra-corporate transferee of a law practice which has established a representative office to supply legal services (other than Chinese legal practice). In respect of these persons:

        i. it would be desirable to be able to obtain 3 year visas;

        ii. it would be desirable to implement a streamlined or expedited application process if the person is seeking to enter for shorter period of, say, 90 days;

        iii. it would be desirable for a commitment enabling visa holders to work as an employee of the foreign law practice anywhere in China;

    b. reference to class of specialist who is an existing employee of a law practice having established a representative office to supply legal services (other than Chinse legal practice), and who has proprietary knowledge of the employer's business. The wording used in the Australia – Malaysia FTA was:

> *specialists, being persons employed by an enterprise operating in another Party who possesses knowledge at an advanced level of expertise and who possesses proprietary knowledge of the enterprise's service, research, equipment, techniques or management and who have been employed by the enterprise for at least two years immediately prior to the application.*

[32] A 'like' service would be defined in line with China's demarcation of 'Legal Services (CPC 861, excluding Chinese law practice)' with all of its inherent problematic definitional issues.

c. reference to a class of visa for Business Visitors, possibly using the text in Australia's 2005 WTO offer:

> *Business visitors, being natural persons seeking to travel to China for the purpose of participating in business negotiations or meetings, with entry being approved for period requested up to 3 months.*

d. as an alternative to implementing an expedited process for obtaining a short-term Specialist Visa, creating a class of visa for Business Visitors, being employees of a foreign law practice which has an approved Representative Office in China and who is seeking to travel to China for the purpose of assisting Chinese or foreign clients with their participation in business negotiations or meetings, with entry being approved for any period requested up to 3 months.

96. The Law Council submits that it would also be desirable for China to make a positive undertaking to grant visas requested for intra-corporate employees who meet certain criteria. By way of example, possible criteria could be:

a. qualification to practice in home jurisdiction;

b. membership of professional association;

c. in good standing; and

d. satisfaction of rules regarding duration of prior legal practice.

Secondment Arrangements

97. Australian law practices have raised concerns with secondment arrangements. They would like to make it easier to mover employees from one office to another.

98. They have expressed concerns with secondment arrangements involving an employee of one representative office in China moving to another representative office of the same law practice in China. This issue could be addressed by seeking a commitment that all specialist and business visitor visas do not limit the person to visiting, residing in or working in any particular part of the country.

99. Australian law practices have also expressed concerns with secondment arrangements relating to an employee from an office outside of China who is to transfer to a representative office in China of that foreign law practice. This issue could be addressed if there were a category of visa for intra-corporate transfer of specialists and within this a category for shorter term transfers as suggested above.

100. The Law Council understands that Chinese law practices may employ foreign lawyers. However, concerns have been expressed by some Australian law practices in China regarding difficulties in arranging secondments to a Chinese law practice:

a. of employees of a foreign law practice from an office of that firm outside of China;

b. of employees of a foreign representative office in China:

101. The Law Council requests that DFAT seek clarification of these matters as there is clearly confusion amongst Australian law practices in China over the operation of such arrangements.

For Australian student interns

102. Some Australian law practices in China have expressed a concern with the difficulty confronting Australian students in obtaining visas to undertake internships and work experience.

103. In Australia, there are certain visa categories which could be used by a student intern seeking to work in an Australian law practice:

    a. an Australian Training 402 visa, suitable where the law practice is going to provide a specific training programme for the Chinese law student;

    b. an employer sponsored 457 visa nominating the role of Legal Professional, suitable if the person already holds a bachelor degree in law or in another discipline;

    c. a Temporary Work (Long Stay Activity) 401 Exchange stream, suitable if there is an exchange agreement in place between the Australian firm and the overseas firm

104. There appears not to be any existing class of visa in China suitable for an Australian law student seeking to work as an intern in a Chinese law practice or in the representative office in China of a foreign law practice.

105. The Law Council submits that DFAT should consider how an appropriate commitment could be included in China's commitments under the proposed ACFTA.

Temporary Practise of Foreign Law (FIFO)

106. Globally, lawyers frequently travel to another country to provide legal services without establishing a long term commercial presence in that country. Typically, such travel arises when a client from outside the host country requests the foreign lawyer to travel with the client to attend negotiations or business meetings in the other country. Occasionally, such travel could arise where the foreign lawyer is invited by a client in the host country to visit the host country to provide advice about foreign law to the client in the host country.

107. There has been a longstanding tolerance of such visits by almost every country in the world. Such visits are regularly accomplished by persons seeking Tourist Visas or short-term Business Visitor Visas.

108. Australia (in each jurisdiction except South Australia) has taken the approach of modifying the regulations of the legal profession so that a foreign lawyer visiting Australia to provide legal services limited to foreign country law or international law is permitted to provide that legal service:

    a. without having to qualify as an Australian legal practitioner; and

    b. without having to register as a foreign lawyer or to establish any form of longer term commercial presence in Australia,

    provided that they do not spend more than 90 days in Australia in any 365 day period.

109. In South Australia, a foreign lawyer can fly in to provide legal services restricted to foreign law and international law but on condition that they provide the services only as a consultant to a local Australian legal practitioner and not direct to a client. They do not have to qualify as a local lawyer to do so, but there is no mechanism in South Australia for a foreign lawyer to register as such, and thereby to formally authorise the provision of advice on foreign law or international law directly to their client.

110. The Law Council considers Australia should request that China provide undertakings in the FTA which match the practical reality of what is already happening in China and in every country in the world regardless of any formal prohibition they may have on the temporary practise of foreign and international law.

111. The Law Council submits that there are different approaches that could achieve different gradations of this objective:

    a. introduction of a rule similar to Australia's 90-day rule;

    b. creation of a visa class for business visitors being remunerated from outside China travelling to China to attend meetings or negotiations, for periods requested up to 90 days (this would cover Australian lawyers who do not have a representative office in China); or

    c. creation of a visa class for short-term intra-corporate transferees of existing partners or employees of foreign law practices which already have a representative office in China, for periods requested up to 90 days.

Ability of foreign law practices to provide PRC legal advice

112. Australian law practices in China have expressed concern with Chinese laws prohibiting them from providing PRC Legal advice, for example by employing locally qualified lawyers in China.

113. This restriction may be found under Article 16 of the *Foreign Law Firm Regulations*, 2001.[33] Further clarification of this restriction is provided by Article 40 of the *Foreign Law Firm Implementing Measures* 2002 which provides:

> *"Any one of the following shall be regarded as employing Chinese practising lawyers:*
>
> 1. *Reaching a contract of employment or labour with practising Chinese lawyers;*
> 2. *Forming de facto employment or labour relationship with practising Chinese lawyers;*
> 3. *Reaching an agreement with practising Chinese lawyers to share profits and risks or participate in management;*
> 4. *Paying rewards, fees or share of business proceeds to practising Chinese lawyers as individuals;*
> 5. *Employing practising Chinese lawyers to carry out external business activities in the name of the representative office of its principal law practice.*

114. China's restrictions on the employment of Chinese legal practitioners and the provision of PRC legal advice by foreign law practices is not inconsistent with its WTO obligations under GATS Article XVII (the national treatment rule) or GATS Article VI (regulating licensing requirements) because China's Schedule of specific commitments under the GATS includes reservations to this effect.

115. In past rounds of negotiations, China has indicated that it will not agree to allow foreign firms to employ Chinese lawyers without requiring those lawyers to temporarily suspend their Practising Certificate.

[33] 1. Article 16 of the Foreign Law Firm Regulations, 2001 provides: "*A representative office shall not employ Chinese practitioner lawyers. Its support staff employed shall not provide legal services to clients.*"

116. The prohibition on employment of Chinese lawyers creates a favourable situation for Chinese law practices over foreign law practices. Local Chinse law practices can employ individual lawyers who have the right to practise in other jurisdictions and by doing so can put themselves in a position whereby lawyers within the Chinese law practice can offer advice on the law of all jurisdictions relevant to a transnational matter. By contrast, the representative office of the foreign law practice cannot provide any advice on Chinse law and therefore cannot offer advice on the law of all jurisdictions relevant to the matter.

117. The impact of this scenario is mitigated to some extent by the fact that foreign representative offices of Australian law practices make extensive use of labour dispatching services such as those provided by the Beijing Foreign Enterprise Human Resources Co. (FESCO) and the China International Intelligence and Technology Corporation (CIIC). Law practices issue opinions on the 'effect of the Chinese legal environment' and to avoid regulatory issues utilise a disclaimer to ensure clients are aware that the law practice is not providing PRC legal advice. Law practices also routinely prepare draft opinions for Chinese law practices to review, amend and formally provide to a client.

118. The Law Council submits that the use of labour dispatching services and the delegation of work to Chinese law practices should not be considered an adequate substitute for the formal right of foreign law practices in China to employ locally qualified lawyers and to provide legal advice on Chinese Law.

119. A key objective of the Law Council in promoting liberalisation of legal services internationally is to enable Australian law practices operating in other countries to be able to employ local lawyers. This objective remains a matter of priority.

Right to Qualify and Practice Chinese Law

120. The Law Council is concerned about Chinese laws prohibiting foreign nationals from sitting for legal qualification exams and prohibiting foreign nationals from becoming Chinese legal practitioners.

    Article 5 of the *Lawyers Law of the People's Republic of China* 1996 requires that an applicant has passed the "unified national judicial examination." Under Article 13 of the *Measures for the Implementation of National Judicial Examination*, one of the criteria for sitting the Exam is that the candidate is a Chinese national.[34]

121. The Law Council has a long standing policy that the right to practise local law is to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through transparent process. This position has been incorporated into the *2005 Friends of Legal Services Joint Statement* and the *2005 Regulatory Disciplines Proposal.*

122. The position in Australia is that any person regardless of nationality may be admitted as a local practitioner if they meet the qualification requirements. There is no citizenship requirement and no residency requirement. Admission as an Australian legal practitioner does not convey a right to a visa to enter or work in Australia, but such persons are eligible to apply for a range of visas, including short-term business visitor's visas, sponsored employment visas and permanent residency visas.

[34] Available at http://www.legalinfo.gov.cn/english/Judicial-Examinations/content/2009-02/02/content_1027749.htm?node=7639 (accessed 8 October 2013).

123. The same is true in many jurisdictions around the world. It has become commonplace for lawyers to gain admission as legal practitioners in multiple jurisdictions even when they choose not to live in that jurisdiction or to maintain a legal practice certificate in that jurisdiction.

124. The Law Council submits that Australia should request that China abolish citizenship restrictions for the purpose of qualification as a Chinese legal practitioner.

Recognition of Australian qualifications

125. Since the issue of allowing foreigners to become Chinese practitioners is still at a stage where only residents from Hong Kong and Macau have been allowed to attain local qualifications, and since the right to practise in China is accorded on the basis of passing the national examination and not merely on passing university exams, it would seem that the question of recognition of foreign legal qualifications may only be considered over an extended period of time.

126. It would not be realistic to expect any commitment on recognition of Australian qualifications as part of the ACFTA.

127. The Law Council submits that it would be desirable for mutual recognition of legal qualifications to be included in any ongoing work program to advance liberalisation of legal services arising under the ACFTA.

Commercial Association Arrangements

128. Some Australian law firms have raised concerns about Chinese restrictions on Australian law practices forming commercial associations with local Chinese lawyers.

129. Australia has unsuccessfully raised this in the FTA negotiations.

130. At the Ninth Round of Australia – China FTA negotiations in Beijing on 18-22 June 2007, Australia tabled a proposal for a "China Commercial Association Trial (CCAT)". The proposal was modified and at the Twelfth Round of Australia-China FTA Negotiations in Canberra on 22-26 September 2008, Australia tabled the modified proposal (which is included as **Attachment D** to this Discussion Paper).

131. In Australia, the position is that in 5 of the 6 States a foreign registered lawyer may form a partnership or incorporated legal practice with an Australian lawyer or law practice. Under that arrangement, Australian lawyers and foreign lawyers are each allowed to provide legal services only in relation to the laws of the jurisdictions in which they are entitled to practise.

132. Therefore, in Australia, Chinese law practices (once their practitioners are registered as foreign lawyers) are free to structure a commercial association with an Australian law practice in any way which best achieves their desired mutual outcomes.

133. The Law Council submits that seeking rights for Australian law practices to freely enter into commercial associations with Chines law practices remains an important feature of the liberalisation of China's legal services sector.

Special status of lawyers from the Special Administrative Regions

134. Some Australian law firms have raised concerns about the significant advantage held by lawyers from Chinese Taipei, and the Special Administrative Regions of Macao and of Hong Kong.

135. FTAs between the PRC and Macao and between the PRC and Hong Kong have been notified to the WTO and are publicly available. In these agreements the PRC does make some commitments which go beyond the commitments under the GATS. The PRC would maintain that these agreements satisfy the provisions of GATS Article V and that the granting of more favourable treatment to lawyers and law practices from these regions does not breach the MFN rule under GATS Article II. Alternatively the PRC would argue that there is no breach of Article II because neither Macau nor Hong Kong are separate countries.

136. The governments of the PRC and of Chinese Taipei have not entered into an FTA. However, the two governments appear to have facilitated a similar arrangement, carefully constructed not to be a state to states agreement. On 29 June 2010, the Straits Exchange Foundation and the Association for Relations across the Taiwan Straits signed the "Cross Straits Economic Cooperation Framework Agreement".[35] The text includes a schedule of early harvest commitments relating to trade in services. The "Mainland" commitments toward service suppliers from Taiwan do not include anything relating to legal services. Chinese Taipei has notified this agreement to the WTO, not as a free trade agreement but as an agreement in respect of which an early announcement has been made.

137. If it is the case that the People's Republic of China is providing preferential treatment to law practices and lawyers from Taiwan, the question of whether that constitutes a violation of GATS Article II depends on whether one can regard Taiwan as a country separate from the PRC. Whatever the answer to that question, it is clear that it will not help Australia's negotiation of the proposed FTA with China to make any argument that is premised upon the proposition that Taiwan is not part of China.

If China gives any commitments in the FTA which go beyond its GATS commitments, then these would likely reduce the extent of the existing margin of preference in favour of the Special Administrative Regions.

Annexures

Attachment A Profile of the Law Council of Australia.

Attachment B Profile of the International Law Section.

Attachment C Table setting out China's commitments on legal services under its existing Free Trade Agreements.

Attachment D China Commercial Association Trial Discussion Paper (as modified and tabled 22-26 September 2008).

[35] The text of the CSECFA is available from the website of the Ministry of Economic Affairs of the Republic of China http://www.moea.gov.tw/Mns/populace/news/News.aspx?kind=1&menu_id=40&news_id=19723 and from the website of the WTO at http://rtais.wto.org/rtadocs/713/TOA/English/990921-ECFA%28text_and_annexes_combined%29.pdf

ATTACHMENT A

Attachment A:

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- 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 Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

ATTACHMENT B

Attachment B:

The International Law Section (ILS) provides a focal point for judges, barristers, solicitors, government lawyers, academic lawyers, corporate lawyers and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues.

The ILS runs conferences and seminars, establishes and maintains close links with overseas legal bodies such as the International Bar Association, the Commonwealth Lawyers' Association and LAWASIA, and provides expert advice to the Law Council and its constituent bodies and also to government through its Committees.

Members of the 2013 ILS Executive are:

- Dr Gordon Hughes, Section Chair
- Dr Wolfgang Babeck, Deputy Chair
- Ms Anne O'Donoghue, Treasurer
- Mr Fred Chilton, Executive Member
- Mr John Corcoran, Executive Member
- Mr Glenn Ferguson, Executive Member
- Ms Maria Jockel, Executive Member
- Mr Andrew Percival, Executive Member
- Dr Brett Williams, Executive Member.

The ILS Committees are:

- The Alternative Dispute Resolution Committee (Ms Mary Walker, Chair)
- The Migration Law Committee (Mr Erskine Rodan, Chair and Ms Katie Malyon Vice-Chair)
- The Human Rights Committee (Dr Wolfgang Babeck and Mr Glenn Ferguson, Co-Chairs)
- The Trade & Business Law Committee (Mr Andrew Percival, Chair)
- The Comparative Law Committee (Dr Wolfgang Babeck and Mr Thomas John, Co-Chairs).

ATTACHMENT C

China's scheduled commitments on legal services including limitations on national treatment[1]

WTO	China-Chile[2]	China - Costa Rica[3]	China – New Zealand[4]	China – Singapore[5]	China – Pakistan[6]	China – Iceland[7]	China – Peru[8]	China – Thailand[9]	China-ASEAN[10]	China – Hong Kong[11]	China – Macao CEPA[12]	China – Taipei
foreign law firms can provide legal services only in the form of representative offices in (Beijing, Shanghai, Guangzhou, Shenzhen, Haikou, Dalian, Qingdao, Ningbo, Yantai, Tianjin, Suzhou, Xiamen, Zhuhai, Hanghou, Fuzhou, Wuhan, Chengdu, Shenyang and Kunming only.) Representative offices in China shall be no less than the number established upon the date of accession. A foreign law firm can only establish one representative office in China. The above-mentioned geographic and quantitative limitations will be eliminated within one year after China's accession to the WTO. (*to be abolished within one year of accession*).	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	Same as WTO Commitments (copy paste including lifting of restriction within one year after China's accession to the WTO).	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	Similar to WTO. "Foreign law firms can provide legal services only in the form of representative offices." (does not include geographic restrictions)	No scheduled commitment on legal services.	No scheduled commitment on legal services.	Different to WTO. "To allow Hong Kong law firms (offices) that have set up representative offices in the Mainland to operate in association with Mainland law firms, except in the form of partnership. Hong Kong lawyers participating in such association may not handle matters of Mainland law."	Different to WTO. **As a pilot measure in Guangdong Province, to allow Macao law firms and Guangdong law firms to enter into agreement under which Guangdong law firms may second Mainland lawyers to work as consultants on Mainland law in representative offices set up by Macao law firms in Guangdong Province.**[13] 1. To allow Macao law firms that have set up representative offices in the Mainland to operate in association with Mainland law firms, except in the form of partnership. Macao lawyers participating in such association may not handle matters of Mainland law. 7. To confer those Macao lawyers, qualified after training, with Mainland recognized notary qualification.	**As yet, unable to locate copy of services schedule text.**
Can only establish one representative office in China (*to be abolished within one year of China's accession to the WTO*).	No restriction.	No restriction.	Same as WTO.	No restriction.	No restriction.	No restriction.	No restriction.	Nil.	Nil.	No restriction.	No restriction.	
Representative offices can engage in profit making activities.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	Same. (implied by business scope?)	Not stated (implied by business scope?)	
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.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	2. To allow Mainland law firms to employ Hong Kong legal practitioners[2]. Such practitioners who are employed by Mainland law firms must not handle matters of Mainland law. 3. To allow the 15 Hong Kong lawyers who have already acquired Mainland lawyer qualifications to intern and practise on non-litigation legal work in the Mainland. 4. To allow Hong Kong permanent residents with Chinese citizenship to sit the legal qualifying examination in the Mainland and acquire Mainland legal professional qualification in accordance with the "State Judicial Examination Implementation Measures". 5. To allow those who have acquired Mainland legal professional qualification under item 4 above to engage in non-litigation legal work in Mainland law firms in accordance with the "Law of the People's Republic of China on Lawyers".	Same as Hong Kong Agreement (name replaced with Macao) except for listed provisions: 3. To allow Macao lawyers with Chinese citizenship who have already acquired Mainland lawyer qualifications to intern and practise on non-litigation legal work in the Mainland.	

[1] Prepared by David Naylor, Senior Policy Lawyer, International, Law Council of Australia for and on behalf of the Law Council of Australia. For queries please email David.naylor@lawcouncil.asn.au.
[2] China Chile Free Trade Agreement (entered into force 1 October 2006 (goods), 1 August 2010 (services). Available at http://fta.mofcom.gov.cn/topic/enchile.shtml (accessed 22 September 2013).
[3] China Costa Rica Free Trade Agreement (entered into force 1 August 2011). Available at http://www.sice.oas.org/Trade/CRI_CHN_FTA/Texts_Apr2010_e/CRI_CHN_ToC__PDF_e.asp (accessed 22 September 2013).
[4] China New Zealand Free Trade Agreement (entered into force 1 October 2008). Available at: http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php (accessed 22 September 2013).
[5] China Singapore Free Trade Agreement (entered into force 1 January 2009). Available at: http://www.fta.gov.sg/fta_csfta.asp?hl=27 (accessed 22 September 2013).
[6] China Pakistan Free Trade Agreement (entered into force 10 October 2009). Available at: http://fta.mofcom.gov.cn/pakistan/xieyi/chinachengruo_en.pdf (accessed 22 September 2013).
[7] China-Iceland Free Trade Agreement (signed 15 April 2013, not yet entered into force). Available at: http://www.mfa.is/foreign-policy/trade/free-trade-agreement-between-iceland-and-china/ (accessed 23 September 2013).
[8] China Peru Free Trade Agreement (entered into force 1 March 2010). Available at: http://fta.mofcom.gov.cn/topic/enperu.shtml (accessed 23 September 2013).
[9] See http://www.bilaterals.org/spip.php?rubrique26 (accessed 25 September 2013).
[10] China ASEAN Free Trade Agreement (services agreement entered into force July 2007). Available at: http://fta.mofcom.gov.cn/topic/chinaasean.shtml (accessed 25 September 2013).
[11] China Hong Kong Free Trade Agreement (entered into force 29 June 2003). Available at http://www.tid.gov.hk/english/cepa/legaltext/fulltext.html (accessed 22 September 2013).
[12] China Macao Closer Economic Partnership Agreement (entered into force 17 October 2003, amended with effect from 1 January 2014) Available at http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_Index&locale=en_US (accessed 22 September 2013).
[13] "From 1 January 2014, the Mainland shall further relax the market access conditions in 28 areas, namely, legal…" Supplement X to CEPA http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_CEPA_XI&locale=en_US (accessed 22 September 2013).
[2] In this Annex, Hong Kong legal practitioners refer to solicitors and barristers of Hong Kong.

WTO	China-Chile[2]	China - Costa Rica[3]	China – New Zealand[4]	China – Singapore[5]	China – Pakistan[6]	China – Iceland[7]	China – Peru[8]	China – Thailand[9]	China-ASEAN[10]	China – Hong Kong[11]	China – Macao CEPA[12]	China – Taipei
Foreign lawyers must be a member of the bar or law society of a WTO member	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	No equivalent restriction.	No equivalent restriction.	
Foreign lawyers must have no less than 2 years experience outside of China.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	No equivalent restriction.	No equivalent restriction.	
Chief representative shall be a partner or equivalent (member of a law firm of a limited liability corporation) of a law firm of a WTO member	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	No equivalent restriction.	No equivalent restriction.	
Chief representative shall have practiced for no less than three years.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Nil.	Nil.	No equivalent restriction.	No equivalent restriction.	
Limitations on National Treatment												
WTO	**China-Chile**	**China - Costa Rica**	**China – New Zealand**	**China – Singapore**	**China – Pakistan**	**China – Iceland**	**China – Peru**	**China – Thailand**	**China-ASEAN**	**China – Hong Kong**	**China – Macao CEPA**	**China – Taipei**
All representatives shall be resident in China no less than six months each year. The representative office shall not employ Chinese national registered lawyers.	Same as WTO.	Same as WTO.	Same as WTO.	Same as WTO.	Sane as WTO.	Same as WTO.	Same as WTO.	Nil.	N/a.	Minimum residency is waived for all Hong Kong representatives stationed in the Mainland representative offices of Hong Kong law firms located in Shenzhen and Guangzhou. Minimum Residency is 2 months each year.	8. To allow Macao lawyers that are Macao permanent residents to engage in legal matters of Macao as well as other countries and regions that the lawyers are allowed to practise in the Mainland pursuant to the Mainland laws, regulations and administrative regulations	

ATTACHMENT D