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- Foreign Investment in Australia
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- Joint Ventures
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25 YEAR HISTORY

2010 is the anniversary of the foundation of our law firm and our first appointment as the lawyers for the Chinese government on China's first major overseas project, the Channar joint venture between China Metallurgical Import and Export Corporation (under the Ministry of Metallurgical Industry) and Hamersley Iron Pty Ltd.

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Beijing (Affiliate Office)
Room 902, Tower A, Beijing Fortune Centre
7 Dongsanhuan Zhonglu, Chaoyang District
Beijing 100020
People's Republic of China
Tel 86 (10) 6530 8846
Fax 86(10) 6530 8849
Email zglee@chamberslawyers.com

Melbourne
Level 41, ANZ Tower
55 Collins Street
Melbourne VIC 3000
Australia
Tel 61 (3) 9654 1988
Fax 61 (3) 9650 3958
Email rhchambers@chamberslawyers.com

Perth
Level 17, The Quadrant
1 William Street
Perth WA 6000
Australia
Tel 61 (8) 9288 6688
Fax 61 (8) 9288 6001
Email clumsdon@chamberslawyers.com

Doing business in Australia

By Louise Le Yi Gong

Chambers & Company

The general stance of Australia's Foreign Investment Policy is that it encourages and welcomes foreign investment. Australia's stable economy and government, transparent legal system and abundance of natural resources have made it an increasingly popular destination for Chinese investors in recent times. Over the past 18 months, Chinese projects worth over A$34 billion (US$31.5 billion) have been submitted to the Australian Foreign Investment and Review Board (FIRB) for approval. The most high profile proposals being made by Chinese state-owned enterprises (SOEs) are in the Australian resources sector as China moves offshore to secure long-term supply of natural resources. Increasingly, privately owned Chinese enterprises have also taken direct interests in both Australian public and private companies. In response to the increased volume of applications coming before the FIRB, the Australian Government has recently moved to clarify Australia's foreign investment regime especially as it applies to foreign government investments.

Australia's foreign investment regime

Australia's foreign investment regime is regulated by a combination of federal legislation and policy. All direct investments by foreign governments and foreign government owned enterprises irrespective of their size require notification to the FIRB for prior Government approval under the Federal Government Policy. Notification under the Foreign Acquisitions and Takeovers Act 1975 (FATA) will also be required for all investments made by privately owned foreign investors and foreign government-owned entities that meet the specified monetary thresholds under the Act and the Foreign Acquisitions and Takeovers Regulations 1989.

The Act is the key legislation for assessing both private and government related foreign investment proposals. Under the Act, an acquisition of an interest of 15% or more in an Australian entity or assets valued at above A$219 million (US$200 million) will require statutory notification to the FIRB. A statutory review period of 30 days applies to all investment proposals, which can be extended for a further 90 days by an Interim Order issued by the Treasurer.

Unlike under the Act, there is no formal review mechanism for proposals notified under the Policy. The Policy works in conjunction with the Act to provide a framework for assessing certain investment proposals in the purchase of Australian businesses and real estate. The Policy itself has no statutory force and is revised from time to time. Media releases and public announcements made by the Government on foreign investments also form part of the Policy and become guidelines for assessing future proposals.

The FIRB is responsible for screening each proposal and reporting its findings to the Treasurer. The Act gives the Treasurer the ultimate power to reject or impose conditions on proposals that do not pass the 'national interest' test. National interest is not defined in the Act or the Policy but rather each proposal is assessed on a case-by-case basis and in accordance with the guidelines set out in the Policy.

Guidelines for investments by foreign SOEs

The Policy sets out six principles to assess whether a foreign government investment is against the national interest. They require the Government to look into the independence, commerciality, corporate governance and business behaviour of an SOE investor. The extent to which the investor operates at arm's length from a government is a relevant factor that will be considered. Proposals by SOEs that operate on a 'transparent and commercial basis' will be less likely to raise national interest concerns. However, investments that will impact on Australia's national security, hinder competition or impact on Australian revenue policies will be closely scrutinised. The Government will also examine the extent of Australian participation in the ownership, control and management of the company after being acquired by the foreign investor.

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Business structures in Australia

In Australia, the available business structures are sole proprietorship, partnerships, companies (proprietary and public), trusts, joint ventures and representatives offices and branches.

Rather than carry on business in Australia itself, a foreign company may choose to establish an Australian incorporated subsidiary as a special purpose vehicle to conduct its affairs in the country. This may be either a proprietary company or a public company.

Joint ventures

The joint venture structure has been widely adopted by Chinese investors for projects with Australian partners in the resource sector.

In Australia, joint ventures have been devised not only to provide a convenient structure for bringing together capital and expertise on a large scale, but also to achieve a satisfactory position under Australian taxation and trade laws.

Unlike China, where joint venture laws are codified, Australian joint ventures typically will take one of two forms. They are the

incorporated (equity) joint venture (EJV) and the unincorporated (contractual) joint venture (CJV).

An EJV is set up by the incorporation of a company under the Corporations Act 2001 (Cth). The participants in the EJV are shareholders in the joint venture vehicle, which is a separate legal entity from the participant. The contractual joint venture is one created under general contract law. It is created by a contract entered into between two or more parties that mutually agree to enter into formal legal arrangements with each other. This is with a view to undertaking activities on a joint basis (for example, exploring for or mining minerals). In a CJV, the participants are also free to negotiate the administration and management of a CJV, and are subject to less restrictions and statutory duties than an EJV.

Resource projects undertaken in Australia in recent years have been most commonly developed as a CJV. The distinguishing feature of a CJV is the entitlement of each participant to take its percentage ownership share of the joint venture production separately in kind (rather than in the form of a share in profits or in dividends).

In an EJV, the participants do not have right to the cash flow or product of the EJV. Shareholders have only a right to the dividends.

Another advantage of the CJV structure is that each participant is responsible for its own tax treatment and is free to adopt its own accounting principles for tax purposes. Participants can transfer tax losses to other members of the corporate group and generally have more freedom to arrange affairs in the most tax advantageous way.

Prior to entering into a joint venture agreement with an Australian participant, a legal due diligence investigation is commonly undertaken to identify material legal risks for the project. For Australian mining projects, the due diligence report would typically report on the corporate structure of the Australian participant, the mining tenements, Aboriginal heritage and native title, environmental matters and material documents and contracts.

Acquisitions of private companies

While the joint venture structure has been the predominant form of investment by Chinese investors in Australia, more recently Chinese investors are taking a direct stake in Australian companies by way of mergers and acquisitions.

Acquiring a shareholding in an Australian private company can be completed either by acquiring the company's existing shares or through a share placement to subscribe for additional shares to be issued in the company.

There are no special regulations for foreign entities purchasing existing or new capital in an Australian private company. Notification to the FIRB for approval of the investment by the Australian Government will be required for acquisitions that meet the monetary thresholds under the FATA and/or under the Foreign Investment Policy where the investor is a Chinese SOE. The acquisition will be required to take place in accordance with the provisions of the Australian company's constitution.

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Acquisitions of public companies

Chinese investors can buy into Australian publicly listed companies by acquiring existing shares on the market, by a share placement or alternatively by a takeover.

The key body of laws and regulations relevant to acquisitions and takeovers of an Australian public listed company are as follows:

- Australia's foreign investment law requires certain acquisitions to be notified to the FIRB for approval under the FATA, or the Foreign Investment Policy or both;
- The Corporations Act 2001 (Cth) governs Australian company law, including takeovers of companies, and sets out the procedure for a takeover of an Australian public company. It is administered by the Australian Securities and Investments Commission;
- Listing Rules of the Australian Securities Exchange (ASX) set various requirements and rules on a public company listed on the ASX in relation to the management and dealing of the company's shares;
- The Trade Practices Act 1974 (Cth) prohibits direct and indirect acquisitions of shares or assets that would be likely to have the effect of substantially lessening competition in Australia.

Acquisition by takeovers

The takeover provisions under the Corporations Act 2001 (Cth) are triggered by an acquisition of 20% or more of the shares in a publicly listed company. Where there is an acquisition of 10% or more of the target company, the acquirer is in a position to block a compulsory acquisition by another party who may make a competitive bid for the target company.

There are two main types of takeovers in Australia – an 'on-market takeover' and an 'off-market takeover'. Off-market takeovers

AUTHOR BIOGRAPHIES

LOUISE LE YI GONG
Senior associate

Louise Le Yi Gong is a senior associate at Chambers and Company International Lawyers in Melbourne. As a qualified Australian lawyer, she has been actively involved in all of the firm's major joint ventures over the years, advising major Chinese State-Owned Enterprises (SOE) and privately owned enterprises on major energy and resource projects within the Australian mining industry and globally. She has extensive experience with working with the Australian Foreign Investment and Review Board, representing SOEs such as Sinosteel Corporation and Wuhan Iron and Steel (Group) Co. Ltd on their international acquisitions and joint ventures.

are made by formal written offers to a target company's shareholders. The bid can be made conditionally, either full or partial, and the bidder can offer the target shareholders shares or cash or a combination. On-market takeovers are undertaken by on-market acquisitions on the ASX by the bidder at a stated price. On-market bids must be unconditional, in cash, and a full bid for all securities within a class.

A takeover offer may be made with the support of the target company's directors ('recommended' or 'friendly' takeovers) or without the support of the target company's directors ('unsolicited' takeovers).

The main regulator of takeovers is the Takeovers Panel, which is responsible for resolving disputes about a takeover bid.

There is no requirement under Australian law to approach the target company before making a takeover offer. The bidder can launch an unsolicited takeover offer for the target company. If it does so, the bidder will not be able to undertake any internal due diligence on the target company and it will not know if the target directors will recommend the offer to the shareholders.

If the bidder seeks a recommended offer, it may approach the target company and conduct due diligence. Documents are required to be lodged with the ASIC and ASX during the takeover bid, including the Bidder's Statement and Target's Statement.

A takeover offer will usually contain conditions that if not satisfied will allow the bidder not to complete the takeover offer. The conditions of the takeover offer should be finalised before any announcement of the offer.

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Restrictive trade practices, antitrust and competition

In Australia, the Trade Practices Act 1974 (Cth) (TPA), administered by the Australian Competition and Consumer Commission, prohibits anti-competitive behaviour including:

- Acquiring shares/assets: likely effect of substantially lessening competition;
- Misuse of substantial market power;
- Arrangements: purpose or likely effect of substantially lessening competition;
- Horizontal and vertical price fixing;
- Horizontal and vertical market sharing; and
- Horizontal and vertical third line forcing.

Contravention of the TPA will attract penalties for a corporation and individuals. The TPA does not have a mandatory notification procedure for acquisitions of shares or assets. Where parties proceed with an acquisition that would be likely to substantially lessen competition in Australia without the approval from ACCC, the parties bear the risk of the ACCC seeking orders on the acquisition. This includes orders for an injunction, divesture, making the acquisition void and pecuniary penalties may also be applicable. It is therefore advisable for investors to seek voluntarily formal or informal clearance from the ACCC in advance of completion of the acquisition.

This chapter provides an overview on relevant legal topics on doing business in Australia. Chinese investors coming to Australia would also need to seek advice such as tax structuring under Australian taxation law, intellectual property protection, workplace legislation, relevant state mining and environment laws and import/export regulation, depending on the nature of their investments. The following websites are also available to find more information on investing in Australia:

www.austrade.gov.au
www.dfat.gov.au
www.firb.gov.au

在澳大利亚营商

龚乐怡
张百善事务所

澳大利亚对外国投资政策的基本立场是鼓励及欢迎外国投资。澳大利亚的稳定经济、政府、高透明度的法律制度，以及丰富的天然资源，近期更受中国投资者欢迎。过去18个月，总值高于340亿澳元（315亿美元）的中国项目，已提交澳大利亚外国投资审查委员会（审查委员会）审批。中国国有企业备受瞩目的建议书，是有关澳大利亚的资源界别，因为中国借此从海外获取长期供应的天然资源。更多民营中资企业也持有澳大利亚上市及私营公司的直接股权。因应审查委员会接获的申请有所增加，澳大利亚政府近日主动厘清国家的外国投资制度，尤其是有关制度适用于海外政府投资。

澳大利亚外国投资制度

澳大利亚的外国投资制度受联邦法和政策规管。海外政府及海外政府企业，不论规模大小，所有直接投资均须通知审查委员会，由政府根据联邦政府政策预先审批。如私人外国投资者及海外国有企业符合《1975年外国收购及并购法令》及《1989年外国收购及并购规例》的指定金额，所有投资项目必须按照1975年法令作出通知。

1975年法令是评估私人及政府有关的外国投资建议书的主要法规。根据此法令，收购澳大利亚公司15%或以上股权或收购资产值高于2.19亿澳元，必须向审查委员会作出法定呈报。法定审查期为30天，适用于所有投资建议书，并可通过财政部长发出的临时命令延长额外90日。

与1975年法令不同，如建议书根据政策作出通知，并无正式的审议机制。政策与法规共同提供框架，评估收购澳大利亚企业及房地产的投资建议书。政策本身并无法定效力，并不时修订。政府有关外国投资的新闻发布及通告也为政策的一部分，为检讨日后建议书提供指引。

审查委员会负责甄选每份建议书，并向财政部长报告结果。对没有通过“国家利益”测试的建议书，1975年法令赋予财政部长否决或施加条件的最终决定权。1975年法令或政策并无界定国家利益的定义，反之，每项建议书均视乎每宗个案的情况，并根据政策所载的指引评核。

过去18个月，总值高于340亿澳元（315亿美元）的中国项目，已提交澳大利亚外国投资审查委员会（审查委员会）审批

海外国有企业投资指引

政策提出六项原则，评估海外国家的投资是否有违国家利益，要求政府就国有企业投资者的独立性、商业性质、企业管治及业务行为进行调查。投资者独立自主的程度会是予以考虑的相关因素。如国有企业以“公开及商业模式”运作，其提交的建议书较少受到国家利益方面的顾虑。不过，如投资会影响澳大利亚的国防、妨碍竞争或对澳大利亚的收益政策有所影响，便会受到密切审查。政府也会在外国投资者收购公司后，探讨澳大利亚涉足公司的拥有权、控制及管理程度有多大。

澳大利亚的业务架构

澳大利亚的业务架构包括独资企业、合伙企业、公司(控股及上市)、信托公司、合资经营企业、代表处及分支机构。

外国公司除了在澳大利亚营运外，可在该国成立子公司，作为处理该国事务的特别工具，形式可以是独资企业或上市公司。

合营企业

与澳大利亚伙伴在能源界项目方面的合作，合营企业是中国投资者广泛采用的方式。

在澳大利亚，合营企业是轻易集合大量资本及专业知识的架构，同时在澳大利亚的税务和贸易法下达致有利的位置。

与中国已编纂为成文法则的合营企业法不同，澳大利亚的合营企业一般以两种形式设立，一是公司制合(资) 经营企业，一是非公司制合(作)经营企业。

合资经营企业是根据《2001年公司法令》成立的公司。合资经营企业的合营方是企业的股东，而合营企业是独立的法人实体。合作经营企业根据一般合约法成立，由两个或以上合作方签订合约，并互相同意与对方达成正式的法律安排，借此联合进行活动(例如探测或采矿)。合作经营企业的合作方可自由商议合作企业的行政及管理，比合资经营企业受到较少限制，承担的法定责任也较少。

近年来在澳大利亚进行的资源项目普遍成立为合作经营企业，此形式的一项特点，是各合作方有权根据所属的股权份额百分比，从合营企业的生产中获取实物回报(而不是利润或股息分配)。

合资经营企业的合营各方没有权利获得合营企业的现金或产品。股东只有获发股息的权利。

合作经营企业的另一项优点，是合作各方自行负责各自的税务处理，并可根据税务需要自由选择所采用的会计准则。合作各方可将税收损失转移到集团的其他成员，有更大自由度安排企业事务，使之最有利税务安排。

与澳大利亚一方签订合营协议前，通常要进行法律尽职调查，识别项目的重大法律风险。对澳大利亚的采矿项目来说，尽职报告一般会报告澳大利亚合营方的企业架构、采矿权、原住民的文化及土地所有权、环境事项和重要文件及合约。

收购私营公司

虽然合营企业是中国投资者在澳大利亚投资的主要形式，最近中国投资者也以并购方式直接持有澳大利亚公司的股份。

收购澳大利亚私营公司股份持股量的方法，是收购公司现有股份，或以配股权认购公司即将发行的额外股份。

外国公司收购澳大利亚私营公司的现有或新股权，并无特别规定。如收购达到1975年法或外国投资政策指定的金额(投资者是中国的国有企业)，有关收购获澳大利亚政府批准后，必须通知审查委员会，并根据澳大利亚公司章程进行。

作者简历

龚乐怡
高级律师

Louise Le Yi Gong是墨尔本张百善事务所的高级律师，持有澳大利亚的执业律师资格。多年来，她积极参与公司所有重要合营企业活动，就澳大利亚的矿业及全球的主要能源和资源项目，向主要中国国有企业及民营企业提供法律意见。与澳大利亚外国投资及检讨委员会(Australian Foreign Investment and Review Board)合作方面，她具备丰富的经验，曾代表中国中钢集团公司及武汉钢铁(集团)公司等国有企业洽谈有关国际并购和合营企业事宜。

收购上市公司

中国投资者可通过收购市场上的现有股份、配股或并购，取得澳大利亚上市公司的股份。

澳大利亚上市公司的并购相关法律法规主要有：

- 澳大利亚的外国投资法规定，一些收购必须根据1975年法令、外国投资政策或两者通知审查委员会；
- 《2001年公司法令》监管澳大利亚的公司法，包括公司收购；并指出收购澳大利亚上市公司的程序，由澳大利亚证券及投资委员会负责管理；
- 澳大利亚证券交易所的上市规则，对公司股份的管理和交易，订立上市公司在澳大利亚证券交易所必须符合的各项要求及规则；
- 《1974年贸易行为法令》禁止在澳大利亚直接及间接收购有可能大幅减低竞争的股份或资产。

以并购方式收购

《2001年公司法令》的并购条文适用于收购20%或以上的上市公司股份。如收购10%或以上被收购公司的股份，收购人可阻止进行竞争性收购被收购公司的另一方进行强制收购。

澳大利亚有两种主要并购方式—“场内并购”及“场外并购”。场外并购通过正式的书面要约被收购公司的股东。要约可以附设条件(全面或部分)，而收购者可向目标股东提供股份、现金或两者。场内并购由收购者以指定价格在澳大利亚证券交易所进行收购。竞价必须不设限制，以现金交易，并竞投同一级别内的所有证券。

并购要约可由被收购公司的董事支持而提出(“建议”或“友好”并购)，或不获被收购公司的董事支持(“主动”并购)。

并购的主要监管机构是并购委员会，负责解决并购招标的争议。

澳大利亚的法规并无规定在并购要约前与被收购公司联系。收购者可向被收购公司提出主动并购要约。如采取此方法，收购者不能对被收购公司进行内部尽职调查，而且不知悉被收购公司的董事是否向股东建议要约。

如收购者有意提出建议要约，可联系被收购公司进行尽职调查。为进行并购竞价向澳大利亚证券及投资委员会和澳大利亚证券委员会提交的文件，包括收购者声明书及被收购公司声明书。

并购要约一般包括的条件如不符合，收购者可不完成并购要约。并购要约的条件应在要约宣布前订立。

限制交易行为法、反垄断及竞争

澳大利亚的《1974年贸易行为法令》是由澳大利亚竞争及消费者委员会管理，禁止反竞争行为，包括：

- 收购股份/资产：很可能大幅减少竞争；
- 滥用主要市场支配力；
- 安排：目的或很可能大幅减少竞争；
- 横向及纵向限价；
- 横向及纵向市场份额；
- 横向及纵向强制向第三者购货。

《2001年公司法令》的并购条文适用于收购20%或以上的上市公司股份

如违反贸易行为法令，企业及个人要缴付罚金。贸易行为法令对收购股份或资产，不设强制性通知程序。如双方进行的收购，很可能大幅影响任合一方在澳大利亚的竞争力，不获澳大利亚竞争及消费者委员会许可，双方必须承担的风险是澳大利亚竞争及消费者委员会对收购申请的命令，包括禁制令、撤资、令收购无效及缴付罚金。因此投资者宜于收购完成前，向澳大利亚竞争及消费者委员会申请自正式或非正式批准。

本章概述在澳大利亚营商的相关法律议题。因应投资性质的不同，在澳大利亚投资的中国投资者，也必须征询意见，例如澳大利亚税务法律下的税务重组、知识产权保护、与工作环境有关的法律法规、有关的国家采矿及环境法、进出口规则。以下网站提供在澳大利亚投资的更多资料：

www.austrade.gov.au
www.dfat.gov.au
www.firb.gov.au