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Ms Elisabeth Bowes
Chief Negotiator for the Australia-UK FTA

CC: Australia-UK FTA Coordinator
Regional Trade Agreements Division
Department of Foreign Affairs and Trade
RG Casey Building, John McEwen Crescent
Barton ACT 2600

By email: ukfta@dfat.gov.au
CC: Arjuna.Nadaraja@dfat.gov.au

Dear Ms Bowes

Legal services under the Australia-UK Free Trade Agreement

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission with respect to the Free Trade Agreement between Australia and the United Kingdom (**AU-UK FTA**).
2. The Law Council is grateful to the International Trade and Business Committee of its International Law Section, the Law Society of New South Wales, Queensland Law Society, the Bar Association of Queensland and Law Firms Australia for assisting with the preparation of this submission.
3. The Law Council notes that Australia and the United Kingdom (**UK**) share a common legal tradition and similar professional standards, and our two professions enjoy a close relationship. In both jurisdictions, the option to spend a period practising in the other country (or participate in a secondment or exchange) is an attractive prospect to advance a lawyer's career. In terms of outward movement, in the years following admission, Australian junior solicitors often choose to avail themselves of opportunities to transfer to UK branches of their firm, or otherwise leave their employment, to pursue several years of legal experience in the UK. In terms of inward movement, traditionally it is the more experienced UK solicitors who seek to relocate (either temporarily or permanently) to Australia and gain local admission.
4. The Law Council understands that the priorities expressed by the UK legal profession with respect to improved legal market access include:
 - (a) Greater recognition of professional legal qualifications obtained in the UK to enable admission without additional study (i.e. a Mutual Recognition Agreement);
 - (b) Greater uniformity of regulation across States and Territories with respect to practise and admission of foreign lawyers;
 - (c) Clearer guidelines for admission with prior experience and conditional admission under the *Legal Profession Uniform Law (LPUL)*; and
 - (d) Greater availability of business structures.
5. The Law Council notes that due to Australia's robust education and regulatory scheme, Australian lawyers are highly regarded around the world – including in the

UK. Facilitating the professional mobility of Australian lawyers, and maintaining the high level of professional standards expected of Australian legal professionals by consumers, should therefore be a priority in the Department's negotiations.

Access to legal services markets

6. The Law Council notes that Australia and the UK have long had good access to each other's legal services markets.
7. UK lawyers can readily practise UK law in Australia on either a temporary (fly-in/fly-out) or permanent basis. As an Australian-registered foreign lawyer, there are no restrictions on UK lawyers practising UK law in Australia on their own account; as employees; in partnership with Australian and/or other foreign lawyers; or within any of the alternative business structures available to Australian law practices. The ability of UK lawyers to practise UK law alongside Australian lawyers brings substantial benefits to Australian law practices and their clients.
8. The Law Council expects that the AU-UK FTA will ensure the mutual recognition of the following rights:¹
 - (a) The right to establish a commercial presence (through branch office or other legal presence with a right to establish one or more commercial presences as provided to local lawyers) and, where a commercial presence has been established, the option to use the firm name used in Australia respecting local customs or usage in the host country;
 - (b) The right to provide legal services covering the laws of multiple jurisdictions in respect of which the Australian legal service provider or employees of the Australian legal service provider are qualified to advise;
 - (c) The option to enter into commercial association with local lawyers and law firms, with the freedom to negotiate fee and profit-sharing arrangements;
 - (d) The right to provide legal services on a fly-in/fly-out basis, without mandatory residency or registration requirements;
 - (e) The opportunity to participate in secondments and similar exchange programs to and from the host country;
 - (f) The right to prepare and appear in arbitrations, conciliations and mediations as well as provide services as Arbitrators, Conciliators and Mediators; and
 - (g) Non-burdensome visa conditions and processes for both independent service providers and intra-corporate transferees.

Admission to the legal profession

(i) Admission of UK lawyers in Australia

9. A person seeking admission to the Australian legal profession must:
 - (a) obtain tertiary academic qualifications that include the equivalent of at least 3 years' full-time study of law (including completion of 11 prescribed academic subjects – referred to as the Priestley 11);
 - (b) complete prescribed practical legal training; and
 - (c) satisfy the 'fit and proper' person requirements.
10. Admission to the legal profession is a matter for the Supreme Court of each State and Territory, although the expressions "Australian lawyer" and "Australian legal practitioner" are generally used as descriptors, reflecting the principle of mutual recognition which applies to admission and to the granting of a practising certificate.

¹ Law Council of Australia. *Generic Legal Services Market Access Request* (November 2016). See **Appendix A**.

Thus a person admitted to the legal profession in one jurisdiction will have that admission recognised in all other Australian jurisdictions. Similarly, a lawyer granted a practising certificate in one jurisdiction is entitled to practise law in every other Australian jurisdiction.

11. In general terms, foreign lawyers seeking admission to the Australian legal profession will make application to the admitting authority in the State or Territory in which they intend to seek admission. The admitting authority will:
 - (a) assess the foreign lawyer's academic qualifications to determine the extent to which they are substantially equivalent to the prescribed Australian requirements, and advise the foreign lawyer of additional academic study that must be undertaken;
 - (b) assess the foreign lawyers training and experience, and advise the foreign lawyer of additional practical legal training that must be undertaken.
12. Each State and Territory admitting authority applies a set of Uniform Principles when undertaking these assessments. In the case of lawyers from England and Wales, it is generally the case that an applicant will be required to undertake additional academic study in four to six subjects, including Federal and State Constitutional Law, Administrative Law, and Ethics and Professional Responsibility.
13. Provision has been made in each State and Territory for the admitting authority to take into consideration the applicant's training and experience in legal practice when making its assessment, although the extent to which 'exemptions' from further academic studies or training are ultimately granted is a matter for each admitting authority to determine on a case-by-case basis.
14. The Law Council understands that for many years, UK law firms and lawyers have considered this process to be overly onerous – particularly with respect to experienced practitioners with specialist legal expertise. Large law firms operating in Australia, many of which have offices in the UK, have also expressed their dissatisfaction with the present admission requirements, and consider that these:
 - (a) may discourage UK lawyers from seeking to work (or undertake secondments) in Australia;
 - (b) reduces the inward movement of lawyers with experience and expertise in international markets (especially in relation to financial markets, mergers and acquisitions and infrastructure projects);
 - (c) reduces flexibility for international firms in managing their workforce; and
 - (d) creates difficulties for Australian law practices in meeting their resourcing needs.
15. The Law Council notes that any agreement regarding mutual recognition of admission to the legal profession in Australia and the UK necessarily requires the agreement of all of the States and Territories, which would, in turn, require consensus among the State and Territory legal profession regulatory and admitting authorities. The Law Council considers that an agreement for mutual recognition must be satisfactorily aligned with Australia's regulatory framework, consistent with admissions standards expected of local lawyers, and be workable in practice.
 - (ii) *Admission of Australian lawyers in the UK*
16. The Law Council considers that the current process for Australian lawyers to be admitted as solicitors in England and Wales through the Qualified Lawyers Transfer Scheme (**QLTS**) to be satisfactory.² It also understands that this relatively

² See Solicitors Regulation Authority, *Qualified Lawyers Transfer Scheme* (May 2020) <<https://www.sra.org.uk/solicitors/qlts/>>.

straightforward process will be replicated in the Solicitors Qualifying Examination (**SQE**) to be introduced in September 2021. The Law Council notes that since Australia will be a “recognised jurisdiction” under the SQE (preserving its recognised status under the QLTS), an Australian regulatory or professional body may apply for total or partial recognition of stage one (legal knowledge assessments) and/or stage two (practical legal skills) – which is understood to enable simplified or expedited admission under the SQE. The Law Council hopes that any concessions or exemptions afforded to Australian lawyers under the SQE recognise the equivalence between legal professional qualifications in Australian jurisdictions.

17. The Law Council understands that the process for admission to the Bar of England and Wales by a foreign Barrister lacks clarity and uniformity. It understands that the usual process for admission to the English Bar requires a barrister to join one of the four Inns of the Court, satisfy dining requirements at the Inn (a traditional requirement which most undertake during their studies) and complete a Bar vocational course. They must then complete a compulsory period of pupillage (ordinarily 12 months, split into a non-practising and practising period comprising 6 months each). The Law Council understands that many Australian practitioners may be called to the English Bar without needing to satisfy these requirements. Some are exempted from undertaking the Bar vocational course, while others are required to undertake an advocacy intensive weekend. Some are required to undertake a reduced period of pupillage. While this process may accord with the seniority of the barrister, there is no clear guidance with respect to the admission requirements and available exemptions for foreign barristers.
18. Importantly, the Law Council notes there is no equivalent system of domestic mutual recognition between the three jurisdictions in the United Kingdom (i.e. England and Wales, Scotland and Northern Ireland). The Law Council recommends that in any negotiations on mutual recognition, Australia give particular attention to the differences that exist in the UK between England and Wales, Scotland and Northern Ireland.

(iii) *Recognition of silks*

19. The Law Council understands that Australian silks, regardless of whether they are appointed by letters patent, are not recognised as silks in England when appearing in English Courts. It further understands that Australian Courts recognise the status of English silks.

Conditional Admission under the Uniform Law

20. The Law Council recognises that conditional admission might be a suitable form of admission to the Australian legal profession for some UK lawyers, but cautions that conditional admission should not be an alternative where a UK lawyer seeks full admission to the Australian legal profession.
21. As mentioned above, the *Legal Profession Uniform Law (LPUL)* provides for conditional admission of foreign lawyers (section 20) and provides for exemptions from prescribed academic and/or practical legal training requirements where the authority is satisfied that the applicant seeking full admission has sufficient legal skills or relevant experience to be eligible for admission (section 18).
22. The Law Council also recognises that concerns have been expressed that these provisions are underutilised, and further guidance is needed regarding their operation and the determination of applications. However, the Law Council also notes that the Legal Services Council has commenced a comprehensive review of the regulatory framework governing the admission of foreign qualified lawyers under the LPUL.³

³ Legal Services Council ‘*Foreign Lawyers Review Steering Committee Terms of Reference*’ (15 June 2018) <<https://www.legalservicescouncil.org.au/Documents/news/foreign-lawyers-review-tor-june-2018.pdf>>.

23. As the two largest Australian legal markets, it is likely that the majority of foreign lawyers seeking admission in Australia would seek admission in New South Wales or Victoria – the two states currently participating in the LPUL.⁴ Where a foreign lawyer gains full admission through exemptions under section 18, the lawyer may then practise in other Australian jurisdictions.
24. However, difficulties may arise where a lawyer conditionally admitted under section 20 of the LPUL seeks to practise in a State or Territory that does not participate in the Uniform Law scheme. The Law Council suggests this matter will need to be clarified as part of the development of the FTA.

Limited Liability Partnership Structures

25. The Law Council supports the introduction of Limited Liability Partnerships (**LLPs**) as an alternative business structure, considering that this would provide a business vehicle to support growth and investment, competition and structural relationships across domestic and global markets. LLPs have rapidly become the internationally-preferred business vehicle for knowledge-based professions, and in the context of law practices, LLPs are the predominant form of the major global law firms with operations or affiliates/alliances in Australia.
26. The Law Council notes that limited liability partnership structures provide a number of benefits, which include:
 - (a) allowing for the liability of all partners in the partnership to be limited;
 - (b) imposing sensible tax obligations; and
 - (c) allowing Australian law practices that are part of international firms with limited liability partnerships in the UK to standardise their business structures, and thereby ease regulatory burdens.
27. The Law Council further notes that the absence of LLPs as an available form of entity for Australian law practices, coupled with the federal and state impediments to transitioning an Australian law practice from one business structure to another, has required the adoption of complex and inefficient business structures for the Australian operations of most major global law firms.
28. The Law Council emphasises, however that the introduction of limited liability partnerships in Australia would be a complex undertaking requiring cooperation by the Commonwealth, the States and the Territories. In other jurisdictions allowing limited liability partnerships, the statutory framework is usually situated in either partnership law or corporations law. Under Australia's constitutional arrangements, partnership law is a matter for the States and Territories. Also, while corporations law is now unified in federal legislation, it is underpinned by a limited referral of powers by State parliaments to the Commonwealth Parliament.⁵ An extension of the federal corporations law to facilitate limited liability partnerships may therefore require a further referral of powers. Other matters that would need to be addressed and resolved include the taxation treatment of a limited liability partnership, and the tax and duty consequences of formation, changes in membership, and dissolution.
29. The Law Council notes that Australia pioneered the introduction of the incorporated legal practice and the multi-disciplinary partnership as alternative business structures for law practices. Over the past 15 years, it has been conclusively demonstrated that legal services can be provided through these kinds of entities in accordance with, and adherence to, the professional duties and obligations of the legal profession. A similar

⁴ Western Australia is also expected to join the LPUL scheme in 2021, and legislation has been introduced in the Western Australian Parliament to give effect to the scheme. See <https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=B3DFC715EBAF44CC4825852F000F85BF>.

⁵ See for example the *Corporations (Commonwealth Powers) Act 2001 No 1* (NSW).

regulatory design approach to limited liability partnerships should ensure that there is no compromise to the fundamental role of the profession in the community and justice system, or the safeguards provided to consumers of legal services.

Visas

30. Recognising that visas are outside the scope of the AU-UK FTA, the Law Council notes that the most significant barrier to professional mobility between Australia and the UK is the person's ability to secure a visa.
31. Australian lawyers may be eligible to obtain the following visas to work in the UK:
 - (a) An **Intra-company transfer (ICT) visa** enables an employee of a company or organisation with a branch in the UK to live and work for up to nine years (if earning more than £120,000 p.a.) or five years and one month (if earning less than £120,000 p.a.) – provided they have worked for the company for over 12 months and will be earning at least £41,500p.a. in the UK.⁶ This enables Australian lawyers working for large firms to transfer to the firm's UK office, however ties them to working for that firm unless they apply for a new general visa.
 - (b) A **Youth Mobility visa** enables an Australian citizen under 30 to live and work for up to two years in the UK.⁷ This facilitates young lawyers to gain international legal experience by working in the UK, without requiring the young lawyer's employer to sponsor them under the points-based visa system.
 - (c) An **Ancestry** visa permits an Australian of any age to live and work for up to five years in the UK (with the option to extend the visa and/or settle in the UK permanently), provided they can prove that one of their grandparents was born in the UK.⁸ While this might enable some lawyers to move to the UK to work, the Law Council notes that only a very limited proportion of Australia's legal profession would be eligible for this visa.
 - (d) The **Permitted Paid Engagement visa** would permit a lawyer to accept paid work in the UK (following an invitation from a UK-based organisation or client) and stay for up to one month to provide advocacy in a particular area of law or lecture at a higher education institution.⁹ This is would support only fly-in, fly-out legal services or a secondment or exchange of less than 30 days.
32. The Law Council understands that under the new Points-Based skilled visa regime to be introduced in 2021, an Australian lawyer wishing to work in the UK (who is not eligible for an ICT visa, Youth Mobility Visa or Ancestry Visa) will need to be offered a job by a UK employer (which is a 'licensed sponsor') with a salary of at least £49,700 p.a., in addition to holding a PhD in a subject relevant to the job.¹⁰ Both of these requirements must be met because legal services are not listed under the Shortage Occupation List.¹¹ It is envisaged that this regime will substantially diminish the ability of Australian lawyers to work in the UK unless they are employed by a large Australian law firm or are eligible for a Youth Mobility or Ancestry visa.

⁶ United Kingdom Government, *Intra-company Transfer visa (Tier 2)* <<https://www.gov.uk/tier-2-intracompany-transfer-worker-visa/eligibility>>.

⁷ United Kingdom Government, *Youth Mobility Scheme visa (Tier 5)* <<https://www.gov.uk/tier-5-youth-mobility>>.

⁸ United Kingdom Government, *UK Ancestry visa* <<https://www.gov.uk/ancestry-visa>>.

⁹ United Kingdom Government, *Permitted Paid Engagement visa* <<https://www.gov.uk/permitted-paid-engagement-visa>>.

¹⁰ United Kingdom Government, *The UK's Points-Based Immigration System – Further Details* (July 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899716/UK_Points-Based_Immigration_System_Further_Details.pdf>.

¹¹ United Kingdom Government, *Immigration Rules Appendix K – Shortage Occupation List* (updated 24 August 2020) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-k-shortage-occupation-list>>.

33. Further challenges arise for barristers. First, by virtue of their self-employed status, barristers do not neatly fit into existing professional visa categories. The Law Council understands that the Bar Council of England and Wales has acted as an effective sponsor to barristers who have secured positions as pupil barristers or tenants in chambers.¹²
34. The Law Council considers that negotiations with respect to facilitating professional mobility between Australia and the UK should consider how this mobility may be best supported by a non-burdensome and fair visa regime for skilled professionals.
35. Please contact Ms Charlotte Stubbs, Policy Lawyer on (02) 6246 3753 or at charlotte.stubbs@lawcouncil.asn.au in the first instance should you require further information or clarification.

Yours sincerely



Pauline Wright
President

¹² Bar Council of England and Wales, 'Immigration Support for Non-EEA barristers' <<https://www.barcouncil.org.uk/bar-council-services/for-barristers/immigration-support-for-non-eea-barristers.html>>.