CLIFFORD

CHANCE

Briefing note

May 2014

Australian inbound foreign investment update: New free trade deals with South Korea and Japan set scene for China

New free trade agreements mean that Korean and Japanese investors will soon enjoy the higher Australian inbound foreign investment thresholds applicable to New Zealand and US investors.

New free trade agreements

The Korea Australia Free Trade Agreement (KAFTA) was signed and conclusion of negotiations on the Japan Australia Economic Partnership Agreement (JAEPA) was announced last month.

Negotiations on KAFTA concluded in early December 2013 and KAFTA was signed on 8 April 2014 in Seoul and is expected to be in force by the end of 2014. Conclusion of negotiations on the JAEPA was announced in Tokyo on 7 April 2014. While the complete text of the JAEPA is not yet available, it is pitched as the most liberalising bilateral trade agreement that Japan has ever concluded and is expected to largely follow the KAFTA.

The new free trade agreements (FTAs) seek to underpin stronger economic relationship between Australia and each of Korea and Japan respectively. Not only will they provide enhanced certainty and protection for outbound investment and exports, they will also provide preferential treatment for Korean and Japanese investors under Australia's foreign inbound investment rules, making Australia a potentially more attractive investment destination.

Impact on inbound investment for private investors

The KAFTA will (once implemented) vary the thresholds for private (non-government) investment to match those applicable to New Zealand and United States investors. In particular, the threshold for share and business acquisitions in non-sensitive sectors will be raised significantly from A$248 million to A$1,078 million. Additionally, the KAFTA will allow acquisitions of developed, non-residential commercial real estate up to A$1,078 million. However, Australia has reserved the right to screen in sensitive sectors and those proposals to invest A$15 million or more in Australian agricultural land and $A53 million or more in Australian agribusinesses.

It is expected that the JAEPA will replicate the position for private Japanese investors.

Government investor rules unchanged

Consistent with Australia's longstanding policy, the existing level of scrutiny over investment by government investors (including sovereign funds and other state owned enterprises) will not change under the KAFTA or JAEPA.

Under current policy, any acquisition of land, establishment of a new business or a "direct investment" by a foreign government investor will continue to require prior notification to and approval by the Australian Treasurer, irrespective of value.

Any investment of an interest of 10 per cent or more is considered to be a direct investment under the current investment policy. Investments that involve interests below 10 per cent may also be considered direct investments if the government investor is building a strategic stake in the target, or can use that investment to influence or control the target (for instance, through veto or other contractual rights).

The FTA landscape and future developments

In addition to KAFTA, Australia has existing FTAs in place with New Zealand, the United States, Chile, Thailand, Malaysia, Singapore, and the Association of South East Asian Nations (which together account for around 28% of Australia's foreign trade[1]) and is also negotiating agreements with not only Japan, but also China, India and Indonesia, as well as four plurilateral FTAs.

To date, the United States and New Zealand are the only jurisdictions to have formally been accorded preferential treatment under Australia's foreign investment regime. The planned extension of the preferential regime to South Korea (and soon also to Japan) provided the backdrop to FTA discussions between Australia and China which took place in April 2014.

Given that significant government ownership in many Chinese companies will deem them to fall within the government investor rules (to which the preferential thresholds accorded to other countries do not apply), it is anticipated that China will seek extension to it not only of the preferential regime for private investors, but also seek additional accommodation in terms of Chinese SOE investors. While discussions on the China Australia FTA are still to play out, relaxation of the foreign government investor rules for China would represent a significant departure from the Australian government's longstanding foreign investment policy.

---

[1] www.dfat.gov.au/fta

Contacts

Sydney

Dave Poddar
Partner
T: +612 8922 8033
E: dave.poddar@cliffordchance.com

Danny Simmons
Partner
T: +612 8922 8007
E: danny.simmons@cliffordchance.com

Mark Pistilli
Partner
T: +612 8922 8001
E: mark.pistilli@cliffordchance.com

Amelia Horvath
Counsel
T: +612 8922 8023
E: amelia.horvath@cliffordchance.com

Perth

Michael Lishman
Partner
T: +618 9262 5502
E: michael.lishman@cliffordchance.com

Tracey Renshaw
Partner
T: +618 9262 5505
E: tracey.renshaw@cliffordchance.com

Paul Vinci
Partner
T: +618 9262 5504
E: paul.vinci@cliffordchance.com

Sean Houthuysen
Counsel
T: +618 9262 5519
E: sean.houthuysen@cliffordchance.com