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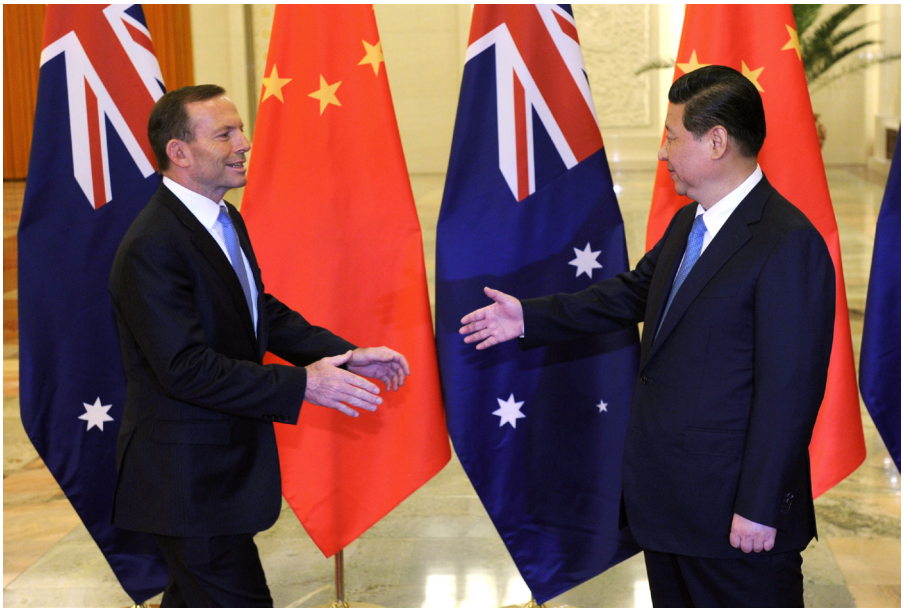
Legal Services under the China-Australia Free Trade Agreement: Surveying the Landscape

Andrew Godwin and Timothy Howse



3

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Abstract

The developments concerning the China-Australia Free Trade Agreement (ChAFTA) have generated a high-level of interest, both in Australia and abroad. This paper considers the benefits of ChAFTA in terms of facilitating trade in legal services and examines the claims and expectations in this regard. The paper concludes by suggesting that the benefits of ChAFTA in relation to legal services are qualified and need to be viewed in the context of other significant developments.

Mr Andrew Godwin

Andrew Godwin is Director of Transactional Law, Director of Studies of Banking and Finance Law and an Associate Director, Asian Law Centre at Melbourne Law School, The University of Melbourne.

Mr Timothy Howse

Timothy Howse is a research assistant, Asian Law Centre at Melbourne Law School, The University of Melbourne.

Legal Services under the China-Australia Free Trade Agreement: Surveying the Landscape*

Mr Andrew Godwin

Mr Timothy Howse

The Signing of ChAFTA

On 17 November 2014, the Australian Prime Minister Tony Abbott announced that the negotiations for a China-Australia Free Trade Agreement (ChAFTA) had concluded and that both countries would prepare the text in English and Chinese for signature in 2015. For this purpose, both countries would sign a Declaration of Intent (Abbott, 2014a; 2014b). This marked the end of discussions that had commenced in 2005 under the Howard Government and had 'languished between 2007 and 2013' (Abbott, 2014b).

Australia's previous experience in the negotiation of Free Trade Agreements (FTAs), including those with Korea or Japan, did not involve the signing of a declaration of intent and the practice appears to be novel.[1] Information released by the government indicates that the Declaration of Intent 'formalised the conclusion of the negotiations and cemented the intent of both Australia and China to take the necessary steps towards bringing the Agreement into force' (Department of Foreign Affairs and Trade [DFAT], 2014d).

ChAFTA was formally signed by the Australian Trade and Investment Minister, Mr Andrew Robb, and the Chinese Commerce Minister, Mr Gao Hucheng, in Canberra on 17 June 2015.[2]

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* A shortened version of this briefing paper was first published in the *Law Institute Journal*: Godwin and Howse (2015).

1 For an outline of the process for negotiating FTAs, see Productivity Commission (2010: 288). An FTA will be signed once the parties have agreed on its terms and conducted a legal review of the translation. In Australia, the text of the agreement must then be tabled in the Australian Parliament for 20 joint sitting days along with a National Interest Analysis, which is prepared by the relevant government department. An inquiry will then be conducted by the Joint Standing Committee on Treaties before the relevant domestic legislation will be introduced. The final process of implementing an FTA is often the exchange of diplomatic notes certifying that the agreement is ready to enter force on a date agreed between the parties: DFAT (2015d).

2 DFAT (2015l).

The Objectives of Free Trade Agreements

In essence, a Free Trade Agreement (FTA) is a 'reciprocal arrangement whereby trade barriers between participating nations are reduced or eliminated' (Sappideen and He, 2010: 257, 258). In addition to tariffs and quotas on goods, common barriers to trade include regulatory restrictions, such as licensing, local content and other administrative requirements (DFAT, 2015a). FTAs are designed to encourage stronger trade and commercial ties between the signatory countries and are increasingly being used to remove obstacles to services (DFAT, 2015a). They are capable of facilitating 'higher GDP growth by allowing domestic businesses access to cheaper inputs' (DFAT, 2015k) and 'harnessing new or more secure access to services markets' (DFAT, 2015f).

An FTA may take the form of a bilateral agreement between two jurisdictions or a multilateral agreement between numerous jurisdictions. A bilateral FTA 'allow[s] "asymmetric nations" – in terms of their population, economic size, and GDP – to enter into meaningful and mutually beneficial trade arrangements' (Clarke and Gao, 2007: 842, 854). An example of a multilateral agreement is the proposed 'Trans-Pacific Partnership Agreement' which currently involves 12 negotiating parties. If realised, this multilateral agreement would capture 25 per cent of world trade (DFAT, 2015i). Australia currently has nine FTAs in force that account for 42 per cent of Australia's global trade (DFAT, 2015a). Eight of the FTAs are bilateral and one is multilateral: the ASEAN-Australia-New Zealand Free Trade Agreement.

Economic Benefits of ChAFTA

Trade with China accounts for 23 per cent of Australia's total trade (DFAT, 2015a). China is Australia's largest trading partner in goods and services (Abbott, 2014b), with Australia exporting $7 billion of services to China in 2013 (DFAT, 2015e).

ChAFTA covers a range of sectors, including agriculture, resources, services and investments (DFAT, 2015j). The Prime Minister has stated that Australia will be able to do business more easily with China in the following areas:

> [l]egal services, financial services, education, telecommunications, tourism and travel, construction and engineering, health and aged care services, mining and extractive industries, manufacturing services, architecture and urban planning, as well as transport. (Abbott, 2014b)

ChAFTA has been widely praised as 'unique in securing China's first-ever treaty commitments on commercial association between law firms' (DFAT, 2015b). With the exception of New Zealand (China FTA Network, 2015), ChAFTA is one of China's first FTAs concluded with a developed economy. Commentators have asserted that it will provide Australia with a competitive trading position and that 'all Australian businesses will be in a better position than any of our global competitors', with Australian business having a first mover advantage (King and Wood Mallesons, 2014). While the benefit

that ChAFTA will bring to Australia has been questioned on the basis that it involves 'old and irrelevant modelling' (Jericho, 2014), the reactions are largely positive (News, 2014). In particular, the benefits that ChAFTA will bring to financial service providers and law firms have been consistently highlighted.[3]

ChAFTA and Legal Services

The Department of Foreign Affairs (DFAT) states that ChAFTA

> is unique in securing China's first-ever treaty commitments on commercial association between law firms. In addition to guaranteeing existing access for Australian law firms in China, ChAFTA also guarantees to allow Australian law firms the ability to establish commercial associations with Chinese law firms in the Shanghai Free Trade Zone (SFTZ). These commercial associations will be able to offer Australian, Chinese and international legal services, without restrictions on where clients are located.[4]

DFAT has referred to the effect of 'commercial associations' in the Shanghai Free Trade Zone as follows:

a) Australian qualified lawyers will be able to practise Australian and international law.

b) Legal practitioners qualified to practise law in other foreign countries will also be able to practise the laws of those countries.

c) Chinese qualified lawyers will be able to practise Chinese and international law without suspension of their Chinese practising certificates. (DFAT, 2015c)

DFAT further states that ChAFTA will increase the mobility of Australian and Chinese lawyers through professional secondments between law firms and through enhanced cooperation between peak legal professional bodies in Australia and China (DFAT, 2015c). Issues surrounding mobility had previously been raised in submissions presented to DFAT concerning ChAFTA by the Law Institute of Victoria in June 2004.[5]

3 See, for example, QIC (2015); King and Wood Mallesons (2014); and Landers (2015).

4 DFAT (2015c). A previous version of the fact sheet stated that ChAFTA would 'provide Australian law firms with unprecedented … access to the Chinese market'. For the reasons outlined below, this no longer appears to be the case following the rules concerning associations between foreign law firms and Chinese law firms in the Shanghai Free Trade Zone. ChAFTA has also been welcomed by the Law Council of Australia (2014).

5 See Law Institute of Victoria. International Law Briefing Committee and Commercial Law Section (2004).

The commercial association model under ChAFTA appears to be the same as the model available to other foreign law firms under the recent rules concerning the Shanghai Free Trade Zone (see further below).

Legal Services and Other FTAs

Since coming to power in September 2013 the Coalition Government has concluded two other bilateral trade agreements. The Korea-Australia Free Trade Agreement (KAFTA**)** entered into force on 12 December 2014 (DFAT, 2015h). The Japan-Australia Economic Partnership Agreement (JAEPA) entered into force on 15 January 2015 (DFAT, 2015g). A bilateral trade agreement with India, known as the Australia-India Comprehensive Economic Cooperation Agreement, is currently under negotiation.[6]

Under KAFTA, Australian law firms are now able to establish representative offices in Korea and advise on Australian and public international law (DFAT, 2015h). This is significant because Korea did not make any commitments under the 'General Agreement on Trade in Services' (GATS) with respect to legal services (World Trade Organization, 2015c). Consequently, Korea has been opening up its legal services market pursuant to FTAs, which ensures that it maintains autonomy with respect to how and when its legal services market is opened. This occurred first under the free trade agreement with the EU, then with the US and subsequently with Australia (Godwin, 2013a). By December 2016, Australian law firms will be permitted to enter into cooperative arrangements with Korean law firms. By December 2019, Australian law firms will be able to form joint venture law firms in Korea (DFAT, 2015h).

This is a substantive achievement under KAFTA with respect to legal services. Australian law firms will, for the first time, obtain progressive access to the Korean legal market.

JAEPA guarantees *existing* market access for Australian lawyers (DFAT, 2014). For this reason, it is unlikely to result in significant changes to the current arrangements concerning legal services. Australian firms will continue to be able to form Legal Professional Corporations under Japanese law. Further discussions will take place between the Law Council of Australia and the Japan Federation of Bar Associations regarding cooperation in legal services (DFAT, 2014).

6 <www.dfat.gov.au/trade/agreements/aifta/Pages/australia-india-comprehensive-economic-cooperation-agreement.aspx>.

The Rules Governing Foreign Law Firm Representative Offices in China

Under the rules governing representative offices of foreign law firms in China,[7] foreign law firms are able to establish representative offices in China to practise foreign law and international law. However, foreign law firms are subject to a regulatory regime that is separate from the regime that applies to local Chinese law firms. Representative offices are not permitted to practise PRC law and, until the release of the new rules in the Shanghai Free Trade Zone as outlined below, have not been permitted to enter into any arrangements with Chinese law firms to provide legal services on an integrated basis (that is, as part of a single practice or through arrangements involving shared resources and joint management), although the rules do permit them to enter into 'long-term retainer arrangements' with local law firms.

It is likely that the original intention behind these restrictions was that foreign law firms would practise foreign law and Chinese law firms would practise PRC law and each would stay out of the other's area of practice. Because of the undeveloped state of local law firms in the early decades of economic modernisation, however, foreign law firms have developed 'virtual' PRC law practices, by which foreign law firms provide information and advice on PRC law generally and only instruct Chinese law firms in circumstances where a formal legal opinion is required or where the nature of the work requires the involvement of Chinese lawyers (e.g. competition law filings). For the purpose of advising clients and developing their virtual PRC law practices, foreign law firms employ Chinese law graduates and former Chinese law practitioners; namely, professionals who have relinquished their practising certificates in order to avoid contravening the prohibition against foreign law firm representative offices employing Chinese lawyers.

China's Legal Commitments under the World Trade Organization

China has been a member of the World Trade Organization (WTO) since 11 December 2001 (World Trade Organization, 2015a). China made specific commitments to open up its market to foreign law firms as part of its accession to the WTO, including the following commitment in respect of the permitted business scope of foreign law firms in China:

> Business scope of foreign representative offices is only as follows:
>
> a) to provide clients with consultancy on the legislation of the country/region

7 Administrative Regulations on Representative Offices of Foreign Law Firms in China (PRC) State Council, Order No 338, 19 December 2001; Ministry of Justice, Rules for the Implementation of the Administrative Provisions on Representative Offices of Foreign Law Firms in China, 25 June 2002. For general background information, see Godwin (2009) and (2013b: 148).

where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices;

b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work;

c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs;

d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs;

e) to provide information on the impact of the Chinese legal environment. Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.[8]

It is important to note that China's WTO accession commitments did not include a commitment to allow foreign lawyers to practise Chinese law, nor did it include a commitment to allow foreign law firms to employ Chinese lawyers. Instead, their permitted business scope was limited to advising on the laws of foreign jurisdictions where they were qualified to practise (Godwin, 2009: 132, 136).

Under WTO agreements, it is generally prohibited to discriminate between trading partners who are WTO Members. The GATS requires a Member to extend to all other Members 'treatment no less favourable than that accorded to like services and services suppliers of any other country.'[9]

Preferential treatment is often referred to as 'most-favoured nation' (MFN) status, which forms a cornerstone of WTO membership and is a priority under GATS. Where one party is granted an advantage, it follows that *all* WTO members should be given the same advantage. A small number of exceptions apply to the general rule (World Trade Organization, 2015b).

Accordingly, if ChAFTA grants Australian law firms an advantage that is not available

8 Accession of the People's Republic of China, WTO Doc WT/L/432 (2001) (Decision of 10 November 2001) Annex 9 ('Schedule of Specific Commitments on Services — List of Article II Exemptions'), incorporating by reference Report of the Working Party on the Accession of China, WTO Doc WT/ACC/CHN/49/Add.2 (2001) (Addendum — Part II: Schedule of Specific Commitments on Services — List of Article II MFN Exemptions) II(A)(a).

9 World Trade Organization, 2015, 'The General Agreement on Trade in Services (GATS), art II. See also World Trade Organization (2015b).

to other WTO members, it follows that once ChAFTA comes into force, the advantage should be offered to foreign law firms from *all* WTO members.

Tie-ups between Foreign Law Firms and Local Law Firms in China

With the increasing importance of PRC law in cross-border and domestic transactions and the growing competitive strength of Chinese law firms, the need for foreign law firms to explore ways in which to obtain formal Chinese law capacity as part of their services has become more critical. Accordingly, many foreign law firms have entered into 'strategic alliances' with Chinese law firms. In essence, these are a variation of the 'best friends' model and often involve exclusive referral arrangements.

Foreign law firms have also successfully 'combined' with Chinese law firms through the use of a Swiss verein structure. This structure allows firms to enter into an arrangement governed by Swiss law, under which the firms join an association and adopt common branding whilst maintaining their independent status and separate profit pools.

High-profile vereins that involve Chinese law firms include King & Wood Mallesons and the recent tie-up between Dentons and Dacheng, which has been reported as establishing the world's largest law firm (Reuters, 2015).

To some extent, the verein structure fits within the long-term plan of the PRC regulators for Chinese law firms; namely, to foster a regulatory environment in which Chinese law firms can grow stronger internationally whilst maintaining their independence. It is possible, however, that their use will remain limited, particularly in view of China's moves towards further liberalisation as discussed below.

Closer Economic Partnership Arrangement (CEPA)

Law firms from Hong Kong have been permitted to enter associations (联营) with mainland Chinese law firms under the Closer Economic Partnership Arrangement (CEPA) since 1 January 2004.[10] CEPA is an FTA between Hong Kong and mainland China (Hong Kong Trade and Industry Department, 2015). It covers three broad areas; trade in goods, trade in services and trade and investment facilitation (Hong Kong. Trade and Industry Department, 2015).

Under CEPA, mainland China has made a number of commitments with respect to legal services. Two significant commitments are:

1. To allow Hong Kong law firms (offices) that have set up representative offices in the Mainland to operate in association with Mainland law firms, except in the form of partnership. Hong Kong lawyers participating in such

10 Mainland and Hong Kong Closer Economic Partnership Arrangement, signed 29 June 2003 (entered into force 1 January 2004) ('Mainland and Hong Kong CEPA')

associations may not handle matters of Mainland law; and

2. To allow Mainland law firms to employ Hong Kong legal practitioners. Such practitioners who are employed by Mainland law firms must not handle matters of Mainland law.[11]

The above is also applicable to Macau law firms under equivalent arrangements entered into between mainland China and Macau. Such associations are governed by the Administrative Rules on Associations between Domestic Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macau Special Administrative Region ('Administrative Rules on Associations')[12] issued by the Ministry of Justice on 27 November 2003 and effective on 1 January 2004. These provide that law firms may enter into associations (art 2) under which they may pool their resources, market their services under the name of the association, collect and distribute fees, bear costs and assume liabilities — all in accordance with the terms of the association contract (art 9). Each law firm in an association is limited to undertaking the approved legal services that are permitted by the Administrative Rules on Associations (specifically, lawyers from Hong Kong and Macau may not practise Chinese law) (art 12).

The rules provide that an association takes the form of a contractual arrangement and may not be undertaken through a partnership or an incorporated entity (art 3). During the term of the association, the legal status, name and finances of each law firm must be kept independent and each law firm must independently assume civil liability (art 3). This appears to rule out any profit-sharing arrangement under which one law firm is able to share a percentage of the profits generated by the other firm in joint matters. The benefits of the association model include the ability to provide a one-stop shop service to clients, to share resources and to bill clients jointly (Godwin, 2009: 132, 156-57).

Partnership Associations in Guangdong Province

CEPA has now further liberalised the market for Hong Kong and Macau law firms. A Hong Kong Legislative Council discussion paper issued in March 2013 stated:

11 This extracts two of the six commitments in Mainland and Hong Kong CEPA Annex 4 table 1 ('The Mainland's Specific Commitments on Liberalization of Trade in Services for Hong Kong') sector 1(A)(a).

12 Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macau Special Administrative Region (PRC) Ministry of Justice, Order No 83, 27 November 2003, as amended by Ministry of Justice Amendment of 'Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macau Special Administrative Region'] (PRC) Ministry of Justice, Order No 109, 6 March 2008.

> According to the legal sector, the existing operation mode of 'association by agreement' between Hong Kong and Mainland law firms is less than satisfactory. The number of associations formed by the representative offices of Hong Kong law firms and Mainland law firms has consistently been on the low side. As law firms of Hong Kong and the Mainland are currently not allowed to form partnership, both parties in an association can only operate in a relatively independent manner. Moreover, the formation of an association by a representative office of a Hong Kong law firm and a Mainland law firm will result in an exclusion phenomenon, leading to a decline of business referred by other Mainland law firms. (Hong Kong Legislative Council Panel on Administration of Justice and Legal Services, 2013)

Accordingly, the Legislative Council noted the proposal, pursuant to Supplement VIII of CEPA, to allow Hong Kong law firms and mainland law firms to establish and operate an association in the form of a partnership in Guangdong Province 'so as to better meet customers' needs for cross-border legal services'. China has now issued measures in response to this proposal.[13] These measures introduce, on a trial basis from 1 September 2014, a partnership model in three locations in Guangdong Province: Qianhai in Shenzhen, Nansha in Guangzhou and Hengqin in Zhuhai.

The measures permit one or more HK law firms and Macau law firms and one domestic law firm to enter into a 'partnership-style association' in Guangdong Province. The partnership association involves the establishment of a separate law firm, which will take the form of a limited liability partnership or a 'special general partnership' as it is called in China. For the first time, Hong Kong and Macau law firms will be able to enter into profit-sharing partnerships with mainland law firms. The partnership firm will be regulated in the same way as other law firms in China, except that its permitted business scope excludes criminal and administrative matters that involve domestic law.

This development may be a model for further liberalisation of the legal services market for foreign law firms in the same way as associations under CEPA have served as a model for developments in the Shanghai Free Trade Zone (see further below).

Developments in the Shanghai Free Trade Zone (SFTZ)

The Shanghai Free Trade Zone (SFTZ) was launched in September 2013 as a means of 'explor[ing] new routes and systems for China's opening-up policies' (China (Shanghai) Pilot Free Trade Zone, 2015). The SFTZ comprises four areas under the special administration of Customs — Waigaoqiao Free Trade Zone, Waigaoqiao Free Trade Logistics Park, Yangshan Free Trade Port Area and Pudong Airport Free Trade

13 Pilot Implementation Measures for Partnership Associations between Hong Kong Law Firms, Macau Law Firms and Mainland Law Firms in Guangdong Province, Guangdong Province Department of Justice (with effect from 1 September 2014).

Zone. The entire zone covers a combined 28.78 square kilometers.'[14] The SFTZ has been described as a

> testing ground for future investment and financial reforms nationwide. [H]ence policies and rules to be implemented in the Shanghai FTZ are important and may have far-reaching implications for foreign investors seeking to establish or expand their business in China (Clifford Chance, 2013: 1).

With respect to legal services, the SFTZ establishes two mechanisms that, for the first time, permit integration between foreign law firms and Chinese law firms, as outlined below.

Associations

The SFTZ effectively extends the CEPA association structure to all foreign law firms in circumstances where either the foreign law firm or the Chinese law firm has a presence in the SFTZ.[15] The Implementing Measures for Joint Operations Between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone (the 'Implementing Measures') define an association as 'an association between a Chinese law firm and a foreign firm in the Pilot Free Trade Zone with their rights and obligations set out in an agreement' (art 2).

The Implementing Measures suggest that most of the association arrangements will be governed by a written agreement between the two law firms. Article 6 states that:

> A written agreement shall be entered into in respect of the association between a Chinese law firm and a foreign law firm in accordance with the requirements of the relevant Chinese laws and these Measures. (art 6)

The Implementing Measures mention the various matters that must be addressed by the written agreement, including the business scope of the association, the arrangements relating to the sharing of premises and facilities and the arrangements relating to the sharing of fees and operating expenses (art 6). Profit-sharing is not permitted as, during the term of the association, the two firms must remain independent of each other with respect to their legal status, names and finance (art 2). One of the criteria that a Chinese law firm must meet in order to qualify for Joint Operations is that it has '20 or more full-time licensed lawyers' and has been in existence for at least three years (art 3).

14 China (Shanghai) Pilot Free Trade Zone (2015). It has recently been reported that the SFTZ has now been expanded to include the Lujiazui Financial District, Jinqiao and Zhanjiang: Reuters (2014).

15 Implementing Measures for Joint Operations between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone ('Implementing Measures'), issued on 18 November 2014, art 2.

The Implementing Measures provide that at least one of the firms must have a presence in the SFTZ (art 2). The SFTZ rules require the association to be undertaken on an integrated basis through the use of a shared office and shared facilities in the Shanghai FTZ (art 12). The association may be co-branded with the names of each firm as follows: '[Name of Chinese law firm][Name of foreign law firm] Free Trade Zone Joint Operations Office' (art 7).

It is understood that detailed operational provisions for setting up Joint Operations in the SFTZ will be released by the Shanghai Bureau of Justice and that these provisions will include requirements concerning the application materials and procedures. It is uncertain whether the Shanghai Bureau of Justice will exercise any administrative discretion when reviewing and approving applications for associations.

Secondments in the SFTZ

As a result of additional measures issued in November 2014, a further option is available in the form of 'reciprocal secondments'.[16] Such an arrangement would involve a foreign law firm and a Chinese law firm entering into an arrangement under which each firm would second up to three lawyers to the other firm and would require at least one firm to have a presence in the SFTZ (arts 2 and 7). For example, a Chinese law firm in the SFTZ could second up to three lawyers to a foreign law firm representative office to advise on PRC law 'in the capacity of a Chinese lawyer' (art 2).

The secondment option appears to operate as an arrangement under which lawyers from each firm are embedded in the other firm as a means of encouraging the two firms to cooperate more closely. In effect, it would give a foreign law firm convenient, in-house access to a licensed Chinese lawyer. It would not, however, be the same as employing licensed Chinese lawyers directly or operating in partnership with Chinese lawyers or a Chinese law firm.

Conclusion

The development in the SFTZ is significant. When considered along the continuing extension of CEPA into areas such as Guangdong Province, the development indicates that China is liberalising its legal services market further. Yet it is clear that full integration between foreign law firms and Chinese law firms is still some way off.

In our view, China has now reached the stage where Chinese law firms have been given sufficient breathing space in which to develop their capacity and compete effectively with foreign law firms in the domestic market. The task now is to help Chinese law

16 Implementing Measures for Reciprocal Secondment of Lawyers to Act as Legal Consultants between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone, issued on 18 November 2014.

firms to develop multi-jurisdictional practices and to strengthen their capability in the international market. This is particularly relevant given the importance of outbound investment from China. The most realistic way in which to help Chinese law firms develop this capability, we would argue, is to allow closer integration with foreign law firms, either by permitting joint ventures between Chinese law firms and foreign law firms, or by permitting PRC-qualified lawyers to enter into partnerships with foreign lawyers or to be employed by foreign law firms. At the same time, the regulatory framework should be amended so that there is an express basis on which Chinese law firms may employ foreign-qualified lawyers to practise foreign law and on which foreign-qualified lawyers may be registered as foreign lawyers or foreign legal consultants and regulated as such.[17] This would bring the regulatory framework into line with CEPA, under which Chinese law firms are permitted to employ Hong Kong legal practitioners to practise Hong Kong law.

China's willingness to move forward on this basis, and eventually permit full integration, is of critical importance to the growth of its domestic legal profession. We would argue that the days of worrying about competition from foreign law firms in the domestic market have passed; the focus now should be on how Chinese law firms can become fully integrated with the international market for legal services.

So where does this leave ChAFTA? Unlike KAFTA, which is determinative in giving Australian law firms access to the South Korean legal market that they would not otherwise have had under GATS, it does not appear that ChAFTA will be determinative in giving Australian law firms access to the Chinese market, particularly if all of the purported commitments vis-à-vis legal services are already in place by virtue of the SFTZ rules.

Although ChAFTA may be unique in terms of specifically referring to legal services and providing a bilateral basis on which market access can be secured, it remains to be seen whether this places Australian law firms in a favoured or preferential position. For the reasons outlined above, this would appear unlikely.

This is not to disregard the role that ChAFTA may have played in spurring liberalisation in the SFTZ or its potential in terms of strengthening legal ties between Australia and China. If it leads to increased dialogue and cooperation between lawyers, law firms and peak professional bodies in Australia and China, this can only be a good thing.

17 At present, the PRC Lawyers Law does not recognise the employment of foreign-qualified lawyers by Chinese law firms and, unlike other jurisdictions, there is no basis on which foreign-qualified lawyers at Chinese law firms can be registered as foreign lawyers or foreign legal consultants. As a result, at present they can only be held out as 'consultants' and not as 'lawyers'.

References

Abbott, Tony (2014a) 'Conclusion of China-Australia Free Trade Agreement', 17 November <www.pm.gov.au>.

Abbott, Tony (2014b) 'Landmark China-Australia Free Trade Agreement', 17 November <https://www.pm.gov.au>.

China (Shanghai) Pilot Free Trade Zone (2015) 'Introduction', <http://en.china-shftz.gov.cn/About-FTZ/Introduction/>.

China FTA Network (2015) 'China New Zealand FTA', <http://fta.mofcom.gov.cn/>.

Clarke, A and Gao, X (2007) 'Bilateral Free Trade Agreements: A Comparative Analysis of the Australia-United States FTA and the Forthcoming Australia-China FTA', 30(3) *UNSW Law Journal* 842.

Clifford Chance (2013) 'Shanghai's Pilot Free Trade Zone Receives Green Light from China's highest authority', 6 September <http://www.cliffordchance.com/briefings/2013/09/shanghai_s_pilotfreetradezonereceivesgree.html>.

Department of Foreign Affairs and Trade (DFAT) (2014) 'JAEPA Fact Sheet: Trade in Services and Investment', last updated 17 December <www.dfat.gov.au/trade/agreements/>.

DFAT (2015a) 'About Free Trade Agreements' <www.dfat.gov.au>.

DFAT (2015b) 'Background Paper: Australia's Other FTAs and FTA Negotiations', last updated 20 January <www.dfat.gov.au>.

DFAT (2015c) 'China-Australia Free Trade Agreement, Fact Sheet: Trade in Services', last updated 20 January <www.dfat.gov.au>.

DFAT (2015d) 'China-Australia Implementation Timeline', last updated 20 January <www.dfat.gov.au>.

DFAT (2015e) 'China-Australia Key Outcomes', last updated 20 January <www.dfat.gov.au>.

DFAT (2015f) 'How Businesses use FTAs', <www.dfat.gov.au>.

DFAT (2015g) 'Japan-Australia Economic Partnership', <www.dfat.gov.au>.

DFAT (2015h) 'Korea-Australia Free Trade Agreement', <www.dfat.gov.au>.

DFAT (2015i) 'Trans-Pacific Partnership Agreement', <www.dfat.gov.au>.

DFAT (2015j) 'China-Australia Free Trade Agreement: Understanding the Agreement', <www.dfat.gov.au>.

DFAT (2015k) 'Benefits of Free Trade Agreements', <www.dfat.gov.au>.

DFAT (2015l) 'Official documents', <www.dfat.gov.au>.

Godwin, A (2009) 'The Regulation of Foreign Lawyers in China', 33 *Melbourne University Law Review* 132.

Godwin, A (2013a) 'Going Global: The Australian Legal Profession in the Asian Century', December, *Law Institute Journal* 43, <www.liv.asn.au>.

Godwin, A (2013b) 'Liberalisation and Integration of Legal Services', July/August *China Business Law Journal* 148.

Godwin, A and Howse, T (2015) 'Legal services under ChAFTA', 89(5) *Law Institute Journal* 30.

Hong Kong Legislative Council Panel on Administration of Justice and Legal Services (2013) 'Role of the Hong Kong Legal Profession in the Development of Qianhai Area in Shenzhen', *LC Paper* No CB(4) 512/12-13(01), 26 March <www.legco.gov.hk>.

Hong Kong Trade and Industry Department (2015) 'Mainland and Hong Kong Economic Partnership Arrangement (CEPA)', <www.tid.gov.hk>.

Jericho, Greg (2014) 'Why Isn't the Government Being Held to Account on the China Free Trade Deal? *The Guardian* (Online), 20 November <www.theguardian.com>.

King and Wood Mallesons (2014) 'ChAFTA 2014: The Winners, the Thresholds and the Opportunities', 18 November <www.chinalawinsight.com>.

Landers, David (2015) 'The Future of Australian Finance in China', Business Spectator, 13 January <www.businessspectator.com.au>.

Law Council of Australia (2014) 'Law Council Welcomes the China — Australia Free Trade Agreement', *Media Release* MR #1426, 18 November <www.lawcouncil.asn.au>.

Law Institute of Victoria. International Law Briefing Committee (2004) 'Submission for the Australia-China Trade and Feasibility Study', 30 June, <www.dfat.gov.au/trade/agreements/chafta/>.

News (2014) 'Australia-China Free Trade Agreement: What it Means for You', 17 November <www.news.com.au>.

Productivity Commission (2010) 'Bilateral and Regional Trade Agreements: Productivity Commission Report', 13 December <www.pc.gov.au>.

QIC (2015) 'What Does ChAFTA Mean for the Australian Economy?', <www.qic.com>.

Reuters (2014) 'China Shanghai Free Trade Zone to Expand to Include Commercial Centre – Xinhua', 27 December <www.reuters.com>.

Reuters (2015) 'Dentons, Dacheng Merge to Create World's Biggest Law Firm', 27 January <http://uk.reuters.com>.

Sappideen, R and He, L (2010) 'Observations on the Australia-China Free Trade Agreement Negotiation Process', 38(4) *Australia Business Law Review* 257.

World Trade Organization (2015a) 'China and the WTO', <www.wto.org>.

World Trade Organization (2015b) 'The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines', <www.wto.org>.

World Trade Organization (2015c) 'Schedules of Commitments: Republic of Korea', <https://docs.wto.org>.

Legislation

Accession of the People's Republic of China, WTO Doc WT/L/432 (2001) (Decision of 10 November 2001) Annex 9 ('Schedule of Specific Commitments on Services — List of Article II Exemptions'), incorporating by reference Report of the Working Party on the Accession of China, WTO Doc WT/ACC/CHN/49/Add.2 (2001) (Addendum — Part II: Schedule of Specific Commitments on Services — List of Article II MFN Exemptions)

Administrative Regulations on Representative Offices of Foreign Law Firms in China (PRC) State Council, Order No 338, 19 December 2001

Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macau Special Administrative Region (PRC) Ministry of Justice, Order No 83, 27 November 2003, as amended by Ministry of Justice Amendment of 'Administrative Rules on Associations between Interior Law Firms and Law Firms from the Hong Kong Special Administrative Region and the Macau Special Administrative Region'] (PRC) Ministry of Justice, Order No 109, 6 March 2008

Implementing Measures for Joint Operations between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone, issued on 18 November 2014

Implementing Measures for Reciprocal Secondment of Lawyers to Act as Legal Consultants between Chinese and Foreign Law Firms in the China (Shanghai) Pilot Free Trade Zone, issued on 18 November 2014

Mainland and Hong Kong Closer Economic Partnership Arrangement, signed 29 June 2003, entered into force 1 January 2004

Ministry of Justice, Rules for the Implementation of the Administrative Provisions on Representative Offices of Foreign Law Firms in China, 25 June 2002

Pilot Implementation Measures for Partnership Associations between Hong Kong Law Firms, Macau Law Firms and Mainland Law Firms in Guangdong Province, Guangdong Province Department of Justice (with effect from 1 September 2014)

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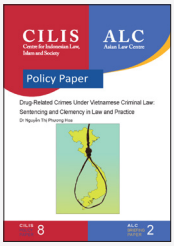	No 2 (2014)	'Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice'	Dr Nguyen Thi Phuong Hoa
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