Written evidence

UK-Australia Trade Negotiations

September 2020

Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

Our Constitutional Law Committee and Trade Policy Working Group welcome the opportunity to respond to the House of Lords EU International Agreements Sub-Committee Inquiry on *UK-Australia Trade Negotiations*.[[1]](#footnote-2) We have the following comments to put forward for consideration.

Consultation questions

**1. Does the Department for International Trade (DIT)’s strategic approach, published on 17 June 2020, set out the right objectives for negotiations? How effectively does that strategic approach represent the interests of different groups and regions across the country, including the devolved nations, businesses, civil society, and individuals?**

We agree with the general principle that “an FTA with Australia needs to work for … UK consumers, producers and companies” and that it must “[uphold] our high environmental, labour, food safety and animal welfare standards.” We are not in a position to comment on the effectiveness of the strategic approach in representing all those groups outlined. However, the comments below relate to a number of these, in particular as they relate to legal services and constitutional issues concerning Scotland.

**4. The UK Government has expressed a strong interest in using a potential FTA with Australia as a key step to joining to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). How might a trade deal with Australia help the UK to join the CPTPP and what benefits would there be in joining? More broadly, what effect could a UK-Australia trade deal have on the UK’s future ability to negotiate deals with other countries?**

We are aware that Australia, along with other CPTPP members such as Japan, Canada and New Zealand has indicated that it is supportive of the idea of the UK joining the CPTPP. The extent to which a deal with Australia might support that goal is a political one but in legal terms it is clearly possible in principle to be a member of the CPTPP and negotiate deals with other countries. However, concerns have been raised that the specific terms of the CPTPP might conflict with existing UK legislation and standards in areas such as food standards[[2]](#footnote-3) and data privacy. Over and above the importance of those considerations as a matter of domestic policy, if these kinds of standards were to be reduced, this could have a knock-on effect on the UK’s ability to negotiate deals with other countries. This has frequently been raised as a particular concern in relation to the UK’s future relationship with the EU as its nearest trading partner.[[3]](#footnote-4)

**5. How can the specific interests of the devolved nations of the UK be best protected as part of the negotiation of a UK-wide trade deal with Australia?**

As we have stated elsewhere, we believe it is important to ensure a “whole-of-government” approach in terms of the negotiations with the EU in relation to the Withdrawal Agreement. The concept is also of particular relevance to other international agreements - including trade agreements - which may or will have an impact on domestic law. In this context “whole of government” should be interpreted as “whole of governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government as well as involving meaningful engagement with stakeholders such as professional bodies, the universities and civic society groups.

*The Concordat on International Relations*

Cooperation between the UK Government and the Devolved Administrations is specifically recognised in paragraph D1.4 of the Concordat on International Relations which is part of the Memorandum of Understanding between the UK Government and Devolved Administrations[[4]](#footnote-5) and paragraph D1.5.[[5]](#footnote-6) In addition to the Memorandum and Concordats there are a number of significant relations between officials which enable exchange on policy developments, evidence building, contacts and related matters on a practical and day to day basis.

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international agreements and consider how these might best be modernised to take account of changes in the UK’s political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with treaty negotiations in recent years.

In order to create a comprehensive and inclusive international and trade policy, conduct negotiations and implement agreements, it would helpful were the UK government to engage with the devolved administrations and legislatures. We were therefore satisfied to note as was set out in the Trade White Paper: *Preparing for our future UK trade policy,* that the Government was committed:

“*To continue to respect the role of Parliament, and the importance of the business and the wider stakeholder community in preparing for and giving effect to an independent UK trade policy,*

*To seek the input of the devolved administrations to ensure they influence the UK’s future trade policy, recognising the role they will have in developing and delivering it*.”[[6]](#footnote-7)

We note, however, that this White Paper was withdrawn on 19 March 2020. **It would be useful for the Government to confirm its current position.**

In our response to the International Trade Committee’s UK Trade Policy Transparency and Scrutiny inquiry some months ago, we set out a range of options for involvement of the devolved administrations as follows:

1. requiring the consent of the devolved administrations to any UK negotiated trade position;
2. normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
3. having a procedural structure for the devolved administrations’ involvement similar to that in the European Union Withdrawal Act 2018 for “common frameworks” (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
4. as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc. and allowing them to have a scrutiny and comment role (as noted above).

With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention or a memorandum of understanding.

Where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in formulating negotiating positions and ongoing engagement as those negotiations progress. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters. This will be important where agreements impact upon on devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate confidence-building and good-faith collaboration across the UK Government and devolved administrations. Such structures may provide, for example, for devolved participation in the design of negotiation mandates and the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to agreement, implementation and minimising risks to UK-wide implementation of trade agreements. We hope that any future statement on Intergovernmental Relations will include such formal structures

**10. What concessions will Australia be seeking regarding indicators of geographical origins on food and drinks, and how do you think the UK Government should respond? What are the likely effects on producers of new arrangements on indicators of geographical origins, in particular small- and medium-sized businesses?**

In previous papers we have highlighted the importance of GIs in protecting producers in particular regions, or who manufacture products with a traditional character,[[7]](#footnote-8) 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. There are a number of Scottish products, which we are aware offer these benefits both domestically and in boosting exports overseas and figure prominently in Scotland’s trade reputation, such as Scotch Whisky and Scottish Salmon. There are similar products of local/regional importance which enjoy a strong reputation and accompanying protection throughout the UK.

In Australia, products with a geographical origin (GI) such are typically protected by way of certification trade marks.[[8]](#footnote-9) 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:*

* *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.”[[9]](#footnote-10)*

The protection offered by the certification trade mark is not as robust as that afforded by the EU’s GI regime and the UK’s domestic regime which replaces it. Under s122 of the (Australian) Trade Marks Act 1995[[10]](#footnote-11) it is not an infringement of a trade mark (including a certification trade mark) when the alleged infringer “...uses a sign in good faith to indicate the…geographical origin…of goods or services.” Consequently, even where the proprietor has not been obliged by the Registrar to disclaim exclusive use of the geographic element in a mark, its registration does not exclude the use of the geographical origin to signify goods that do not comply with other elements in the deposited Use Rules, such as sourcing of ingredients, recipe, etc.

We also note that in an Australian context “Scotch whisky” is protected as a certification trademark but whisky generally is governed by the Food Standards Australia New Zealand (FSANZ) Code, which has lower quality specifications, creating a further danger that it will dilute the reputation of Scotch. The interplay with domestic legislation for other GIs may therefore merit further consultation and consideration but we are not currently aware of any specific issues in other sectors.

**12. The UK Government has expressed interest in increasing opportunities for the UK professional services industry by supporting Mutual Recognition of Professional Qualifications and facilitating the temporary movement of business people between the UK and Australia. What provisions do you think the UK should seek to agree with Australia on the movement of people in professional services and what impacts might there be for UK workers and businesses? What provisions will Australia be seeking?**

We support the inclusion of provisions in a UK-Australia trade agreement to strengthen access for legal service providers and to improve temporary access for UK professionals such as solicitors. 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.[[11]](#footnote-12) 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.

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 in Australia**

Australia is one of the least restrictive markets in the world for practising foreign law in regulatory terms[[12]](#footnote-13) and there a number of Scottish solicitors currently working in Australia.[[13]](#footnote-14) 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.

In June 2020 we surveyed members who are working or have worked in Australia. The majority of respondents reported that in practice they were required to complete a partial or full requalification when they moved to Australia. A number of respondents commented on a change to the law which means that individuals must hold a practising certificate to work as an in-house practitioner and that foreign registration provisions do not apply in-house. Respondents said that to gain a practising certificate additional training and qualification needed to be undertaken in a number of compulsory subjects such as Australian constitutional law.

*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.

*Immigration requirements*

A number of our members initially entered Australia on a 457 temporary work (skilled) visa. In our survey a number of respondents noted that requalification was a necessary condition for obtaining a longer term visa. The visa process itself is generally seen as positive. However, for Mode 4 access (fly-in-fly-out) the current provisions are limited to 90 days in a 12-month period: this is likely to be insufficient for dealing with larger matters such a complex litigation.

**14. How might negotiated digital trade provisions serve as enablers for businesses in the UK? What provisions would bring the most benefit and so should be the highest priority in this area?**

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.

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1. <https://committees.parliament.uk/work/458/ukaustralia-trade-negotiations/> [↑](#footnote-ref-2)
2. See eg <https://www.sustainweb.org/brexit/uk_cptpp_response_to_department_for_international_trade/> [↑](#footnote-ref-3)
3. See eg <https://www.techuk.org/insights/consultation-responses/item/14258-uk-potentially-seeking-accession-to-cptpp> [↑](#footnote-ref-4)
4. “*The UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements (including UN Conventions*)” [↑](#footnote-ref-5)
5. “*The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish Ministers and that the exercise of these responsibilities is likely to have implications for international relations. This Concordat therefore reflects a mutual determination to ensure that there is close co-operation in these areas between the United Kingdom Government and the Scottish Ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts*.” [↑](#footnote-ref-6)
6. <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy/preparing-for-our-future-uk-trade-policy> [↑](#footnote-ref-7)
7. This note does not extend to wines, nor to the proposed “product of island farming” designation. [↑](#footnote-ref-8)
8. <https://www.ipaustralia.gov.au/ctm> [↑](#footnote-ref-9)
9. <https://www.accc.gov.au/business/exemptions/certification-trade-marks> [↑](#footnote-ref-10)
10. [https://www.legislation.gov.au/Details/C2020C00103](https://protect-eu.mimecast.com/s/aNX0CVmZWIZxmEuJyiyo?domain=eur03.safelinks.protection.outlook.com) [↑](#footnote-ref-11)
11. 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’ [↑](#footnote-ref-12)
12. 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> [↑](#footnote-ref-13)
13. <http://www.journalonline.co.uk/Magazine/60-7/1020502.aspx> [↑](#footnote-ref-14)