

Development of country strategies for Japan, China, Indonesia, India and South Korea

**Department of Foreign Affairs and Trade
(DFAT)**

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Acknowledgement

The Law Council acknowledges the assistance of the International Law Section (ILS), Australian Capital Territory (ACT) Law Society's International Lawyers' Committee and Law Society of South Australia's International Legal Practice Committee in the preparation of this submission.

Attachment A provides a profile of the Law Council. **Attachment B** provides a profile of the International Law Section.

The Law Society of South Australia also provided comments on the Philippines. The Law Council is aware that the Philippines is not within the scope of the inquiry and has therefore provided these comments at **Attachment C**.

Executive Summary

The Law Council's interest in liberalisation of legal services in each target country encompasses the introduction of measures to permit:

- the 'fly-in/fly-out' practise of law by Australian lawyers – similar to Australian provisions which permit foreign lawyers to engage in the 'fly-in/fly-out' practise of law in Australia;
- the restricted practise of foreign and international law by Australian lawyers through the introduction of 'registered foreign legal consultant' rules – similar to the Australian provisions which permit foreign lawyers to establish a commercial presence in Australia as a registered foreign legal consultant;
- Australian and foreign law practices to formally enter into commercial associations such as joint ventures and strategic alliances and to permit them to enter into fee and profit sharing arrangements – similar to the Australian provisions which permit foreign law practices to enter into joint-ventures and strategic alliances and to share profits with Australian firms in Australia; and
- Australian lawyers and law practices to engage in commercial arbitration, conciliation and mediation in the target country – similar to the Australian provisions which permit foreign lawyers to engage in commercial arbitration, conciliation and mediation in Australia.

Each of the five target countries prohibit one or more of the above forms of legal practice and none have provisions which are as liberal as Australia.

Achievement of these objectives will be beneficial not only to the Australian legal profession but also to the Australian economy. It is estimated that the export of Australian legal services in 2008-2009 (the most recent figures available) was valued at \$709.1 million. Increased mobility of Australian lawyers and increased flexibility for Australian legal practices internationally will facilitate trade in legal services and will enhance the efficiency of commercial transactions relevant to those services.

The Law Council also seeks support from the Australian Government to engage in Track II diplomatic measures to improve goodwill and understanding between the Australian legal profession and the legal professions in Japan, China, Indonesia, India and South Korea.

The Law Council's interests in relation to the rule of law and capacity building in the law and justice sector are to:

- promote and develop independent peak legal professional bodies with the capacity to engage in public policy debate;
- support effective regulation of the legal profession internationally;
- promote and strengthen the rule of law.

While recognising that there is room for improvement both domestically and regionally on these issues, the Law Council considers that the development of the Country Strategies for Japan, China, Indonesia, India and South Korea presents a strong opportunity to prioritise these objectives.

The Law Council seeks both to establish and maintain effective dialogue with other peak representative bodies, and to raise the profile of the Law Council and individual Australian lawyers within peak international associations of lawyers.

A key component to developing institutional linkages has been the Law Council's long-term strategy of entering into Memoranda of Understanding (MOU) with counterpart bodies. The Law Council has entered 16 MOUs with foreign peak professional bodies. These agreements provide a framework for activity to strengthen relationships through joint activities, roundtables and meetings, delegations, invitations to speak at Conferences and events and other opportunities which may arise.

Background

1. The Law Council welcomes the opportunity to make this submission to Department of Foreign Affairs and Trade (DFAT) to assist in the development of Country Strategies for Japan, China, Indonesia, India and South Korea in response to the *Australia in the Asian Century White Paper*.
2. Having regard to the broad scope of the questions raised in the Issues Paper for each target country, the Law Council's submission focuses on:
 - a) promoting the liberalisation of legal services (and the reduction of barriers to international trade in legal services); and
 - b) promoting the rule of law and capacity building in the law and justice sector.
3. It should not be underestimated that the increased capacity of Australian lawyers to practise in foreign jurisdictions can, through Australia's established and well recognised standards and ethical practices, contribute to the enhancement of professional standards in foreign jurisdictions. This in turn can lead to more stable foreign legal environments and, in that way, can contribute to the maintenance of the rule of law.
4. The Law Council has a long and growing engagement with Asia, particularly through its bilateral relationships with:
 - a) The Japan Federation of Bar Associations (JFBA);
 - b) The China Law Society and All China Lawyers' Society (ACLA);
 - c) Perhimpunan Advokat Indonesia (PERADI);
 - d) The Bar Council of India (BCI);
 - e) Korean Bar Association (KBA);and its involvement in regional organisations such as LAWASIA (the Law Association for Asia and the Pacific) and the International Bar Association.
5. The Law Council has made a number of submissions to Australian Government inquiries regarding Australia's trade and investment relations in recent years. It has participated in numerous meetings with DFAT officers with a view to coordinating activities to promote the liberalisation of markets for legal services in target countries.
6. The Law Council has received funding from DFAT hosted foundations and councils to promote institutional linkages with counterpart bodies in Japan and India and has participated in Government initiatives directed to promoting closer engagement with the Chinese legal profession.
7. DFAT has also provided valuable feedback on the Law Council's International Strategy 2013.
8. The Law Council's ILS has formally established 'Chapters' of Australian lawyers working in foreign jurisdictions. DFAT, through Australian diplomatic missions overseas, has supported the activities of these Chapters in China, Japan and South Korea. These Chapters provide a mechanism through which lawyers from Australia and target countries can engage and also serve as a key source for information on developments affecting the interests of Australian lawyers.

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9. The International Legal Services Advisory Council's (ILSAC) six Principles of Liberalisation of Trade in Legal Services provided at **Attachment D**, provide some useful guidance as to legal services market access work undertaken by Australia.

Japan

10. The Law Council has had a relationship with the JFBA since the early 1990s. The Law Council first entered into an MOU¹ with JFBA in 1999. The MOU recognised a desire by both legal bodies to strengthen cooperation and exchange ideas on areas of mutual interest. It recognised a mutual interest in promoting and preserving the rule of law. It also acknowledged the growing importance of trade and other ties between our two nations. This commitment was reaffirmed in 2009.
11. ILSAC's formal submission to Japan in the early 1990s and the Law Council's subsequent representations have played an important role in a more open regulatory regime in Japan.
12. In 2009 and 2012, DFAT, through the Australia Japan Foundation, supported significant programs to promote bilateral engagement between the Australian and Japanese legal professions. Noting the prospect for achieving further outcomes on legal services under the Japan-Australia Free Trade Agreement (JAFTA), the Law Council believes the greatest opportunity for engagement with Japan in the short to medium term rests in increasing bilateral engagement between Australian and Japanese lawyers and law practices.
13. In 2012, the Law Council, with the support of the JFBA, received limited funding from the Australia Japan Foundation to support the hosting of a seminar on 'Doing legal business in Australia/Japan' and other activities.
14. These activities have provided an opportunity for representatives of the Australian legal profession to explain Australia's foreign lawyer regime, and to point out the shortcomings perceived by Australian lawyers when seeking practice rights in Japan, and the Law Council hopes to replicate these activities in other countries.
15. The Law Council's ILS has a Chapter based in Tokyo and the Law Council would welcome an opportunity to discuss how the Law Council and the JFBA can work with government to promote closer linkages between Australian and Japanese lawyers.

Japan-Australia Free Trade Agreement (JAFTA)

16. Australia's requests on legal services under negotiations for the proposed JAFTA are:
- (a) recognition by Japan of a formal right for Australian lawyers to provide legal services on a 'fly-in/ fly-out' basis;
 - (b) removal of the 180 day residency requirement for Australian lawyers who are registered as foreign lawyers in Japan; and
 - (c) streamlining of the currently onerous foreign lawyer registration and registration-renewal process.

¹ Law Council MOUs are available at http://www.lawcouncil.asn.au/programs/international/mou.cfm?fms_folder_uid=7B991D4E-DD54-92B6-3CD1-620D9A7121EC.

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17. Australia also requests to be treated as a single jurisdiction for the purpose of assessing applications from Australian lawyers for admission as foreign lawyers in Japan.
 18. JAFTA has progressed slowly since 2007. Japan's position in relation to legal services under the JAFTA is essentially to maintain the status quo. However, the Japanese Ministry of Justice is keen to improve its efficiency in processing applications from Australian foreign lawyers and to learn from Australia's experience with incorporated legal practices.
 19. The Japanese Government has taken a strong defensive stance in relation to tariff reductions. In response, Australia has taken a conservative stance on tariff liberalisation on areas which are of commercial significance to Japan.
 20. As part of negotiations on the proposed JAFTA, the Australian Government, on the advice of ILSAC, made the following requests in the areas of legal service:
 - a) to permit an Australian lawyer to provide legal service on Australian law in Japan up to 90 days per year without any registration ('fly-in/ fly-out');
 - b) if (a) is difficult, to reduce the residence requirement in Japan for a foreign-registered lawyer from 180 days per year to 90 days; and
 - c) to abolish the requirement of written advice from a competent lawyer when a foreign-registered lawyer provides legal advice in relation to foreign laws other than Australian laws.
 21. The Japanese Ministry of Justice is not convinced that the perceived barriers to trade in legal services, which the requested changes seek to overcome, actually exist. The JFBA has maintained that it is unable to change legislation, even if it agrees that there is a problem.

The Trans Pacific Partnership Agreement (TPP)

22. Japan has formally expressed interest in joining the TPP negotiations.
23. The Law Council does not anticipate that the TPP will result in substantial outcomes on liberalisation of legal services.
24. Negotiations and outcomes for Australia's existing and proposed free trade agreements suggests that obtaining meaningful outcomes on the liberalisation of legal services is not practicable due to:
 - a) differences between civil and common law systems;
 - b) difficulties in assessing equivalency of qualifications; and
 - c) the close relationship of lawyers to the legal/political system.

China

25. The Law Council first entered into MOU with the China Law Society in 1985. The MOU recognised a desire by both legal bodies to strengthen cooperation and exchange ideas on areas of mutual interest. It recognised a mutual interest in promoting and preserving the rule of law. It also acknowledged the growing importance of trade and other ties between the two nations.
26. In 2010, a ceremony was held during the Shanghai World Expo to mark the 25th Anniversary of that MOU. A new MOU was signed reaffirming the mutual commitment to advancing the interests of the legal profession in the countries.

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27. The Law Council also entered into an MOU with ACLA in 1994.
 28. The strength of the relationship between Australia and China is well demonstrated by the recent combination of King & Wood and Mallesons – the first formal combination of a Chinese law firm and a foreign law firm. King and Wood Mallesons is the only law firm in the world which is currently licensed to practice Australian law, Chinese law and English law.
 29. The Law Council has worked closely with the Attorney-General's Department (AGD) through the ILSAC to promote links between the Australian and Chinese legal profession.
 30. The Australia-China Legal Professional Development Program ran from 2007 to 2009 and was extremely successful. The program concluded due to resource reallocations within the AGD which led to ILSAC no longer having the resources to effectively administer the program. A key area which could have been further explored through this program is improved engagement with alumni.
 31. The Law Council has also engaged closely with DFAT over the past 10-15 years to promote liberalisation of legal services in China and to seek to overcome behind the border barriers to trade in legal services in China.
 32. The Law Council's ILS has a Beijing Chapter which has identified a number of practical issues such as delays in the approval of licenses to practice and business visas. These issues have previously been raised with DFAT. Some of these issues may be able to be addressed through engagement between the Beijing Chapter, the Australian Embassy in Beijing and ACLA.
 33. The Law Council is currently liaising with DFAT and ACLA to coordinate a 2014 China-Australia Law Week in Beijing to coincide with the China Beijing International Fair For Trade in Services (CIFTIS) in May 2014.
 34. The Law Council's priorities include the promotion of the administration of justice, access to justice, and general improvement of the law both in China and in Australia, especially where the interests of the Australian people and the Chinese people overlap. These may be in areas of trade and investment, but may also be in other areas which have been of long-term interest to the Australian legal profession, such as the protection of human rights. The *White Paper Australia in the Asian Century* is largely concerned with economic issues. These are vital, but the legal profession is also interested in a wide variety of social issues.
 35. The completion of a comprehensive Free Trade Agreement (FTA), including in the trade of services, is an important element in demonstrating both sides' willingness to working on reducing the barriers that do exist. It is hoped that the strength of Australia as an efficient provider of quality services, including legal services, will be recognised in the negotiations so as to provide opportunities.
 36. It is recognised however that is not practical or feasible to expect any FTA, no matter how comprehensive, to remove all barriers. There are non-tariff barriers which may not be amenable to being dealt with through FTA.

Indonesia

37. In 2006, the Law Council was instrumental in the establishment of its counterpart body in Indonesia, PERADI, and has maintained this strong relationship through regular bilateral engagement.
38. In 2010, the Law Council co-hosted with PERADI the second Access to Justice and the Role of Law Societies and Bar Associations in Asia Conference, in Brisbane.

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39. Despite close engagement at the peak institutional level, there has been very little bilateral engagement between the Australian and Indonesian legal professions. There has also been little engagement in the legal education sector.
 40. There has been no formal research into the lack of bilateral engagement between the Australian and Indonesian legal professions. Such research would be extremely valuable and would assist in directing future activities to promote closer engagement between Australia and Indonesia in the legal services sector. The Law Council considers that contributing factors may include:
 - a) the shortage of English-speaking Indonesian lawyers and Bahasa Indonesian-speaking Australian lawyers;
 - b) the lack of understanding by Australian and Indonesian lawyers of each others' legal systems;
 - c) Indonesia's relative lack of development in legal infrastructure and lack of certainty in recent years over the regulation of the legal profession.
 41. The Law Council has engaged with DFAT to improve practice rights for Australian lawyers in Indonesia through the Australia-Indonesia FTA and the ASEAN-Australia-New Zealand FTA.
 42. The Law Council has met with DFAT on several occasions in recent years to discuss further efforts to liberalise legal services in Indonesia. The Law Council considers that there is currently a need for much stronger engagement with PERADI and between the legal professions of Australia and Indonesia to build bilateral relationships.
 43. The Law Council is currently seeking to engage with PERADI through the AusAID funded Australia-Indonesia Partnerships for Justice Program to advance access to justice in Indonesia and to support PERADI in strengthening its regulatory and legal education functions.
 44. The Law Council will also seek to involve PERADI in an important joint project with the International Bar Association to support the Timor Leste Bar Association. Supporting PERADI to engage on the international stage is important to developing its profile as the peak legal professional body in Indonesia.
 45. The Law Council is also aware of a recent partnership between the University of Sydney and the University Gadjia Mada in Yogyakarta. Partnerships to promote cultural and legal exchange between law students, such as this, in the legal education sector, should form part of a comprehensive plan to promote engagement between the Australian and Indonesian legal professions.
 46. The Law Council is conscious of the cultural and legal differences that exist between Australia and Indonesia. It is also aware that the legal profession in Indonesia faces many difficult challenges. Indonesia has made great strides over the past 15 years in its transformation to the second largest democracy in the world. Part of that process has been the greater implementation of the rule of law - however, there is still a long way to go. The Law Council believes it can offer more assistance to various non government organisations to enhance exchanges of people and ideas between Indonesia and Australia.
 47. Any expression of an opinion regarding the Indonesian legal system must be done respectfully and in "non inflammatory" language. Some comments made by Australian lawyers during the Schapelle Corby case did not either advance Ms Corby's cause or that of mutual respect between the respective professions. Indonesians are a proud people and expect to be treated respectfully. That of

course, should not inhibit respectful advice and reasoned criticism – always having regard to the difficulties Indonesian lawyers labour under.

India

48. Over the past ten years, the Law Council has worked to develop closer links with the Indian legal profession and with legal professional bodies in India.
49. Key objectives for the Law Council have been to:
 - a) seek recognition of Australian law degrees for the purpose of admission to legal practice in India (12 Australian law schools which have applied for recognition of degrees have been recognised);
 - b) enter into MOU with the BCI – the regulatory body of the legal profession in India (achieved June 2010); and
 - c) improve professional mobility between Australia and India (i.e. seek the introduction in India of rules to formally permit the practice of foreign law on a fly-in/fly-out and permanent basis by Australian lawyers in India).
50. The BCI is a statutory body created under the *Advocates Act 1961* to regulate and represent the Indian legal profession. It prescribes standards of professional conduct and etiquette and exercises disciplinary jurisdiction over the bar. It is the peak legal professional regulatory body in India and represents 1.7 million advocates across India through its constituent State Bar Councils.
51. The BCI sets standards for legal education and grants recognition to universities whose degrees in law will serve as qualification for enrolment as advocates/lawyers. The BCI also conducts representative functions by protecting the rights, privileges and interests of advocates and generating income to provide financial assistance to organise welfare schemes for advocates.
52. In 2010, the Law Council signed MOU and a Partnership Agreement with the BCI after the Law Council received support from DFAT and the AGD to coordinate a visit by the BCI to Australia.
53. The Law Council has continued to engage with the BCI and has kept a watching brief over topical legal issues in India including the *Balaji Case* (see below); legal education reforms led by both the BCI and the Indian Government; and the introduction and development of the All India Bar Exam.
54. The Law Council has pursued liberalisation through consultation regarding the proposed Australia-India Closer Economic Cooperation Agreement (AICECA).² This submission comprehensively set out the interests of the Australian legal profession in India regarding the liberalisation of legal services. Together with the MOU, this agreement describes each organisation's desire to strengthen links between the Australian and Indian legal professions and engage closely in areas of mutual interest, including the liberalisation of legal services in India, facilitating bilateral exchanges of lawyers, academics and students and supporting reform of the legal education sector in India.
55. The Law Council notes the significance of India as a trading partner for Australia and supports the Australian Government's activities to improve opportunities for

²On 30 January 2012, the Law Council made a submission to DFAT in relation to the proposed AICECA. The Submission is available from the Law Council Website.

trade and investment between India and Australia and to seek the relaxation of tariffs and behind the border barriers for trade between India and Australia.

56. The regulatory framework of the legal profession in India imposes many restrictions on legal practice, including the practice of foreign law in India. These restrictions prevent or substantially impede Indian companies and Australian companies in India from accessing quick, accurate and high quality advice on the operation of Australian law.
57. India's framework for the domestic regulation of legal services maintains artificial barriers to trade in services which are contrary to India's commitments under the General Agreement on Trade in Services (GATS). These barriers are costly to India's economy and severely impede both the speed and efficiency of international transactions between Australian and Indian business sectors.
58. Elimination of these barriers requires careful consideration because of the risk of exposing India's domestic market to international pressures. The Law Council believes that, as has occurred in Australia over the past two decades, legal services market liberalisation in India should be progressed through a collaborative partnership between the legal profession and government.
59. In May 2013, Mr Justin Dowd, Executive Member of the Law Council, participated in a Legal Services Mission to India led by the Secretary of the AGD. In addition to this, the President and President-elect of the Law Council held meetings with Mr Prashant Kumar, Chair of the All India Bar Association and Gopal Subramaniam, former Solicitor-General of India in Zurich during the International Bar Association 2013 mid-year conference. The Law Council would welcome the opportunity to meet with DFAT to discuss outcomes from these meetings and consider opportunities for future engagement.

Legal Regulation and Education

60. The most significant reform of legal professional regulation in India, since the introduction of the *Advocates Act 1961*, was the passing of the *Limited Liability Partnerships Act 2008* (LLP Act). The LLP Act made it possible for law practices to utilise alternative business structures and enabled foreign law practices to establish 'consultation offices.' However, whether law practices may use corporate structures continues to be the subject of debate and both the Indian Government and the Bar Council of India have been silent on the issue which has led to several firms choosing to incorporate without clear direction.
61. Debate over the proposed *Legal Practitioners (Regulations and Maintenance of Standards in Professions, Protecting the Interest of Clients and Promoting the Rule of Law) Bill 2010* and *Higher Education and Research Bill 2011* (amongst others) has erupted since they were announced.
62. The proposed *Higher Education and Research Bill 2011* seeks to establish a national Commission for Higher Legal Education and Research which is composed of renowned professionals and jurists.
63. In June 2012, the Indian Human Resource Development Minister wrote an open letter to the legal profession imploring their support of the proposed *Higher Education and Research Bill 2011*. The response from the BCI was to lead the Indian legal profession in a nationwide protest on 11-12 July 2012.
64. In addition to the *Higher Education and Research Bill 2011*, the BCI and state bars also opposed the *Foreign Educational Institutions (Regulation of Entry and Operations) Bill 2010*, reforms to the *National Accreditation Regulatory Authority for Higher Educational Institutions Act 2010*, the *Prohibition of Unfair Practices in*

65. On 23 September 2012, the Law Minister of India, Mr Salman Khursid announced that legal education would remain within the purview of the Bar Council of India.

A.K.Balaji v Government of India & others W.P. No.5614 / 2010

66. On 18 March, 2010, Chennai advocate AK Balaji filed a writ petition on behalf of the newly-formed Association of Indian Lawyers against 31 foreign law firms and legal process outsourcing provider Integreon, claiming that they were practising law illegally in India.
67. Two Australian firms – Freehills and Clayton Utz – were named as respondents as well as Norton Rose (now Norton Rose Fulbright), the Bar Council of India and others.
68. On 21 February 2012, the Madras High Court handed down its decision. The Court upheld the general prohibition of the practice of law in India by foreign law firms or lawyers under the *Advocates Act 1961* and the BCI Rules. Significantly, however, the Court also held that:
- a) there is no bar to foreign law firms or foreign lawyers providing legal advice in relation to “foreign law or their own legal system of law and on diverse international legal issues” for temporary periods on a fly-in, fly-out basis;
 - b) there is no bar to foreign lawyers visiting India to conduct international commercial arbitration; and
 - c) legal process outsourcing (LPO) does not constitute ‘non-litigious legal practice’ and LPO companies may continue to provide LPO services to foreign and domestic clients.
69. The decision has been appealed to the Supreme Court and is unlikely to be resolved before 2014.

South Korea

70. The Law Council has a close relationship with the KBA and has engaged closely with the KBA in areas of mutual concern, in particular, in relation to the liberalisation of legal services in Korea.
71. On 27 May 1998, the Law Council and the KBA entered into MOU on strengthening legal exchange and friendly cooperation. On 3 July 2008, the KBA and the Law Council signed another MOU, reaffirming the principles of the previous agreement in recognition of the strength of their ongoing relationship, and committing to support existing international activities of the International Bar Association and LAWASIA.
72. Under the terms of the 2007 Korea-US FTA, Korea agreed to a progressive opening of its legal market to American lawyers and firms in return for a reduction of certain commodities tariffs. The agreement has been criticised by the KBA amid concerns that “the nation could become more litigious and set off a 'domino effect' that leads to the domination of the domestic market by foreign law firms (a concern that arose in Germany a decade ago). There are also issues around differences between Western and Korean notions of the rule of law.”
73. There are currently few links between the Australian and Korean legal professions. The Law Council's ILS has a small Chapter based in Seoul. The Law Council hopes to strengthen engagement with the KBA and the Korean legal profession through

development of the Chapter and is seeking opportunities to engage directly with the KBA.

74. DFAT supported the Law Council to engage with the KBA in 2012 when Mr Dali Son, Vice-President of the KBA participated in a joint-seminar in Tokyo, Japan hosted by the Law Council and the JFBA. The focus of the seminar was liberalisation of legal services markets in Asia. The Law Council looks forward to the opportunity to discuss possible future engagement with the Korean legal profession with DFAT.

LAWASIA

75. LAWASIA was formed on the initiative of the Law Council in 1966. It remains the most prestigious and influential of the Asian legal profession regional bodies.
76. An advantage to the Law Council is its experience with representation at senior level within LAWASIA because of its traditional and ongoing links with Australia. LAWASIA has had four Presidents from the Law Council since 1966.
77. Engagement in, and support of, LAWASIA has also facilitated the development of the Law Council's strong relationships with counterpart bodies in Asia.
78. LAWASIA enables the Law Council to extend its influence in the region in a variety of ways:
- a) The LAWASIA Annual Conference provides an opportunity for the Law Council to advance its International objectives through side meetings with bar leaders and events. For example, at the LAWASIA Conference in November 2012, the Law Council signed MOU with the Law Society of Hong Kong.
 - b) Through LAWASIA, the Law Council has participated in missions to troubled areas – allowing the Law Council to increase its profile and demonstrate its leadership within the region. Over the last decade, the Law Council has been represented in missions to Fiji, Papua New Guinea, Pakistan and Nepal. All of these missions involved meetings with government, the judiciary and the local peak legal professional body to discuss concerns about the rule of law issues which had arisen.

Liberalisation of legal services

79. Legal services markets in Asia and the subcontinent have liberalised at varying rates due to different social, political and economic triggers and vocal opposition to liberalisation by the legal profession in some countries. Depending on how liberalisation is achieved, the benefits for the domestic legal sector and for industries which rely on legal services can be substantial.
80. Domestic concerns with liberalisation in the Asian region focus on perceived loss of sovereignty and the risks to the domestic profession of the loss of a monopoly on legal service provision.
81. Success in liberalising legal service provision depends on how well Australian lawyers and law firms are able to overcome structural impediments in Asia, including different legal cultures (civil versus common law; role of religious law); disparate approaches to legal education; limits on reciprocal recognition and admission; residency requirements and domestic professional regulation.

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82. Generally, liberalisation works in the favour of mature markets, providing opportunities for the providers in the mature market to exploit opportunities in the emerging market. The targets identified by the White Paper include a mix of mature and emerging markets.
 83. The liberalisation of legal services in Australia provides an excellent example of how legal services market liberalisation can benefit the domestic legal sector while 'growing the pie' and actively promoting opportunities for foreign lawyers and law practices.
 84. General initiatives to support the legal services market between Australia and the five target countries must draw heavily on the measures identified in the White Paper, particularly by:
 - a) increasing competitiveness of Australian lawyers to participate in these markets through language and legal/cultural familiarity; and
 - b) developing mutual trust and confidence through engagement with Law Societies/Bar Associations and re-focussing on the provision of international legal education.

Japan

85. Japan presents as the most liberalised legal services market amongst the five target countries. Certain cooperative joint enterprises have been permitted for a decade, and "full liberalisation," involving foreign employment of local lawyers and joint ventures, was introduced in 2005 although some business limitations continue to apply.
86. The emphasis for future Japanese engagement should therefore be based on relationship-building.

China

87. It has been suggested that China "should be regarded as a liberalised market in terms of permitting foreign law firms to practise foreign law," although "it is still restricted in terms of allowing joint ventures or partnerships with Chinese law firms or allowing foreign law firms to practise Chinese law."³
88. Such a contradictory approach might be explained by the control that the centralized government wants to have on the whole country, with particular emphasis on civil liberties.
89. For the purposes of an engagement strategy, it has "a somewhat unique bifurcated regulatory system, where foreign law firms are regulated not by the local associations but by the Ministry of Justice," which leads to uncertainty in distinguishing between the practice of People's Republic of China and of foreign law.⁴
90. It is likely that the Chinese priority in liberalising legal services is to allow time for domestic firms to develop before opening the market further, but regulatory integration will be required before equality of access can be achieved. However, regulatory integration might not be possible without a cultural understanding of local

³ See article by Andrew Godwin, Associate Director (Asian Commercial Law) of the Asian Law Centre at the Melbourne Law School at the University of Melbourne <http://www.lawcouncil.asn.au/lca/index.cfm?13AD5494-AEC2-5B6B-5D13-7CD599FEB644>.

⁴ Ibid.

legal practices. In this respect, China might be seen as a unique environment where the nominal liberalized market is fully controlled and regulated by a centralized government. A number of major international firms have already expanded into the Chinese market, but such expansion has been limited to the practice of foreign law which limits the potential market. In order to be competitive, Australia must develop an approach that has a comparative advantage compared with other common law systems (UK & USA) that are seeking to exploit the booming Chinese market.

91. A large impediment to deepening engagement between the legal professions of Australia and China is the lack of understanding of each other's legal systems. The origins of the Chinese legal system are deeply historical. In some aspects, the Chinese legal system is closer to the legal systems of continental Europe than to the English common law. The Chinese legal system is influenced in other areas by the systems of the Soviet Union. There is also traditional imperial Chinese law that continues to permeate many areas, both socially and legally. These factors, and the thinking behind them, are a major cause of the gap between form and reality, and between how lawyers study and learn the profession, and how they practise within it.
92. In contrast, the Australian legal system stems from the English system of the common law, equity and legislation. The two legal systems have vastly different historical origins. This should not be overlooked when examining Australia's engagement with China and China's engagement with Australia.

Indonesia

93. Indonesia has specifically committed to a 'GATS-plus' approach to legal services in the ASEAN-Australia-New Zealand Free Trade Agreement (2010), although it does not appear to have resulted yet in a changed approach.
94. The agreement indicates that Indonesia is likely to be receptive to a strengthened legal services relationship with Australia, so long as the engagement acknowledges and addresses Indonesian concerns.
95. There would seem to be greatest scope to shape the liberalising process in Indonesia by emphasising the development of legal education links to bridge perceived cultural gaps between Australia's common law tradition and Indonesia's French-derived civil law structure.

India

96. India has a recent history of litigation confirming that only Indian citizens qualified to practice Indian law may practice as advocates under the *Advocates Act 1961*, thus the most pressing issue for liberalising legal services on a bilateral basis is the preliminary one of a mutually satisfactory reciprocal recognition structure. Moreover, India has attempted to levy tax on legal work related to India, regardless of the location in which the work is performed.
97. Emphasis should be made to engage with India to develop a mutually satisfactory reciprocal recognition agreement.

South Korea

98. Australia is well-placed to leverage from the US entry into the Korean market and should seek a similar agreement for progressive access to legal service provision. Essential to this will be highlighting aspects of Australian legal culture which allay the concerns of the Korean Bar Association through direct engagement with them at both a Law Council and state Law Society level.

Australia

99. Since 1992, and with the support of the Federal Government, state and territory governments and the legal profession, the Law Council has overseen 20 years of almost continuous legal profession regulatory reform.
100. Back in the early 1990s, the Law Council recognised that to compete in the rapidly developing global economy, the Australian legal profession needed to cast off protectionism and embrace liberalisation.
101. The Law Council's work over the past 20 years aimed towards a 'single national market for legal services' which, by embracing concepts of open markets and competition, has increased the competitiveness of Australia's legal profession domestically and facilitated its participation in the international legal services market.
102. Australia's system for the regulation of foreign lawyers and law firms is one of, if not the most liberal system for foreign lawyer regulation in the world.
103. In Australia, there are no restrictions on the registered practice of foreign law and any foreign lawyer is permitted to practice on a temporary basis for up to 90 days without registration of any kind.
104. There are over a dozen Chinese law firms currently operating in New South Wales alone. These firms are entitled to employ Australian lawyers as employees or partners.
105. Australia's system is flexible, inclusive and enables Australian and foreign businesses to access expert legal advice on foreign and international law.
106. It is this principle of access to legal advice which underpins the Law Council's promotion of practice rights for foreign lawyers internationally.
107. The Law Council believes that the best lawyer to provide legal advice on Australian law is an Australian lawyer, just as the best lawyer to provide advice on Chinese law is a Chinese lawyer and the best lawyer to provide advice on the protection of intellectual property is an IP lawyer.
108. Comprehensive legal advice as part of due diligence can prevent substantial losses through risk evaluation and mitigation.
109. Experience suggests that legal advice before things go wrong is a lot less expensive than legal advice after things go wrong.
110. The recent troubles of the CITIC Pacific Mining partnership is a troubling example where timely advice may have prevented losses and a budgetary blow out of nearly \$5 billion (USD).

Comments for consideration

111. International law firms with practices in Australia are currently managing the challenge of delivering local legal services in the target jurisdictions by forming associations with local firms or merging their practices where local rules permit this. Liberalisation will not have a material effect on this activity or increase the risk significantly for domestic law firms.
112. Opportunities exist for the export as well as the import of legal services and lawyers. Liberalisation should therefore be encouraged on a reciprocal basis. Particular effort should be made to achieve such reciprocal behaviours in target jurisdictions where local rules are less favourable to Australian lawyers, for example India.

Consideration should also be given to whether such activities should include early or late liberalisation of domestic rules in favour of the target jurisdiction.

113. Further analysis should be undertaken to determine the appetite for Australian qualified lawyers to practice in the target regions in favour of referring work to local lawyers.
114. Further analysis should also be undertaken to understand what rights Australian qualified lawyers have to work in the target jurisdictions. For example, Singapore acts as a gateway to work in parts of Asia such as Thailand; to what extent do any of the target jurisdictions either require access through a gateway or provide a gateway to other regional jurisdictions?

Rule of law and capacity building in the law and justice sector

Rule of Law

115. A central component of the Law Council's work is promoting respect for the rule of law at home and abroad.
116. In short, the "rule of law" is the principle that no single individual is above the law. The "rule of law" is also a mechanism to provide impartial control of the use of power by the State. Key features of the rule of law include: equality of all before the law; an independent, impartial judiciary; the right to a fair and public trial; and a strong and independent legal profession.⁵
117. In Australia, as in many countries around the region, there are many challenges to overcome when seeking to ensure Australian laws are developed and applied in a manner consistent with rule of law and human rights principles. The Law Council devotes considerable energy to monitoring and reviewing Australian laws and government policies to ensure they comply with rule of law principles.
118. Similarly, the Law Council's overseas work has led it to promote and defend the rule of law in the Asia Pacific region and to advocate the role of an independent judiciary and an independent legal profession in a just and stable society.
119. The Law Council considers that when rule of law breaks down, and state laws and institutions cannot be relied upon to regulate the behaviour of the government or its citizens, economic development inevitably suffers. A country's international reputation as a place to do business can be seriously undermined by the absence of indicators of respect for the rule of law. Therefore, it is critical that policy makers in all nations seek out ways to establish or strengthen the rule of law in their countries.
120. This can be done through a variety of means, including building capacity in state institutions such as courts and corrections facilities, supporting the development of an independent legal profession and ensuring robust protection for human rights.
121. Countries in our region that have strengthened the rule of law have stimulated economic growth and created higher standards of living. Their judicial systems are becoming more open and predictable, courts can be relied upon to resolve commercial disputes, and laws have been enacted to tackle corruption and to

⁵ In order to articulate some of these key principles, the Law Council has adopted a Rule of Law Policy Statement which acts as a guide to the framework often employed by the Law Council in evaluating the merits of government legislation, policy and practice in the Australian context. This is available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/rule-of-law.cfm>

protect individual rights. These developments have been supported by the work of the independent legal profession.

122. The Law Council is active in monitoring and (as far as practicable) intervening in regional issues where there is a perceived threat to the independence of the judiciary, the independence of the profession or a threat to the rule of law.⁶ Wherever possible, the Law Council's work in this area, supports and or complements the work of international lawyers' associations. Some of the Law Council's work in this area is set out below.
123. "Intervention" embraces direct representations to foreign governments, public support for campaigns by local law societies, delegations to foreign governments, appointing trial observers, and raising the profile of a particular issue within international law associations. Underlying the Law Council's work to promote and uphold the rule of law internationally is the development of the Law Council's profile as a leader of the legal profession in the Asia-Pacific region.

Capacity building in the law and justice sector

124. Australia has a vested interest in ensuring that the legal profession in the Asia-Pacific region is represented by a strong local lawyer association in each country, particularly in developing nations. A strong and independent legal profession contributes to the maintenance of the rule of law.
125. The Law Council also has a vested interest in promoting the adoption throughout the region of infrastructure and values within law associations which are equivalent to its own. Furthermore, as a large and relatively well resourced legal association, the Law Council has a corporate and moral responsibility to share its expertise with developing bars within the region. Its capacity building work in this respect is also discussed below.

Law Council's regional role

Rule of law intervention

126. In 2009, the Law Council was requested by the Malaysian Bar Council to send an observer to attend the trial for sedition of Mr Karpal Singh. Following liaison with LAWASIA, the Commonwealth Lawyers' Association and the Union Internationale des Advocates, the Law Council's Human Rights Panel appointed the Hon. Jeffrey Miles AO, former Chief Justice of the Australian Capital Territory to observe the trial on behalf of each of these bodies and the Law Council. A detailed report was prepared and was published widely by the Law Council and other bodies.
127. In August 2011, the Law Council wrote to the President of LAWASIA expressing support for LAWASIA's statement condemning the actions of Malaysian authorities in attempting to prevent the Berish 2.0 rallies from taking place in Malaysia in July 2011. The Law Council's letter followed recent reports that 100 people were detained, and 1600 people arrested following the rallies, and that members of the legal profession had been subjected to repressive measures when seeking to exercise their constitutional rights of freedom of expression and freedom of assembly. The Law Council expressed support for calls by the Malaysian Bar and LAWASIA for an independent investigation by SUHAKAM (the Human Rights Commission of Malaysia) into the way the Malaysian authorities executed their crowd control functions at the rallies, and called for the Malaysian government to be

⁶ The Law Council has developed a set of principles which guide whether or not it will intervene in a matter. These principles are available at <http://www.lawcouncil.asn.au/programs/international/rule-of-law.cfm>.

mindful of not only the rights of Malaysian citizens, but also the importance of adhering to democratic processes and the rule of law.

128. The Law Council drafted a resolution for consideration by LAWASIA at its Council meeting in November 2012, which strongly condemned recent violent incidents, such as the torture and beheading of a young woman in October 2012 by her mother in-law and another male relative for allegedly refusing to become a prostitute, and the execution of a young Afghan woman by her husband in front of hundreds of spectators in July 2012 for allegedly committing adultery. The resolution called on the Afghan Government to: uphold the rule of law; improve protections and support for women who have been subjected to violence; and ensure that the perpetrators of these violent acts and human rights abuses are brought to justice. LAWASIA issued a statement on 18 November 2012 condemning violence against women and calling on the Government to take the action as outline in the Law Council's draft resolution.
129. The Law Council drafted a resolution for consideration by LAWASIA at its Executive Committee meeting in April 2013, which highlighted the ongoing imprisonment and poor treatment of several Iranian lawyers and the need for the Iranian government to respect the independence of the legal profession. The resolution called on the Iranian government to recognise the fundamental importance of an independent legal profession and the rule of law in Iran; end the politically-motivated imprisonment and mistreatment of lawyers who are simply upholding and defending the rights of their clients; and respect the human rights of both lawyers and the clients they are trying to defend. The resolution was adopted by LAWASIA on 21 April 2013.

South Pacific Lawyers' Association

130. In 2007, the Law Council sought and obtained funding from AusAID to support the hosting of a 'South Pacific Forum.' The Forum brought together 21 delegates from 11 countries to participate in a program of meetings and events in Melbourne, Canberra, Sydney and Brisbane and culminated in the inaugural South Pacific Lawyers' Roundtable.
131. At the Roundtable, delegates voted unanimously to establish a Steering Committee to guide development of the South Pacific Lawyers' Association (SPLA) with a small Secretariat to be established within the Law Council Secretariat using seed funding from the International Bar Association.
132. Since 2007, the SPLA has grown from 'just an idea' into an entity with its own Constitution, Executive, quality publications and projects in areas of priority to its constituent member law societies and bar associations. The SPLA continues to be strongly supported by the Law Council.

Centre for Asia Pacific Pro Bono

133. In 2011, the Law Council sought and obtained funding from the AGD to establish the Centre for Asia-Pacific Pro Bono (CAPPB). CAPPB was formally launched by the then Commonwealth Attorney-General in July 2012 and since then has facilitated ten international requests for pro bono assistance (exceeding the benchmark of three requests per year).
134. CAPPB has created opportunities to liaise with AusAID regarding its activities in the law and justice sector in the Asia-Pacific and to strengthen the Law Council's networks with AusAID program coordinators throughout the region. As these networks develop, it is hoped that the Law Council will be able to support initiatives and projects directed to strengthening law societies and bar associations in the region.

135. Through CAPPB, the Law Council has also had the resources and opportunity to work closely with pro bono coordinators of large law firms and legal education committees of Law Council constituent bodies. Over the next 12 months this will enable the Law Council to consider ways to improve coordination of legal assistance in the Asia-Pacific region by the Australian legal sector.

Comments for consideration

136. While recognising that there is room for improvement both domestically and regionally on these issues, the Law Council would support the inclusion in the Country Strategies of objectives and priority actions which reflect the rule of law and legal profession capacity building principles discussed above.

137. The Law Council would be happy to discuss how these principles could be addressed as the Country Strategies are developed, noting that the specific challenges which arise in each country will differ.

Attachment A: Profile of the Law Council of Australia

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

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

Attachment B: Profile of the International Law Section

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: The Philippines

What are your priorities and objectives in Philippines?

Australia has a long relationship with the Philippines on many levels especially since World War II and the movement in Australia's foreign policy towards the United States.

As an English speaking country and common law based country with a long history of democracy there is much that can be developed in the relationship.

There are over 150,000 people born in the Philippines living in Australia with even greater numbers when second generation Filipinos are included.

What opportunities are there to deepen our engagement across the board, including through people-to-people, economic and political/strategic links?

Australian enterprises may not always prioritise the Philippines and many Filipinos look more to the United States rather than Australia when considering opportunities. For Filipino companies Australia could be presented as an opportunity to test products in a culturally Western First World market preparatory to the United States market. Australia offers geographic specific advantages that may not be front of mind that is, Perth shares its time zone with the Philippines.

Opportunities exist to grow links in areas such as education and training with education seen as a culturally important in the Philippines especially in trades and the professions. Mining is a growing and important market. Education in skills relevant to the mining industry, including potentially scholarships, has the potential to be of benefit in promoting both Australia's educational services and ready skills resource for the mining sector.

How is the pace and shape of political, economic and social change in these countries affecting your engagement?

Corruption and internal political unpredictability due to the personality nature of politics in the Philippines remains a significant factor in the relationship. The Philippines political and legal system tends to be insular in approach and outlook.

How can we support stronger social and cultural links with these countries, for example through networks of Australians living in these countries or through communities in Australia?

The relationship needs to be based on principles of mutual trust, respect and benefit. The long colonial history of the Spanish and then the United States may lead to concerns about engagement with developed countries that the relationship will not have mutual benefit. The continuing focus on aid and support to the Philippines Government should be maintained.

Education provides a significant opportunity for greater growth with Australia's respected tertiary and technical training being promoted into the Philippines.

What more can Australia do to connect productively in trade and investment, innovation, research and development?

The use of back office services on the Philippines has been growing. By growing education and trade links Australia can assist in ensuring the reciprocal exchange of intellectual capital.

Are there lessons Australia can learn from our past experience in developing relations with these countries?

The focus on confidence building measures in investment in infrastructure and education provides a good blueprint for future engagement.

At some stage the relationship will develop beyond its current level as increasing sectors of the Filipino economy increase in sophistication. Australia needs to be conscious of the increasing sophistication offered in South East Asia and tailor its policies to take advantage of the changing opportunities as and when they arise.

What are the key barriers, challenges and risks in progressing our relations with these countries?

Internal levels of corruption in the Philippines, the on-going conflict in South Philippines and ongoing communist insurgency present a difficult challenge to growing the relationship.

The lack of predictable outcomes and modes of behaviour from the Philippines Government and government related bodies creates a significant barrier to increased engagement. Less challenging alternatives in South East Asia will be preferred until the issues are diminished.

As a destination Australia struggles to be considered as an alternative over the United States and China, with the significant Chinese community in the Philippines and the very close geographic relationship between the two countries.

The relationship may suffer collateral damage if either country has difficulties in their bilateral relationship with either China or the United States ie increased tensions between China and the Republic of the Philippines in relation to issues such as the South China Seas would create significant difficulty for Australia's respective bilateral relationships.

Significant restrictions apply in the provision of services. Trade liberalisation in that area would be beneficial but faces very significant political impediments in the Philippines.

How can we assess the effectiveness of Australia's efforts to deepen and strengthen relations with these countries?

The levels of person-to-person contact needs to be progressed in the growth of bilateral trade between the two nations.

Not only must levels of bilateral trade be monitored but for both nations the quality of trade in terms of value adding is important to ensure that the trade relationship reflects a viable long term relationship.

Attachment D: Liberalisation of Trade in Legal Services

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

International Legal Services Advisory Council (ILSAC)