Legal Issues for Japanese Mining Enterprises Investing in Australia

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Introduction to Clayton Utz

• One of the largest “Top Four” national firms
• 210 partners – 1000 lawyers
• Offices in all major capital cities
• Associated in Japan with Nishimura & Asahi (Lex Mundi + PRAC)
• Largest Energy & Resources Group in Australia
• Specialists in all relevant offices
• Involved in most major transactions
• Advise on all aspects of sector
• Relationship with NT Government
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<td>ChevronTexaco</td>
<td>Wesfarmers</td>
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<td>EdF</td>
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<td>Iluka</td>
<td>Yara (Norsk Hydro)</td>
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This presentation

• Japanese investment in Australia
• A new approach?
• The process
• Structure and regulatory approvals
• FIRB
• New developments with FIRB
• Uranium (only briefly)
  • [Regulation of uranium mining and “Do’s and Don’t’s” — covered only in slides handout]
Materials

• You will receive a CU Pack

• In Japanese

• Includes:
  - CU Energy & Resources Group Profile
  - CV’s for some of the relevant partners
  - Comprehensive Guidelines on Doing Business in Australia

• USB Memory Sticks

• “Uranium Mining Policy in Australia Update” – also available
Japanese investment in Australia

- Total Japanese investment end 2006 > $51 billion
- Traditionally Japanese investors took relatively small stakes in resources enterprises
- Purposes included:
  - Off-take
  - Marketing rights
  - Information
  - Monitoring performance
  - Competitive factors
- Now seems to be changing
The new approach

- Japanese investors have been in Australia for a very long time
- Sophisticated and generally risk averse (Similar to US / Europeans)
- The competition has come and gone
- But now we have the Russians, the South Americans, the Indians and especially the Chinese
- Many are willing to accept reduced process and higher risk
- Some are engaging in takeovers of public companies
- This may explain new approach by some Japanese investors
China’s Australian resources grab...  

...enter the “Hungry Dragon”

- Over the last 2 years, Chinese state corporations have either spent, agreed to spend, or acquired the rights to spend $A40 billion on Australian resources and assets

- Chinese becoming more aggressive – recent first successful hostile takeover of an Australian resources company (Midwest Corp).
China’s Australian resources grab

Since March 2007…

• Shougang Corp $68 m for 13% share of iron ore developer Australian Resources + agreement to fund $US2 billion development of Balmoral South Project
• CITIC $113 m – Macarthur Coal
• Chalco $3 billion – Aurukun bauxite
• Anshan Iron & Steel $1.8 billion JV – Karara iron ore
• Consortium of 5 Chinese companies $3 billion funding of Oakajee, WA port and rail project
• Sinosteel $100 m for >10% of Midwest Corp
• Chinalco $15.5 billion for 9% share of Rio
• China Metallurgical Group proposed $400 m for Cape Lambert Iron project
• China Petrochemical Corp $600 m for 60% of Puffin oil field, Timor Sea
• Sinosteel accepted bid of $1.36 billion for Midwest
Japanese investment in Australia

- Japan is the third largest foreign investor in Australia
- Rudd Government reaffirmed “strong and enduring commitment” to the Australia-Japan relationship – described as a “strategic partnership”
- Trading relationship is mature and highly sophisticated
- Japan and Australia said to be “making good progress” in FTA negotiations
- NT Government strongly encourages Japanese investment.
Why are the Australians selling?

- Commodity prices are up
- Marginal prospects are now more viable
- Competitive tender process drives up prices
- Japanese participation gives credibility
- Japanese long term off-take arrangements underwrite projects
- Some are off-loading unattractive assets
What is the process?

Phase I (1-2 months)
- Initial discussion
- Submit bid or begin negotiation
- Negotiate MOU
- Initial due diligence

Phase II (2-4 months)
- Negotiate definitive agreements
- Complete due diligence
- Prepare standalone audited financials
- Negotiate financing arrangements
- Sign detailed MOU
- Public announcement
- Begin regulatory approval process

Phase III (1-3 months)
- Sign definitive agreement
- Begin shareholder approval process

Closing
Structure

• Joint ventures are common in the mining industry

  • **Unincorporated joint venture**
    • No separate legal entity
    • The agreement governs party behaviour

  • **Incorporated joint venture**
    • A special purpose joint venture company is incorporated
    • Shareholder agreements govern partner rights and responsibilities
Regulatory Approvals

- ASIC  Australian Securities & Investments Commission
- ASX   Australian Stock Exchange Limited
- ACCC  Australian Competition & Consumer Commission
- ATO   Australian Taxation Office
- RBA   Reserve Bank of Australia
- FIRB  Foreign Investment Review Board
Foreign Investment Review Board (FIRB)

- Foreign Acquisition and Takeovers Act 1975
- FIRB establishes Australia’s Foreign Investment policy
- FIRB is a division of the Commonwealth Treasury
- Certain transactions by foreign interests require the prior approval of the Treasury
- Suddenly controversial
FIRB Approval

- FIRB approval required before a Foreign Person acquires a substantial holding in an Australian Corporation or business or a Foreign Person acquires any interest in certain types of land
Which transactions must be notified?

- The acquisition of **shares** where total assets >A$100 m
- The purchase of a **business** where total **assets** >A$100 m
- The establishment of a **new business** where total investment >A$10 m
- Direct investments by foreign governments and their agencies regardless of size
- The acquisition of an "interest in Australian urban land"
  - An interest in any land that is not “rural land”
  - Land used wholly and exclusively for primary production
Approval timing

- **Compulsory notification:** 40 days from date of receipt of notice, subject to extension

- **Voluntary notification:** 30 days from date of receipt of notice, subject to extension. 10 days to give notice of decision

- **Order deadline:** If no Treasurer order within relevant time period, transaction may proceed
Effect of approval

- **Effecting approved transactions:** Parties must enter into approved transaction within 12 months

- **Options:** Parties must exercise approved options to acquire shares, assets or property within 12 months of approval
Which countries are affected?

- No distinction based on source country
- Except US - Free Trade Agreement
- US investors enjoy higher dollar thresholds
- Otherwise, Japan is treated the same way as other countries
Recent Developments (1)

- FIRB Guidelines – February 2008

- Investors must:
  - be independent from relevant foreign government
  - adhere to Australian law and business behaviour
  - not hinder competition

- FIRB will assess the investment’s impact on Australian:
  - revenue or other policies
  - national security
  - business, economy and the broader community
Recent Developments (2)

• Uncertainty regarding the Rudd government's stance on foreign investment:

• Public stance is positive and supportive but as the pace and dimension of Chinese acquisitions in Australia accelerates, the calls for protection are growing.

• Widely reported suggestion that Government has deliberately slowed Chinese investment – in particular, by requiring Chinese FIRB approval applications to be withdrawn.

• This has been rejected by the Australian Government – applications withdrawn and resubmitted to avoid 90 day automatic extension of time.
Recent Developments (3)

• Australian media suggests that Chinese government has launched “a coordinated strategy to buy up as much of Australia’s resources as possible” – Chinese commercial sector is more an “arm of the state than it is of the market”

• Fears of difficulties in the emerging commercial engagement between China and Australia – China remains closed to foreign takeovers while attempting to take over the parts of the commercial world it covets

• Attention now on how Rudd government will meet these challenges
Uranium mining in Australia

- Australia has largest proportion (approx 40%) of economic demonstrated resources of uranium in the world.

- 2006: Australian Government commissioned “Switkowski Report” – found that Australia well positioned to increase uranium production and export to meet market demands, and that an opportunity existed for Australia to be a participant in the wider nuclear fuel cycle.

- Report recommends the rationalisation of the regulatory regime.

- April 2007: Howard Government introduces new policy designed to expand the nuclear industry in Australia and increase uranium mining and export.

- However, the Howard coalition government was voted out of power before any of its intended policy actions were taken.
Uranium mining in Australia (2)

• In early 2007 – Labor (in opposition) formally abandoned “No New Mines” policy and recognized the significant economic opportunities that uranium poses for Australia.

• Labor Government policy allows for the mining and export of uranium – but does not propose to intervene in state government approval or non-approval of uranium mining or exploration.

• NT Government is pro-uranium exploration and mining.
CLAYTON UTZ