



Law Society  
of Scotland

# Consultation Response

Consultation on trade negotiations with Australia

October 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Trade Policy Working Group welcomes the opportunity to consider and respond to the Department for International Trade's consultation on trade negotiations with Australia.<sup>1</sup> We previously responded to the Government's consultation on Preparing for our future UK trade policy.<sup>2</sup> The Society has the following comments to put forward for consideration.

## General Remarks

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Trade agreements can be used to effect a wide range of changes in the relationship between states and regions. In many such agreements provisions are a means to promote or reinforce the application of the rule of law. Trade negotiations should take into consideration the need to ensure minimum standards or norms and respect for the rule of law and the interests of justice and access to justice.

Other aspects of the legal framework play a similarly important role in facilitating trade. The foundation of negotiations should be a long-term vision for trade, incorporating issues such as regulatory cooperation in order to ensure effective markets and protect consumers. This extends, for example, to continuing protection of intellectual property rights, promotion of competition and facilitating flows of data.

In the context of trade in legal services, we emphasise the importance of recognising that Scotland is a distinct jurisdiction with its own law, court system and separately regulated legal profession. This should be

<sup>1</sup><https://consultations.trade.gov.uk/policy/consultation-on-trade-negotiations-with-australia/>

<sup>2</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

taken into account in pursuing trade agreements including negotiations with the EU. It may be helpful to highlight a few statistics which relate specifically to the Scottish legal services sector:

- Scottish solicitors contribute £1.5bn to the economy on an annual basis;
- There are almost 1,200 Scottish firms; and
- More than 24,000 people are employed within the Scottish legal profession.<sup>3</sup>

As set out in our response to the consultation on the UK's future trade policy,<sup>4</sup> we believe that a whole of governance approach should be taken when considering trade negotiations. In the context of devolved competences this is particularly relevant where international agreements would bind domestic legislatures to effect changes to domestic law. We considered this further in our response to the International Trade Committee's inquiry into UK Trade Policy Transparency and Scrutiny.<sup>5</sup>

## UK approach to trade negotiations

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There are a number of general structural issues which need to be addressed and which provide necessary context to stakeholders seeking to engage with proposed or potential UK trade negotiations in the most constructive way possible. Stakeholder engagement on an ongoing basis will be necessary to ensure that any agreement reached is fit for purpose. We note that the background papers to the current consultations do not provide detail as to the logistical arrangements for trade deals. Some issues on which further information would be welcomed are set out below.

At the outset it is important to note that the UK's relationship with the EU will have a bearing on relationships with other trading partners going forward. This will be relevant, not only in terms of what may be legally and practically achievable but could also inform negotiating priorities. We note that the International Trade Committee of the House of Commons is currently conducting an inquiry into the *Impact of UK-EU arrangements on wider UK trade policy*. We will set out our comments on this topic in greater detail in our response to that inquiry.

There may also be some issues to be resolved around common frameworks, which will allow more effective engagement with the devolved administrations throughout the course of trade negotiations and implementation. In October 2017 the JMC(EN) agreed that common frameworks should be established where necessary. The communique stated:

<sup>3</sup> The number of practising Scottish solicitors is over 11,000.

<sup>4</sup> [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)

<sup>5</sup> <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

*“The following principles apply to common frameworks in areas where EU law currently intersects with devolved competence. There will also be close working between the UK Government and the devolved administrations on reserved and excepted matters that impact significantly on devolved responsibilities. Discussions will be either multilateral or bilateral between the UK Government and the devolved administrations. It will be the aim of all parties to agree where there is a need for common frameworks and the content of them. The principles referred to included that common frameworks will be established where they are necessary in order to (amongst other things):*

- *enable the functioning of the UK internal market, while acknowledging policy divergence;*
- *ensure compliance with international obligations; and*
- *ensure the UK can negotiate, enter into and implement new trade agreements and international treaties”.*

In terms of the UK’s approach to trade, we consider it is important to take a strategic approach, not only to priorities to be pursued in specific negotiations but as a precursor to this in identifying partners within whom to pursue bilateral or regional trade agreements. We note that no background rationale has been given regarding the choice to explore negotiations with Australia, New Zealand and the USA in the first instance. We note that the European Commission provides impact assessments<sup>6</sup> before opening trade negotiations: this could be helpful in a UK context.

Beyond this, additional logistical information is essential to facilitate constructive dialogue in relation to the proposed negotiation and give a clearer picture of the anticipated architecture of UK agreements. Many countries, including Australia, New Zealand and the USA, operate on the basis of model trade agreements. This is helpful in setting broad expectations which inform negotiations with prospective partners as well as creating a framework within which domestic stakeholders can input into negotiations. We consider that this can also provide benefits to businesses involved in cross border provision of goods and services in terms of understanding arrangements ultimately concluded.

With this in mind, we consider that it would be helpful to create a model for new agreements which is consistent with the structure of existing agreements, so far as is practicable to achieve the UK’s desired outcomes. The model FTA could also address issues such as the UK’s preferred approach to resolution of disputes between the contracting parties. It could also indicate whether the UK would seek to include investor protection provisions and its proposed approach to investor state dispute settlement (ISDS). Even if this is not included in a model agreement *per se*, further information on these issues is needed.

Furthermore, there is a growing conversation around the desirability of incorporating review clauses into trade agreements. This could allow modernisation of agreements to ensure they remain relevant and effective in facilitating effective and inclusive trading relationships. Consideration might usefully be given to whether these should be included as a feature of UK agreements.

<sup>6</sup> <http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/impact-assessments/>

## Issues to be considered in the context of trade negotiations with Australia

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As with any other trade agreement, the benefits to the UK or otherwise will depend on the precise terms of any agreement reached.

### Legal services

The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy in its own right. This includes contract negotiations for the provision of goods or services and also extends to advice on matters such as intellectual property protection.

Businesses of all types are increasingly international in focus and global in reach and lawyers must be able to provide their services accordingly, whether this is through expansion of their own offices or partnering with firms in other jurisdictions on an ongoing or case-by-case basis. Furthermore, trade agreements create legal rights and obligations and it is therefore imperative that individuals and business have access to legal advice to allow them to exercise those rights and meet the requirements of their obligations.

In practical terms, this must be supported by efficient business visa systems which allow lawyers to enter a country for the purposes of meeting their clients face-to-face.<sup>7</sup> If a lawyer has to wait a long time for a business visa to be authorised this could act as practical barrier to provision of legal services. Additionally, clients may sometimes wish to travel to the UK to instruct or receive legal services, requiring an efficient business visa system for visitors to the UK.

Lawyers also play a key role in resolving disputes when problems arise. This ability should extend to advising on representing clients with respect to, international law and international arbitration.

### *Position in Australia*

Australia is one of the least restrictive markets in the world for practising foreign law.<sup>8</sup> There a number of Scottish solicitors currently working in Australia.<sup>9</sup> In the longer term many choose, or are required by their firms, to requalify but this can be an arduous process. There are more exemptions for those with an English solicitor qualification than those qualified in Scotland.

<sup>7</sup> Such temporary provision of services is also known as “fly-in-fly-out” and forms part of the commitments under Mode 4 of the GATS and other trade agreements under the heading ‘Movement of natural persons’

<sup>8</sup> OECD – see <http://communities.lawsociety.org.uk/international/regions/north-asia-and-the-pacific/australia/want-to-learn-how-foreign-lawyers-practise-law-in-australia-read-our-new-guidance-document/5052296.fullarticle>

<sup>9</sup> <http://www.journalonline.co.uk/Magazine/60-7/1020502.aspx>

### *Qualification and regulation*

Australia, like the UK, is divided into a number of different jurisdictions which operate their own systems of qualification and regulation. The relevant state and territory governments are responsible for the regulation of lawyers in each jurisdiction. Admission and discipline falls within the remit of the supreme courts. As in the UK there are bars and law societies which set down rules for professional conduct, legal practice and CPD. There are also independent regulators and professional bodies which carry out regulatory functions but the precise remits of these organisations vary between jurisdictions.

There are parallels in terms of regulatory approach, particular in the legal profession acts in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia which are all based on the same model law. South Australia has also adopted some elements of this law.

The last two jurisdictions, New South Wales and Victoria, aligned their legislative regimes three years ago with a scheme called the Legal Profession Uniform Law. This has been set up in such a way as to allow for accession by other states and territories in due course.

### **Intellectual property – geographical indications**

We are pleased to note the Government's current consultation on establishing UK Geographical Indications Schemes.

The EU has created a set of rules which safeguard the authenticity of regional and traditional products. These benefit producers in particular regions, or who manufacture products with a traditional character,<sup>10</sup> by offering specific protection to those products through the right to use a particular designation of origin, geographic indicator or guarantee of traditional speciality. This protection ensures that the reputation and quality of the product is maintained as producers are not subject to pressures from competitors who can cut corners to produce a cheaper version of the product or damage its reputation. It can therefore offer a way of preserving traditional industries, often made up of smaller/family-run businesses and sustaining employment vital to regional economies. By preserving the integrity of products and manufacturing processes, the measures offer consumers a guarantee of quality and the knowledge that they are supporting the preservation of cultural heritage, which can also promote investment and encourage tourism.

- a) Protected Designations of Origin (PDO): produced, processed *and* prepared in a specific geographical area, using the recognised know-how of local producers and ingredients from the region concerned

<sup>10</sup> This note does not extend to wines, nor to the proposed "product of island farming" designation.

- b) Protected Geographic Indications (PGI): quality or reputation is linked to the place or region where it is produced, processed or prepared, although the ingredients used need not necessarily come from that geographical area
- c) Geographical Indications of Origin for Spirit Drinks (GI's): having a given quality, reputation or other characteristic that is essentially attributable to geographic origin.
- d) Traditional Speciality Guaranteed (TSG): having a traditional character, either in the composition or means of production, without a specific link to a particular geographical area

Specific examples from regions of Scotland include: Orkney Lamb PDO, Native Shetland Wool PDO, Ayrshire New Potatoes PGI (applied for), Orkney Scottish Island Cheddar PGI, and Stornoway Black Pudding PGI and the Spirit Drink GI Scotch Whisky. All the above and about 70 other producer registrations from across the UK exist or have been applied for in the EU register, which contains about 1,300 plus registrations in total.

The strength of the protection lies in the absolute reservation for producers in a particular area. It extends beyond direct usage to cover evocation.<sup>11</sup> The rights are usually enforced through civil actions.

The current EU rules are contained in Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. Spirit Drink GI's are covered by Regulation (EU) No. 110/2008.

#### *Position in Australia*

In Australia, products with a geographical origin such are typically protected by way of certification trademarks.<sup>12</sup> The certification process is similar to that for trade marks but in addition requires a copy of the certification trade mark's rules to be submitted. These properties include the requirement that they originate from a particular place. Harris Tweed is an example of a Scottish product already recognised and protected under the Australian scheme. Grana Padano, Stilton and Prosciutto di Parma are other examples of products protected in both the EU and Australia.

IP Australia is responsible for administering the regime. It conducts an initial screening of the application before sending to the Australian Competition and Consumer Commission for further consideration.

*"The ACCC's role involves assessing and approving rules for the use of CTMs, including:*

<sup>11</sup> See for example the recent decision of the Court of Justice of the European Union regarding Scotch Whisky: *Scotch Whisky Association v Michael Klotz* C-44/17 ("Glen Buchenbach")

<sup>12</sup> <https://www.ipaustralia.gov.au/ctm>

- *assessing the requirements that goods/services/persons must meet in order to be eligible to have a CTM applied to them, and assessing the proposed process by which compliance with certification requirements will be judged*
- *examining the rules to ensure they are not to the detriment of the public, or likely to raise any concerns relating to competition, unconscionable conduct, unfair practices, product safety and/or product information.”<sup>13</sup>*

## **Creation of functioning markets and open competition**

In addition to the specific legislation which applies to the legal services industry outlined above, there are other aspects which, in a general sense, enhance the ability of lawyers to serve their clients in relation to trade between the UK and EU countries and advantage those citizens and businesses in their own right.

These include provisions relating to harmonisation of product standards and other aspects of consumer protection, competition law and procurement rules that regulate the functioning of and fair access to business opportunities within the Internal Market and EU-wide protections in terms of intellectual property

More recent EU trade deals have included provisions relating to state aid and competition law. There may be aspects of both state aid and competition of particular relevance in a Scottish context and we have stressed elsewhere the importance of ensuring that the particularities of Scottish or more localised markets and the communities to which they correspond, are observed.

## **Rules of Origin**

The Rules of Origin (ROO) system under FTAs imposes a further practical and administrative burden where goods are crossing borders into a customs union. The rules are intended to avoid goods from one trading party where this is no or a less favourable FTA with the destination party being routed through intermediary countries to take advantage of lower tariffs under an FTA between the intermediary and final destination. It is essential that rules of origin are clear, particularly in the context of logistics and international value chains. These should be framed in such a way as to ensure that the anticipated outcome is achieved, thereby avoiding unnecessary disruption or confusion and increased costs.

<sup>13</sup> <https://www.accc.gov.au/business/exemptions/certification-trade-marks>



## Data flows

International trade increasingly relies on international data flows. We therefore support the objective of seeking digital trade packages to support those data flows.

In context of trade beyond the EU, we once more emphasise the importance of ensuring that such agreements not only facilitate flows of data between the UK and other countries but also contain safeguards to ensure that any data stored, processed, or used in those countries is effectively protected. The domestic legislation of the UK's trading partners must therefore guarantee the same level of protection as UK data protection rules but rules alone are insufficient without effective enforcement.

The UK should therefore seek to engage with international partners on these issues and to support the work of the ICO in relation to the duties set out the Data Protection Act 2018.

**For further information, please contact:**

Carolyn Thurston Smith  
Policy Team  
Law Society of Scotland  
DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)