



Australian Government



**International Legal Services Advisory Council
(ILSAC)**

Submission on Legal Services

to the

Department of Foreign Affairs and Trade

in respect of the

**Indonesia-Australia Comprehensive Economic
Partnership Agreement
(IA-CEPA)**

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1. *International Legal Services Advisory Council (ILSAC)*

The International Legal Services Advisory Council (ILSAC) is a part-time, voluntary advisory body established by the Australian Government to advise the Attorney-General and other Ministers on matters relating to Australia's international performance in legal and related services. Detail of ILSAC's functions and activities are available at www.ilsac.gov.au.

2. *Market access priorities in Indonesia of Australian lawyers and law firms*

As Australia's thirteenth largest trading partner with over \$9 billion in two-way trade¹ and close geographic proximity, Indonesia is an important trading partner and a significant market for legal services, particularly in resource and infrastructure related projects. Australia's services exports to Indonesia continue to grow, amounting to \$1,200 million in 2009², representing an increase of 26% since 2005³. Exports in services to Indonesia are likely to continue to grow given Indonesia's buoyant growth rate (GDP grew at 6.2% in 2011)⁴ and the large share of GDP represented by the Services Sector (37.1% in 2009)⁵.

ILSAC is of the view that under an Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), Australia should pursue:

1. A right for Australian licensed lawyers to enter Indonesia and provide legal advisory services in foreign and international law⁶ as 'foreign lawyers', on a temporary fly-in, fly-out basis and through representative or branch offices of Australian law firms, without being required to meet minimum residency requirements.
2. A right for Australian lawyers and law firms to establish offices (commercial presence) in Indonesia with a right to use own firm name or a firm name of their choice, respecting customs or general usage conventions in Indonesia.
3. A right for Australian lawyers and law firms to enter into partnership, joint venture or other forms of commercial association with Indonesian law firms, including with the freedom to enter into profit sharing arrangements, or alternatively, a right to employ local lawyers.

¹ Indonesia Fact Sheet (figures for 2009-10 financial year) as at 31 December 2010 Department of Foreign Affairs and Trade at <http://www.dfat.gov.au/geo/indonesia/index.html>

² ABS Statistics, Cat 5368.0.55.004 Table No 5: International Trade in Services, Credits, Calendar Year by Country & Service, \$m

³ See above Catalogue No and Table.

⁴ CIA World Factbook, Indonesia Profile 2010. May be accessed at http://www.indexmundi.com/indonesia/economy_profile.html

⁵ See Footnote 3.

4. A right for Australian lawyers to prepare and appear in arbitration, conciliation and mediation proceedings in Indonesia.

Australian lawyers are not seeking to practise host-country law, or represent clients before Indonesian courts. Australian lawyers and law firms are primarily interested in providing fully integrated commercial legal services to corporate clients and financial institutions. A framework that permits Australian and Indonesian lawyers to work together in close commercial association will ensure the availability of fully integrated legal services that includes both domestic and foreign law components. In addition to reducing cost for clients, such a framework will play a significant role in providing the levels of confidence that major domestic and foreign investors take into consideration when making significant investment decisions.

3. Indonesia's Legal Services Sector

Most Indonesian law firms are small, generalist firms with practices spanning a wide area of mainly non-commercial work. Lawyers (known as pengacara) may be advocates or legal consultants. Legal consultants (known as penasehat hukum) are pengacara who specialise in commercial law. Penasehat hukum are usually in large law firms based on international models and most are situated in Jakarta and undertake work in all areas of corporate law. The only exception to this seems to be the area of dispute resolution which is dominated by a number of high-end and boutique firms⁷ specialising only in this area.

There are a number of Indonesian firms which are seen as “leading the pack” in transnational commercial work and most of these firms have close links to overseas firms. Several Australian law firms have close and long standing relationships with Indonesian law firms, including through the secondment of senior lawyers to local law firms in Indonesia.

Indonesia continues to be of significant interest to Australian lawyers and law firms. Indonesia was identified in late 2009 by an experienced and eminent Asia practitioner to be ‘the country with the most potential for Australian firms’ in South East Asia⁸. Transnational legal services work on major resource and infrastructure projects are seen as two areas providing substantial continuing growth opportunities. An easing of restrictions in Indonesia for Australian law firms to establish a commercial presence will play an important role in providing greater opportunities for local firms in

⁶ *Joint Statement on Legal Services* under the World Trade Organisation, TN/S/W/37 Or S/CSC/W/46 of 24 February 2005 - refer to terminology of legal services.

⁷ Same as Footnote 6

⁸ *Entry to Asian Markets: A Regulatory and Management Challenge* Jim Dunstan, Partner, Allens Arthur Robinson at the 36th Australian Legal Convention of the Law Council of Australia, 19 September 2009.

Indonesia to engage in transnational legal services work. A more open Indonesian legal services market is likely to complement, rather than rival, Singapore or Hong Kong as major hubs for Australian law firms to service the region. Currently at least twenty-seven international firms use offices in South East Asia, predominantly Singapore or Hong Kong as a base into the Indonesian market⁹. Due to similarities in culture and language with Malaysia in particular, greater integration of Australian law firms in the Indonesian legal services market is likely to provide increased opportunities for both Australian and Indonesian law firms to jointly undertake Islamic finance related work for Malaysian clients.

Reducing conditions of entry for Australian law firms will also complement Indonesia's recent initiatives in relation to foreign investment. New laws passed in 2010 provide greater certainty and clarity for foreign investors interested in investing in Indonesian mines, healthcare and postal services¹⁰. The new laws are expected to add to the current trend in increased demand for transnational legal services work. As Australia's major imports from Indonesia are petroleum and gold, the new laws relating to foreign investments in mining are likely to be of particular interest to Australian companies¹¹.

This liberalisation related foreign investment initiatives have come at a time when there has been a parallel increase in the level of intra-Asian investment into Indonesia. In the last few months Indonesia has entered into arrangements with India worth \$15 billion to obtain infrastructure equity, and media reports indicate that similar arrangements are being negotiated with China, Japan and South Korea¹². Restrictions on the establishment of foreign law firms in Indonesia have resulted in a significant proportion of this increased transnational legal work being undertaken from Singapore or Hong Kong¹³. Consequently, as the liberalisation focussed initiatives relating to foreign investment are not matched in the area of regulations relating to foreign lawyers and law firms, the potential benefits of investment liberalisation are not fully realised by Indonesian law firms aspiring to an international practice.

⁹ This information has been compiled by analyzing the offices of the top 30 US law firms listed on the website www.ilrg.com.nlj250 and by analyzing the firms listed as having offices based in South East Asia and undertake Indonesian work in the website <http://www.legal500.com/c/indonesia/foreign-firms>

¹⁰ Presidential Regulation No. 36 of 2010 regarding Business Sectors that are Closed to Investment and Business Sectors that are Conditionally Open to Investment was issued on May 25 2010.

¹¹ Department of Foreign Affairs and Trade, Indonesia Factsheet, see: www.dfat.gov.au/geo/fs/indo.pdf

¹² See the article from Online magazine, Financial Times at <http://www.ft.com/cms/s/0/51fd4e94-271a-11e0-80d7-00144feab49a.html#axzz1EgWunKp7>

¹³ The Legal 500 Asia may be accessed at <http://www.legal500.com/c/indonesia/foreign-firms>

4. *Barriers to entry for foreign lawyers*

Indonesia is among the more restrictive ASEAN economies for legal services. Only lawyers with a degree from an Indonesian law school and Indonesian citizenship have a right to practise Indonesian domestic law or establish law offices. Foreign lawyers may, however, operate as legal consultants employed by an Indonesian law practice.

The legal profession is regulated by Law No 18 of 2003 on the Advocates Profession (the Law)¹⁴. Article 23 of the Law regulates foreign lawyers in Indonesia. Paragraph 1 of Article 23 of the Law prohibits a foreign lawyer (described in the Law as a ‘foreign Advocate’) from appearing in Indonesian courts, practicing Indonesian law or opening a law firm.

Paragraph 2 stipulates that a foreign lawyer, if they are to provide foreign law legal services, must be employed as a technical expert pursuant to a work permit issued by the Indonesian Government after recommendation from the Bar Association. The work permit is akin to a visa permitting the foreign lawyer to work in Indonesia for a set period of time.

Paragraph 3 requires foreign lawyers employed in Indonesian law firms to provide pro-bono legal education services for a specified minimum number of hours. One example of this service could be tutoring or assisting academics at the local law school. Australian lawyers who have worked in Indonesia advise that they are happy to assist in this area, including contributing to knowledge transfer and capacity building initiatives.

Other restrictions on the number and ratio of foreign lawyers working in Indonesian local firms can also hamper the capacity to bring together, on a temporary basis, teams of foreign and local lawyers with specialist expertise to undertake complex or major projects.

Article 24 subjects a foreign advocate to the Indonesian Advocates’ Code of Ethics.

While not expressly stated in the Law, ILSAC has been advised that formal legal advice must be provided by Indonesian lawyers, although foreign advocates with work permits may assist in framing the advice¹⁵.

The Ministry of Law and Human Rights presently regulates work permits for foreign lawyers seeking to work with an Indonesian law firm. The process is complicated and lengthy. The prospective employing law firm must lodge an application with the Minister who needs to obtain written recommendation from the Bar Association in respect of each lawyer applying for a work

¹⁴ The Law encapsulates Indonesia’s commitments under the ASEAN-Australian-New Zealand Free Trade Agreement.

¹⁵ Legal Service Country Profile – Indonesia, ILSAC, Attorney-General’s Department, 2002.

permit. Each foreign lawyer seeking to work in Indonesia must pay in advance a fee of \$100USD per month for their time in Indonesia. We understand that there are around 40 foreign lawyers with work permits working in Indonesia as legal consultants.

5. The benefits to Indonesia of liberalisation of trade in legal services

There are a relatively small number of Indonesian law firms, which have foreign lawyers working in them, with a capacity to partly meet the demand for fully integrated commercial legal services that clients seek in relation to complex and transnational projects. Therefore, there is a constant need for additional transnational legal services expertise, which is met by Australian and other foreign law firm offices operating out of regional hubs such as Singapore and Hong Kong as well as by law firms directly from Australia.

While the liberalisation of the trade in transnational legal services will contribute to underpinning rule of law and good governance initiatives, there are two areas that are likely to gain a direct economic benefit from further liberalisation of the legal services market. Firstly, ensuring the ready availability of fully integrated commercial legal services will encourage and facilitate increased levels of foreign direct investment, thereby benefiting the Indonesian economy. The capacity for foreign investors to obtain legal services from their own lawyers (and law firms) who can then work in close association with Indonesian counterparts with the option of bringing together teams of lawyers with specialist expertise (eg. resources, infrastructure) from multiple jurisdictions, is crucial in building the level confidence and assurance to better facilitate foreign investment.

The second area that will benefit from the liberalisation of the trade in transnational legal services is the local profession. Australia's experience is that the opening of the legal services market to foreign lawyers and law firms, particularly over the last two and half decades or so, is that the advent of foreign lawyers and law firms have coincided in a corresponding increase in the export of legal services by Australian law firms. Essentially, the presence of international law firms has resulted in Australian law firms more readily looking for opportunities overseas. In addition, improved access for Australian law firms to Indonesia will provide improved access opportunities for Indonesian firms into Australia and the region through the current network of Australian law firm offices across the region and beyond.

6. *Australia's legal services sector*

As an APEC¹⁶ member, Australia has been successful in moving to achieve the Bogor Goals of open trade and investment liberalisation¹⁷. Australia's approach to an open, liberal and competitive market is reflected in the legal sector.

Australia has autonomously liberalised its legal services market creating a hospitable limited licensing scheme consistent with the 'Statement of General Principles of the Establishment and Regulation of Foreign Lawyers' adopted by the International Bar Association. Foreign legal practitioners qualified and licensed to practise the law of a jurisdiction other than Australia may gain a limited licence to provide legal advisory services through a none-burdensome registration process with a State or Territory professional body. Registration as a foreign lawyer involves:

- establishing that the foreign lawyer is duly qualified and registered to engage in legal practice in one or more foreign countries and is not an Australian legal practitioner
- satisfying requirements as to probity and good professional standing, and
- a declaration to clients of whether they maintain professional indemnity insurance.

Foreign lawyers and law firms have a right to practise foreign law and a right to enter into partnership or other forms of voluntary commercial association with other foreign legal practitioners or Australian legal practitioners, without limitation on the number and type of such associations. 'Fly-in, fly-out' legal practice, without the requirement to register as a foreign lawyer, is permitted for an aggregate duration of 90 days in any twelve month period. Foreign lawyers also have the option of seeking admission as an Australian legal practitioner. Australia has no nationality or citizenship requirement for legal practitioners, no residency requirements, and no quantitative or geographic limitations for admission.

Progressive liberalisation has produced substantial benefits for Australian and foreign lawyers and law firms in Australia, including transparency of regulation, national treatment (non-discrimination between domestic and foreign lawyers), and minimal interference in the operation of law firms and legal practice. Regulatory change has stimulated competitiveness and innovation. Australia's legal services sector and international trade in legal services have expanded, and Australian lawyers are keenly recruited in overseas jurisdictions, particularly England, the US and Asia.

¹⁶ Asia-Pacific Economic Cooperation <www.apec.org>

¹⁷ Australia's speed of liberalisation in trade and investment has been described as 'exceptional' see: APEC 2010, Bogor Goals, a publication of the Australian Government. The publication may be accessed at: <http://www.dfat.gov.au/publications/trade/APEC-2010-Bogor-Goals.html>

7. *Bilateral trade between Australia and Indonesia*

Indonesia was Australia's tenth largest export market for trade in services in 2009-10. In terms of legal services an ILSAC survey¹⁸ found that the total Australian legal services exports to and cross-border activity with Indonesia are worth about \$7 million annually, not including work undertaken on Indonesian matters from Singapore branches of Australian firms (approx a further \$2 million annually). However, these statistics may be understated by as much as 25%. Indonesia's legal services requirements are expected to increase as a consequence of the strong Indonesian economy, and growing inter-Asian investment into Indonesia.

Indonesia is one of the top ten source countries for students studying law in Australia, with 122 students either enrolled in law/legal studies or commencing law/legal studies in 2009¹⁹. Student numbers have been steadily increasing and this is an area where there is likely to be growth.

8. *Background*

8.1 *The role of legal services in trade and investment*

Legal services are essential for trade and investment. Their vital role in supporting and facilitating business forms a critical part of the infrastructure that underpins commercial transactions. Legal services enable economic and commercial activity by defining rights and responsibilities and processes for dispute resolution where commercial conflicts arise. Commercial legal services are typically categorised as *producer* (or intermediate) services provided in the form of advice to corporate clients and financial institutions. These producer legal services form the core in delivering the level of certainty and assurance required for commercial, trade and investment decisions.

Along with other business services like accountancy and information technology, legal services are increasingly traded internationally. As cross-border business transactions increase, the availability of fully integrated legal services covering the laws of multiple jurisdictions is critical to sustainability and growth of international trade and investment. Corporations, financial institutions and other clients involved in cross-border commercial transactions seek legal *advisory* services covering the laws of jurisdictions in which the transaction spans. Foreign lawyers are, therefore,

¹⁸ Conducted by FMRC Legal as a collaborative exercise with the Commonwealth Attorney-General's Department, the Law Council of Australia, Austrade and eight leading law firms. The survey was conducted in response to concerns that the official statistics may understate the export and cross-border market for legal services by not identifying earnings of overseas branch offices of Australian law firms specifically as 'exports', but rather as 'returns on investment.'

¹⁹ Statistics provided by the University Statistics Unit, Higher Education Group, Department of Education, Employment and Workplace Relations (DEEWR).

not interested in providing *consumer* legal services, which are typically services such as those relating to family law, wills and personal injury. Nor are foreign legal practitioners usually interested in obtaining a right of audience to represent clients in the courts of host jurisdictions, other than a right to appear in international commercial arbitration.²⁰ Foreign legal practitioners are predominately concerned with providing legal advisory services that facilitate cross-border commercial, trade and investment activity of their corporate clients.

8.2 Globalisation of legal services and legal practice in the 21st Century

Law firms around the world are internationalising as their clients pursue opportunities in a rapidly globalising marketplace. The nature of legal services as a key business input has been transformed with the emergence of borderless commerce and client demand for multi-jurisdictional advice. The importance to international trade and investment of a regulatory framework that facilitates the ready provision of transnational legal services and service suppliers is paramount.²¹ Such systems are seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment. Australia's approach to the liberalisation of legal services has been influenced by ILSAC's Principles for the Liberalisation of Trade in Legal Services.²² An increasing number of countries are establishing regulatory frameworks, guided by similar principles, to facilitate international trade in legal services.

8.3 Multilateral developments

Australia has made a significant and positive impact internationally by promoting the liberalisation of trade in legal services through the World Trade Organisation's General Agreement on Trade in Services (GATS). Australia's role in legal services negotiations under the WTO has been supported by Australia's own legal services commitments under the Uruguay Round and offers under the Doha Round of negotiations. Australia chairs the Friends Group on Legal Services under the GATS and is recognised as a leader in promoting the liberalisation of trans-national trade in legal services.

Indonesia's offer on services at the Doha Round of negotiations reflects the foreign lawyer regime established in the law, providing that foreign lawyers:

- are only allowed as employees or experts in Indonesian law firms

²⁰ WTO, 'Legal Services: Background note by the Secretariat' S/C/W/43, 6 July 1998, paragraph 4.

²¹ WTO, 'Communication from Australia: Negotiating Proposal for Legal Services' S/CSS/W/67, 27 March 2001, paragraph 2.

²² Australian Government, Attorney-General's Department, 'International Legal Services Advisory Council Fifth Triennial Report' 2004-2007, 17.

- employed in a firm cannot exceed 20% of the proportion of lawyers in the firm and no more than 5 foreign lawyers per firm
- are obliged to transfer knowledge and teach skills to Indonesian lawyers, and
- are obliged to undertake voluntary work in education, legal research or a government institution for at least 10 hours per month.

This offer only provides for access under the GATS service delivery Mode 4 (temporary movement of natural persons) and does not provide sufficient flexibility to efficiently deliver transnational commercial legal services demanded by clients. The IA- CEPA provides an opportunity for Indonesia to take another step towards legal sector liberalisation in a safe environment by providing Australian law firms with a right to establish branch offices (GATS Mode 3: commercial presence).

8.4 Regional and bilateral developments

Both Indonesia and Australia are members of the Asia-Pacific Economic Cooperation Forum (APEC) and Indonesia is also a member of the Association of South-East Asian Nations (ASEAN). Both Australia and Indonesia are founding members of the East Asia Summit.

Australia has been strengthening ties with APEC countries including Indonesia through a series of regional initiatives. Australia was the major proponent of the Asia Pacific Economic Cooperation (APEC) Legal Services Initiative and the Initiative has led to the creation of a website through which APEC members are informed of the level of liberalisation in legal services offered by individual APEC economies. This initiative has been widely supported by APEC members and aims to increase the level of confidence within APEC economies concerning the benefits associated with the mobility of lawyers across borders.

Australia has also promoted the liberalisation of transnational trade in legal services through the Individual Action Plan process under APEC. The Individual Action Plan, which was updated annually, sets up regulatory provisions applicable to both goods and services sub-sectors across the economy. It also identifies regulatory improvements foreshadowed or implemented by the APEC economies each year.

Australia has free trade agreements with New Zealand, ASEAN, the USA, Thailand, Singapore and Chile and is in various stages of negotiations with China, Korea, Malaysia, the Gulf Cooperation Council, Japan and collectively with eight countries in the Trans-Pacific Partnership²³, and thirteen

²³ Countries involved in the Trans-Pacific Partnership negotiations are Australia, Brunei, Chile, Malaysia, Peru, New Zealand, Singapore, the US and Vietnam.

members of the Pacific Islands Forum²⁴. Improving the professional mobility of legal service providers continues to be an important aspect of these negotiations.

Indonesia is not new to FTA negotiations and as a member of ASEAN, Indonesia has been involved in FTAs with China, India, South Korea, Japan, Australia and New Zealand. Indonesia is also currently negotiating an FTA with the USA and is considering the possibility of commencing FTA negotiations with Pakistan.



²⁴ Countries involved are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

PRINCIPLES FOR LIBERLISATION OF TRADE IN LEGAL SERVICES

Bearing in mind the general principles set out in the General Agreement on Trade in Services (GATS) of MFN (non-discrimination between countries), national treatment (non-discrimination between domestic and foreign entities), and transparency, as well as the other matters provided for, and the four modes of delivery for a services described in the Agreement, the following guiding principles appear particularly relevant to achieving 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 three 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 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.

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