

Australia's Foreign Investment Law not Targeted at China

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Recent changes to Australia's foreign investment law are not targeted at Chinese investors. The changes make it harder for all private investors to avoid the law.

On 5 February the *Global Daily* said that the Australian media regarded new foreign investment regulation in Australia as targeted at China. The *Global Daily* referred to an article in *The Australian* newspaper which noted that the changes were first proposed at the time of Aluminium Corporation of China's (Chinalco) attempted acquisition of a second strategic stake in Rio Tinto.

The change passed the Australian Senate on 2 February 2010 and is awaiting assent. The change will then take effect. Before the change, some investors used convertible securities in an attempt to circumvent Australia's foreign investment rules. As was said in the Australian Parliament when the change was debated, the use of innovation financing arrangements have been a growing feature of investment activity over recent years and the changes were proposed to ensure that the foreign investment framework keeps pace with this trend.

Chinalco is State-owned, and therefore under Australia's policy requires approval for any investment. Chinalco did not have any opportunity to circumvent Australia's foreign investment rules. So the change was not directed against Chinalco or any other State Owned entity.

Before the change the Australian approval requirements applied to acquisitions of shares or assets. Some investors argued that an acquisition of rights to acquire shares using convertible instruments was not an acquisition of shares. After the change, it is clear that acquisitions of convertible instruments will also need approval.

A convertible note:

- is a debt note:
 - on which interest is paid; and
 - where the face value of the note may be repaid in money; and
- carries a contingent right to be repaid by the issue of new shares instead of money.

Options have also been used in Australia's foreign proposals. Options are contingent rights to be issued new shares, on payment of the option exercise price.

Australia does have a different policy for sovereign wealth funds and State-owned entities than for private buyers. The Australian Government considers that investments by sovereign wealth funds and State-owned entities may be partly strategic rather than strictly commercial. It prefers to see investors in key Australian assets behaving commercially than to be driven by foreign strategic interests. It also prefers for product sale prices to have reference to market prices.

The policy does not target Chinese entities. However, because many Chinese investors are State-owned, this policy applies to a larger proportion of Chinese investors than investors from most other countries.

As for Chinalco's proposed acquisition of a second strategic stake in Rio Tinto, the time that regulators including Australia's foreign investment regulator required to evaluate the transaction contributed to the delay in putting it to a vote of Rio Tinto shareholders. After the delay, as a result of improvements in Rio Tinto's businesses and prospects, the transaction was no longer in Rio Tinto's best interests and thus the transaction was terminated.

In recent years many Chinese entities have made successful direct investments in Australia, particularly in the resources sector. Chinese SOEs and other entities have found that they can achieve their investment objectives within the Australian policy established for direct investment by sovereign wealth funds and State owned Entities.

Expert advice on how to structure a proposal, and early discussion with the foreign investment regulator, both improve the prospects of a successful outcome.

澳大利亚外商投资法并非针对中国

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近期澳大利亚外商投资法的修改并非针对中国投资者。这些修改使得所有私有投资者试图规避相关法律变得更加困难。

2月5日, Global Daily称澳大利亚媒体将澳大利亚新的外商投资规则视为指向中国。Global Daily援引The Australian报纸上的一篇文章, 该文章留意到新法规的修改是在中国铝业股份有限公司(中铝)拟进行第二次对力拓战略股权的收购时被首次提出的。

该修改于2010年2月2日在澳大利亚议会通过并等待批准, 届时即生效。在此前, 一些投资者利用可转换债券的投资工具试图规避澳大利亚外商投资法规。正如澳大利亚国会所说, 当该修改被争论时, 运用创新性融资安排已成为近年来一项日益渐长的投资活动特征, 而该修改旨在确保外商投资框架与这种趋势保持同步。

中铝是一家国有企业, 因此根据澳大利亚政策需要获得批准才能进行投资。中铝从未有任何机会规避澳大利亚外商投资法规。从而可见此次修改并非针对中铝或任何其他国有企业。

在此前, 澳大利亚审批要求适用于股权或资产的收购。一些投资者主张利用可转换工具收购可转换股权的权利不是一项对股权的收购。此次修改后, 很明显对可转换工具的收购也需要获得批准。

可转换票据:

- 是一种债务票据, 该票据:
 - 具有利息; 且
 - 票据面值可兑换为金钱; 且
- 拥有一项可兑换新股取代金钱的可能权。

期权已在澳大利亚外资提议中使用。期权是在支付期权执行价格时发行新股的可能权。

澳大利亚对主权财富基金及国有企业不存在区别于私有购买者的不同政策。澳大利亚政府考虑主权财富基金与国有企业的投资可能部分属于战略性的而并非严格意义的商业性。澳大利亚政府更希望看到投资者对澳大利亚重要资产的投资行为是商业性行为而非受外国战略利益的驱使。同时其希望产品销售价格是参照市场价格的。

该政策并非针对中国企业。然而, 因许多中国投资者属国有性质, 相比其他国家, 该政策不可避免地将适用于更大比例的中国投资者。

对于中铝欲向力拓进行第二次战略股权的收购, 包括澳大利亚外商投资审查委员会在内的监管者要求评估该交易所需的时间致使力拓股东延迟投票。延迟后, 鉴于力拓业务及前景的好转, 该交易不再属于为力拓的最大利益, 因而告停。

最近许多中国企业已在澳大利亚成功进行了直接投资, 特别是在资源领域。中国国有企业及其他企业已发觉他们可以在澳大利亚针对主权财富基金及国有企业的直接投资方面建立的政策框架下获得他们的投资目标。

咨询关于如何架构一项投资提议的专业意见以及早期与外商投资监管人的沟通讨论都将有助于获得一个成功的局面。

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