Australia-India CECA and Legal Services

Submission to the Department of Foreign Affairs and Trade by Andrew Godwin[1], 8 March 2015

1. Introduction

This submission outlines a suggested strategy for Australia in its negotiations with India concerning the Australia-India Comprehensive Economic Cooperation Agreement (CECA). It proceeds in three sections: (1) what is the current landscape in Asia; (2) what is the current situation in India; and (3) what strategy should Australia adopt in its CECA negotiations with India?

2. What is the current landscape in Asia?[2]

The table below contains information on certain key jurisdictions in Asia. It identifies whether the jurisdiction is closed or liberalised. It also identifies whether integration is possible between local and foreign lawyers or law firms. In this context, "liberalised" refers to the ability for foreign law firms to establish a presence in their own right; "integration" refers to the ability for local and foreign lawyers and law firms to provide legal services on a joint basis, whether through a loose association or through employing, or entering into partnership with, local lawyers.

Jurisdiction	**Closed or liberalised?**	**What can foreign law firms do? Is integration with local law firms permitted?**
Hong Kong SAR	Liberalised	Foreign law firms may practise foreign law through a branch. A local partnership – one in which all of the partners are HK-qualified - is required to practise Hong Kong law. However, the local partnership may employ foreign lawyers and operate as an affiliate of an international practice.
Mainland China	Liberalised	Foreign law firms may establish a presence to practise foreign law and international law. However, they may not practise PRC law and integration is not permitted, except where it involves an "association" between a foreign law firm and a Chinese law firm pursuant to the rules governing the Shanghai Free Trade Zone. These rules are based on the existing model under which a Hong Kong law firm and a mainland firm may establish an association pursuant to the Closer Economic Partnership Arrangement (CEPA). Such an association allows the firms to share costs and resources; however, it does not enable them to share profits.

[1] Andrew Godwin is Director of Transactional Law at Melbourne Law School and Associate Director (Asian Commercial Law) at the Asia Law Centre, Melbourne Law School.

[2] The information in this section is extracted from Andrew Godwin, 'Going global - The Australian legal profession in the Asian century' (2013) 87 *Law Institute Journal* 43-45.

Japan	Liberalised	Foreign law firms may establish a presence to practise foreign law. It is possible for a foreign law firm to enter into a "specific joint enterprise" with a Japanese law firm. This permits the law firms to cooperate and co-handle matters in various areas, not including litigation, and to share revenues and profits. It is also possible for foreign lawyers to enter into a local partnership with local lawyers to practise foreign and local law, and the local partnership may operate as an affiliate of an international law firm.
South Korea	Liberalised	Foreign law firms may establish a presence in South Korea to practise foreign law to the extent permitted under the free trade agreements entered into with the US and the EU. Integration is currently not permitted. However, under the free trade agreements with the US, the EU and Australia, South Korea has announced a roadmap that would permit integration over a period of five years.
Singapore	Liberalised	A foreign law firm may establish a presence in Singapore to practise foreign law. A foreign law firm may also enter into a "joint law venture" with a local law firm to practise foreign law and local law on a joint basis. In addition, it is possible for a foreign law firm in Singapore to apply for a "Qualifying Foreign Law Practice" licence to enable it to employ Singapore-qualified lawyers and practise Singapore law. However, Singapore law may only be practised in "permitted areas of legal practice". These are mainly commercial areas of law, and exclude domestic areas of legal practice such as constitutional and administrative law, conveyancing, criminal law, family law and conduct of litigation.
Vietnam	Liberalised	Foreign law firms may establish a presence to practise foreign law and may also employ locally-qualified lawyers to practise local law, subject to certain restrictions. In recent times, local law firms have called for greater restrictions on foreign law firms.
Thailand	Partly Liberalised	Foreign law firms may not establish a branch in Thailand to practise foreign law. However, they may hold a minority interest (49% or less) in a legal consultancy services company, which may take the name of the foreign law firm and advise on Thai law.
Malaysia	Partly Liberalised	Previously a closed market, Malaysia has introduced reforms that grant up to five licences for foreign law firms to establish a "Qualified Foreign Law Firm". Eligibility is tied to the firm's experience in Islamic finance in line with the initiative to establish Malaysia as an Islamic finance centre. In addition, a foreign law firm may enter into an "international partnership" with a Malaysian law firm. As in Singapore,

		restrictions apply to the areas in which an international partnership may practise Malaysian law. Initial concerns were voiced as the legislation appeared to prohibit foreign lawyers from providing advice on a fly-in-fly-out basis.
India	Closed	Foreign law firms may not establish a presence in India as the legislation governing advocates only recognises the practice of law by Indian-qualified lawyers. However, after over a decade of legal proceedings against foreign law firms, it appears that foreign lawyers may now provide foreign law advice on a fly-in fly-out basis.
Indonesia	Closed	Foreign law firms may not establish a presence in Indonesia. The only basis on which foreign lawyers can practise is as a "foreign legal consultants" employed by an Indonesian firm.

3. What is the current situation in India[3]

As a member of the BRICS group[4] and one of the fastest-growing economies in the world, India is an interesting case study for the purpose of this analysis of legal professionals. Despite its economic importance, it is one of the few countries in the regions that might be categorised in the 'closed' category and do not yet permit foreign lawyers to establish a presence, even to practise foreign law in local law firms. Protectionism is often cited as the key reason for India's closed approach.[5] Another reason is the legislation governing lawyers, the Advocates Act 1961, under which only Indian-qualified lawyers (or 'advocates') are recognised as being 'entitled to practise the profession of law'.[6] In addition, an advocate must be a citizen of India.[7]

The question as to how the 'right to practise the profession of law' should be defined under the legislation, and whether it should draw a distinction between advocates practising before courts or tribunals and advocates (including foreign lawyers) who practise in non-litigious matters, was litigated in the case of *Lawyers Collective v Union of India* (2010) (2) BCR 753 (Bombay High Court). This long-running case, which was initiated in 1995, was triggered by the issuance of licences to the respondent foreign law firms to establish a representative office in India for

[3] The information contained in this section is extracted from Andrew Godwin, 'Barriers to Practice by Foreign Law Firms in Asia' (unpublished manuscript).
[4] The BRICS group consists of Brazil, Russia, India, China and South Africa.
[5] For detailed discussion of protectionism, see Udobong (2013), Chhina (2012) and Krishnan (2010.
[6] Advocates Act 1961, s 29: 'Advocates to be the only recognised class of persons entitled to practise law.—Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.' Under section 2 of the Advocates Act, an 'advocate' is defined as 'an advocate entered in any roll under the provisions of this Act'. See also s 33, which provides that "[e]xcept as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act."
[7] Advocates Act 1961, s 24(a).

marketing and liaison purposes. The Lawyers Collective took proceedings to obtain declarations that the licences were invalid and in breach of the Advocates Act 1961.

The details of this case in terms of the background context and the arguments considered by the court have been covered extensively.[8] Of particular interest for the purposes of this paper is the way in which the court characterised the profession of law and linked it to a broader social purpose. The social purpose extended beyond the obligations that lawyers owe to their clients and the obligations that lawyers owe to the legal system as represented in bodies such as the courts.

Counsel for the respondent law firms pointed to judicial statements in previous cases to support their argument that the object of the legislative provisions was to regulate legal practice in litigious matters and that the practice of law by foreign lawyers in non-litigious matters was therefore not regulated or barred by the legislation governing local lawyers. This was the correct interpretation, they argued, because it was only in the context of litigious matters that the concerns identified in those cases could arise and the restrictions on practising the profession of law could therefore apply. One of these cases was *Indian Council of Legal Aid and Advice vls. Bar Council of India* (1995) 1 SCC 732, in which the court made the following comments:

> It is generally believed that members of the legal profession have certain social obligations, e.g., to render "pro bono publico" service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administrative of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette, which advocates must follow to maintain the dignity and purity of the profession.[9]

The above comments, the respondents argued, reflected concerns that could only arise if the purpose of the Advocates Act was to regulate lawyers in a litigious context. Another case in support of this contention was *Jamilabai vls. Shankarlal* AIR 1975 S.C. 2202, in which the court stated that 'the paramount consideration that the Bench and the Bar form a noble and dynamic partnership geared to the great social goal of administration of justice puts the lawyers appearing in the Court in a class by himself and to compare him with an ordinary agent may be to lose sight of the lawyer as engineer of the rule of law in society.'[10]

Despite these arguments, the court in *Lawyers Collective* held that the Advocates Act had been enacted to 'ensure the dignity and purity of the noble profession of law'[11] and that it was intended to apply not only to the person practising before the

[8] See, for example, Udobong (2013), Chhina (2012) and Krishnan (2010).
[9] (1995) 1 SCC 732, paragraph 29ff.
[10] (1995) 1 SCC 732, paragraph 32.
[11] (1995) 1 SCC 732, paragraph 2. This sentiment was echoed by others at the time: 'Gopal Subramaniam, Chairman of the BCI, strongly opposed the liberalisation of the Indian legal market by arguing that "the legal

Courts but also to persons practising in non-litigious matters outside the Court.[12] In this context, the court cited the decision of the Supreme Court in *M.P. Electricity Board Vls. Shiv Narayan* reported in (2005) 7 Supreme Court Cases 283, in which it was held that 'there [was] a fundamental distinction between the professional activity and the activity of a commercial character' and 'that to compare the legal profession with that of trade and business would be totally incorrect.'[13] As these comments suggest, the Indian courts have given legal practice a special or privileged place in society. The decision of the court in *Lawyers Collective* reinforces the view that the legal profession is distinctive, even in relation to non-litigious work, and that the special position of lawyers in society, including their broader social obligations, should be recognised and protected. According to this view, no regulatory distinction should be drawn between local lawyers and foreign lawyers based on the different areas of practice in which they might be involved and whether they are involved in litigious or non-litigious matters.[14]

The argument that the legal profession in India should not be equated with trade and business was also aired in the more recent case of *A. K. Balaji v Government of India & Ors.* (2012) 35 KLR 290, in which the Madras High Court considered a claim that foreign lawyers were illegally practising Indian law by maintaining offshore Indian law practices and advising clients in India on a 'fly-in, fly-out' basis. Although concurring with the decision in *Lawyers Collective* that establishing a liaison presence in India was not permitted under the legislation, the Court held that the legislation and rules did not prohibit foreign lawyers from visiting India for a temporary period on a fly-in, fly-out basis for the purpose of giving legal advice to their clients in India regarding foreign law or international legal issues.[15] The claimant in that case, an Indian lawyer, argued as follows:

> In India, [the] legal profession is considered as a noble profession, intended to serve the society, and not treated as a business venture. But, it is not so for the foreign law firms, which are treating it as a trade and business venture for earning money. It is submitted that here in India, the lawyers are prohibited from advertising, canvassing and soliciting work. No lawyer in India is permitted, either through print media or through electronic media or in any other form, to canvass or solicit work or market the profession. Whereas the foreign law firms, who are impleaded here as respondents 9 to 40, are glaringly advertising through their websites about their capabilities and they also canvass and solicit work by assuring results. It clearly shows that they are

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profession is a noble profession and the Bar Council cannot consider this profession as a business. It is a duty of the BCI to protect each and every lawyer of the country"', as cited in Chhina (2012: 297).

[12] (1995) 1 SCC 732, paragraph 48.

[13] (1995) 1 SCC 732, paragraph 42.

[14] According to the court in *Lawyers Collective*, any change in this regard was a matter for the legislature: 'Counsel for the Union of India had argued that the Central Government is actively considering the issue relating to the foreign law firms practising the profession of law in India. Since the said issue is pending before the Central Government for more than 15 years, we direct the Central Government to take appropriate decision in the matter as expeditiously as possible' (paragraph 59).

[15] Nor, the court held, did the rules prohibit foreign lawyers from coming to India and conducting arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

> treating the legal profession as nothing short of a trade or business, far different from the nobility attributed to it by Indian lawyers.

Implicit in the Indian lawyer's argument is the notion that foreign lawyers cannot serve the interests of society, whether through undertaking *pro bono* work or otherwise.[16]

A similar position concerning the scope of work that is attributable to the 'legal profession' or the 'practice of law' found in India also prevails in Indonesia and the Philippines, both of which are typically categorised as 'closed' markets for the practice of law by foreign lawyers. In Indonesia, the Law concerning Advocates defines 'advocates' as 'a professional person providing legal services, either inside or outside a court of law, and who has complied with the requirements as set forth in this law.'[17] Unlike the situation in India, however, Indonesia permits Indonesian law firms to employ foreign-qualified lawyers to practise foreign law and international law as foreign legal consultants. Further, unlike the assumptions inherent in the Indian lawyer's comments extracted above, however, Indonesia recognises that foreign legal consultants can serve the interests of society and requires foreign legal consultants to provide 10 hours per month pro bono services in the areas of legal education, legal research or government legal service.[18]

Accordingly, in addition to protectionism, there are philosophical and policy obstacles to liberalising the legal services market in India. Encouragingly, there is now a widespread recognition in India that liberalisation is now a question of 'when' rather than 'if'. In particular, professional bodies such as the Society of Indian Law Firms (Silf) have called for a phased approach to liberalisation, under which a level playing field for Indian law firms would first be created by permitting Indian law firms to advertise and by lifting restrictions on the form in which Indian law firms operate. This would then be followed by permission for foreign lawyers and foreign law firms to establish a presence in India subject to conditions, including that they be 'permitted to practice their "home country" law only'. This phase would last for 'a minimum of seven years', after which there would be 'an assessment of readiness of Indian law firms'. If considered appropriate, foreign law firms would finally be able to practise Indian non-litigation law subject to certain conditions.[19]

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[16] See Udobong (2013: 18). Interestingly, Indonesia requires foreign legal consultants to provide 10 hours per month pro bono services in the areas of legal education, legal research or government legal service. See http://international.lawsociety.org.uk/ip/asia/1365/practise. Foreign legal consultants are also required to pass an ethics examination.

[17] Law No. 18 of 2003, Article 1(1).

[18] See http://international.lawsociety.org.uk/ip/asia/1365/practise. Foreign legal consultants are also required to pass an ethics examination.

[19] For a recent article that provides a summary of the background and the current situation, see Kian Ganz, 'Why foreign law firms are most likely to enter India now (or never): An investigation into the realities of legal policy, lobbying & backroom talks', *Legally India*, 3 March 2015, available at http://www.legallyindia.com/Law-firms/legal-market-liberalisation-investigation-into-lobbying-and-policy.

4. What strategy should Australia adopt in the CECA negotiations with India?

The analysis in section 3 above indicates that India is actively considering various options in connection with the liberalisation of the legal services market in India. The pathway towards liberalisation that has been suggested by bodies such as Silf is similar to the approach adopted in other jurisdictions such as China, South Korea and Singapore.

As noted above, an interesting point of distinction between India and Indonesia – two countries that might be categorised as 'closed' markets for foreign legal services – is that Indonesia permits Indonesian law firms to employ foreign-qualified lawyers to practise foreign law and international law as foreign legal consultants and, for this purpose, has established a regulatory framework for the registration of foreign legal consultants.

India, on the other hand, does not recognise the practice of law by foreign-qualified lawyers in Indian law firms. In reality, Indian law firms have employed foreign-qualified lawyers as 'consultants', but such employees are not held out as 'lawyers' and do not provide legal services directly to clients, at least in a formal sense. Instead, their role is to operate 'behind the scenes' and to inform, and add an 'international flavour' to, the advice given to clients by Indian-qualified lawyers.

One reform that might be considered in India is the introduction of a foreign legal consultant framework along similar lines to the framework in Indonesia. As noted above, this would allow Indian firms to employ foreign-qualified lawyers to practise foreign law and international law.

It is curious that this option does not appear to have been given much prominence in recent debates concerning the liberalisation of legal services in India. India is not alone in being ambivalent about the benefits of such a reform. A similar ambivalence exists in China, where there is no express basis for local law firms to employ foreign-qualified lawyers to practise foreign law and international law.[20]

Although the lack of such a framework hinders the development of multi-jurisdictional capacity by Indian law firms, it is possible that such a reform would be regarded by some in India as 'liberalisation via the back door' and that this might explain why it has not gained traction in India. Nevertheless, it would be useful to explore this possibility in the CECA negotiations to determine the extent to which this is or might be a live option.

Another interesting point to note is that although there is nothing under the rules in markets such as Australia and the UK that would prevent Indian-qualified lawyers from practising Indian law in those markets, the current rules in India prevent them from doing so. This is because in order to hold a practising certificate in India, a

[20] For a discussion about this, see Godwin, Andrew, 'The Regulation of Foreign Lawyers in China', (2009) 33 *Melbourne University Law Review* 132.

lawyer must be associated with a recognised practice in India. At this point, India does not recognise the overseas practice of Indian law by Indian-qualified lawyers in foreign law firms.

Thus, the obstacles that foreign-qualified lawyers face in practising in India are matched by obstacles faced by Indian-qualified lawyers in practising overseas. Although, in each case, the obstacles are attributable to the legal framework in India, there is a certain equivalence in this regard that makes it difficult for foreign countries to prise open the legal services market in India purely on the basis of reciprocity.

I would suggest that there are various realities that limit the range of options that are open to the Australian government under the CECA negotiations with India. These realities include the following:

- The question of liberalisation is still very sensitive in India, both within the legal profession and within government;
- The arguments in favour of liberalisation have been fully aired in India; consequently, the continuing opposition is not attributable to a lack of understanding of the arguments for and against; and
- It is unlikely that India would be willing to introduce reform pursuant to a bilateral free trade agreement; instead, any reforms are likely to be applied across the board and in line with a phased approach as referred to above.[21]

Given the above realities, I would suggest that the most optimistic (and realistic) outcome would be that CECA recognises that liberalisation of legal services in India is on the agenda and that this alone would represent a step in the right direction. It would, of course, be useful to explore various options with the Indian government, including permitting Indian law firms to employ foreign-qualified lawyers as suggested above. However, experience to date suggests that it is unlikely that the India government would grant substantive concessions to countries like Australia on a bilateral basis.

Accordingly, I would suggest that agreement along the following lines would represent a positive outcome for Australia in its CECA negotiations with India:

> *Consistent with domestic and international developments generally, the two countries will explore opportunities for lawyers admitted to practise in India to practise in Australia and for lawyers admitted in Australia to practise in India. Various initiatives will be undertaken in this regard, including information-sharing and technical-exchange between the regulators and the legal profession in both countries. Both countries will establish a joint consultative committee for the purpose of such information-sharing and technical-exchange.*

[21] This is based on my own analysis and also on discussions with Indian-qualified lawyers and other interested parties.

I hope the above submission is of assistance and would be happy to clarify any aspects or respond to any queries.

Andrew Godwin

Selected Bibliography

Chhina, Amanpreet, ‘Liberalisation of Indian Legal Services: Politics and Challenges’ (2012) 12 *Oxford University Commonwealth Law Journal* 295.

Kian Ganz, ‘Why foreign law firms are most likely to enter India now (or never): An investigation into the realities of legal policy, lobbying & backroom talks’, *Legally India*, 3 March 2015, available at http://www.legallyindia.com/Law-firms/legal-market-liberalisation-investigation-into-lobbying-and-policy.

Godwin, Andrew, ‘Barriers to Practice by Foreign Law Firms in Asia’ (unpublished manuscript)

Godwin, Andrew, 'Going global - The Australian legal profession in the Asian century' (2013) 87 *Law Institute Journal* 43-45

Godwin, Andrew, ‘The Regulation of Foreign Lawyers in China’, (2009) 33 *Melbourne University Law Review* 132

Krishnan, Jayanth K., ‘Globetrotting Law Firms’ (2010) 23(57) *The Georgetown Journal of Legal Ethics* 57

Udobong, Edna, ‘Trends in Cross-Border Lawyering: The GATS Ideal or the Indian Reality for U.S. Lawyers?’ (2013) 43 *California Western International Law Journal* 343