SQUIRE PATTON BOGGS

AUSTRALIA CORPORATE UPDATE

August 2014

Japan-Australia Economic Partnership Agreement: What It Means for Australian Business?

In July 2014, Japan and Australia signed the Japan-Australia Economic Partnership Agreement (**JAEPA**). The JAEPA primarily benefits Australian agricultural and industrial exporters by eliminating or reducing certain tariffs and duties (including for coal and beef). The JAEPA also has key outcomes for Australian service providers and will remove all remaining tariffs on Japanese imports.

DID YOU KNOW?

Unacceptable Circumstances Declared for Inadequate Disclosure in a Bidder's Statement

In *Dampier Gold Limited* [2014] ATP 10, the Takeovers Panel made a declaration of unacceptable circumstances on the basis that a bidder's statement contained material information deficiencies and failed to disclose all the information required by section 636 of the *Corporations Act 2001* (Cth).

Continuous Disclosure Breach Attracts Large Penalty

Newcrest Mining Limited has been ordered to pay an AU$1.2 million penalty for breaching its continuous disclosure obligations under section 674(2) of the *Corporations Act 2001* (Cth).

FOFA Changes: What is the Law Now?

New regulations in force to implement the Government's interim FOFA changes until the new FOFA Bill is passed.

ASIC Shuts Down Unlicensed Foreign Exchange Business

ASIC action serves as a warning for online financial services businesses operating in Australia operating without a current Australian financial services licence.

Thin Capitalisation Changes Proposed

Legislation to implement the proposed thin capitalisation changes has been introduced into Parliament. The proposed changes are still proposed to apply from 1 July 2014.

ATO to Target Property Developers

The Australian Tax Office has issued a taxpayer alert, and indicated that it plans to investigate several hundred property developers using special purpose trusts to undertake developments.

JAPAN-AUSTRALIA ECONOMIC PARTNERSHIP AGREEMENT: WHAT IT MEANS FOR AUSTRALIAN BUSINESS?

The Prime Ministers of Japan and Australia signed the Japan-Australia Economic Partnership Agreement (**JAEPA**) and its Implementing Agreement on 8 July 2014. The intention behind the execution of the JAEPA is to improve Australia's access to the Japanese market.

Entering into an agreement with Australia's second-largest trading partner brings substantial benefits to Australian agricultural exporters, industrial exporters and services suppliers by granting preferential access to the Japanese market and eliminating or reducing certain tariffs and duties. The JAEPA will also remove all remaining Australian tariffs on Japanese imports.

As anticipated, the JAEPA does not include Investor-State Dispute Settlement provisions.

The JAEPA will be implemented following domestic treaty processes in Australia and Japan. Below are some of the key outcomes of JAEPA:

Tariffs Removed for Australian Agricultural Exporters

The JAEPA includes the following key outcomes for Australian agricultural exporters:

- tariffs of up to 219% will be eliminated or significantly reduced on many exports including beef, cheese, horticulture, wine and seafood; and
- tariffs for wool, cotton, lamb and beer will be eliminated.

Australian Industrial Exports to Japan Will be Duty-free

The JAEPA will allow Australia's resource, energy and manufacturing products to be exported to Japan duty-free.

Products for which tariffs will be eliminated include:

- coke and semi coke of coal and non-crude petroleum oils;
- unwrought nickel and ferro-manganese; and
- paints, key plastic products and pearl jewellery.

Outcomes for Australian Service Suppliers

The JAEPA increases market access for Australian services exporters into Japan, including legal and financial services firms and telecommunications providers.

Key outcomes for Australian service suppliers include:

- Australian financial services providers will be able to supply a clearly defined list of financial services on a "cross-border" basis, enabling Australian providers to do business in Japan without the need to open a full commercial presence;
- guaranteed market access for Australian lawyers, including ensuring Australian law firms will be able to form Legal Professional Corporations under Japanese law;
- both governments will support work towards enhanced mutual recognition of professional qualifications;
- thresholds will be increased for private Japanese investment into non-sensitive sectors (these thresholds will be the same as those that apply to US investors under the *Foreign Acquisitions and Takeovers Act 1975* (Cth));
- Australian intellectual property protections will be broadly equivalent in Japan; and
- Australian telecommunications providers will benefit from commitments on non-discriminatory treatment, regulatory transparency, competitive safeguards and fair and reasonable access to telecommunications networks and services.

Removal of Australian Tariffs for Importers

On full implementation, all remaining Australian tariffs on Japanese imports will be eliminated, including for:

- Japanese motor vehicles;
- electronics; and
- white goods.

No Dispute Settlement Provisions

The JAEPA does not include Investor-State dispute settlement (**ISDS**) provisions. Such provisions are intended to protect against political and cross-border risks. The reason for the exclusion of ISDS provisions may be the ongoing negotiations in relation to the Trans-Pacific Partnership (**TPP**). As Japan and Australia are party to the TPP, investors may be able to rely on the provisions of the TPP to protect their investments.

The JAEPA includes a provision to review the inclusion of an ISDS provision.

Timeline for Implementation

Both Japan and Australia need to carry out domestic approval processes to implement the JAEPA. For Australia, this includes having the agreement considered by Parliament and the Joint Standing Committee on Treaties before Australian laws are changed.

The government has announced that both countries aim to complete domestic treaty processes this year. Following this, Diplomatic Notes will be exchanged and the JAEPA will enter into force after 30 days.

The JAEPA has been described as "the most ambitious trade deal Japan has ever concluded with anyone" and covers a broad range of services. Australian businesses should consider the impact of the JAEPA in their industry and how they can advantage of related opportunities.

For further details on the JAEPA, you can read the Australian government's announcement on the Department of Foreign Affairs and Trade website. If you have any queries in relation it the JAEPA, please contact Vinod Kumar.

DID YOU KNOW?

Here is a snapshot of key regulatory issues and case studies in June and July 2014.

PUBLIC M&A

Unacceptable Circumstances for Inadequate Continuously Quoted Scrip Bid Disclosure in a Bidder's Statement

In a recent decision by the Takeovers Panel in *Dampier Gold Limited* [2014] ATP 10, the Panel made a declaration of unacceptable circumstances on the basis that the bidder's statement contained material information deficiencies and failed to disclose all the information required by s.636 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

A prospectus for continuously quoted scrip need only disclose the effect of the offer on the issuer, together with any information not disclosed previously in reliance on the continuous disclosure carve-outs. These requirements effectively take the place of the usual prospectus requirements of providing information regarding assets and liabilities, financial position and performance, profits and losses and prospects.

The Panel made the declaration against the bidder's statement for Ord River Resources Limited (**Ord**). The Panel determined that further disclosures in relation to the following were required regarding:

- Ord's future commitments and funding, particularly over the following 6 months, during which it needed to pay AU$2 million under the JV and under a proposed conditional placement;
- the terms of the JV;
- Ord's intentions, particularly with respect to its rights under, or seeking to amend, the JV (or if none, clear and prominent disclosure to that effect);
- appropriate information regarding the bid premium (including a 30 or 60 day volume weighted average price (**VWAP**) as a comparison to the 90 day VWAP given); and
- given that Ord could acquire 7% of the main asset of Dampier under the JV rather than by making a bid and if the bid was successful an accepting Dampier shareholder would hold shares in a company which still had the JV as its main asset but with a significantly different risk and investment profile, the Panel agreed with ASIC that the bidder's statement should have contained some disclosure similar to that which would be found in a disclosure document prepared in accordance with the content requirements of section 710(1) of the Corporations Act.

Ultimately Ord obtained ASIC's consent to withdraw its bid and therefore no declaration was necessary. If you have any further queries regarding takeovers or control transactions, please contact Campbell Davidson or Carly White for more information.

GENERAL CORPORATE UPDATES (INCLUDING ASIC)

Continuous Disclosure Breach Attracts Large Penalty

Newcrest Mining Limited has been **ordered to pay an AU$1.2 million penalty** for breaching its continuous disclosure obligations under section 674(2) of the Corporations Act.

The penalty follows an almost year-long investigation by ASIC into claims the company selectively briefed a group of investment bank analysts about its expected gold production and capital expenditure for the 2013-14 financial year, which led to the investors having access to market-sensitive information before the rest of the market.

ASIC commenced proceedings against Newcrest in the Federal Court of Australia and the parties filed a joint application for civil penalties to be imposed after Newcrest admitted the contraventions. The Court held that Newcrest twice contravened its continuous disclosure obligations and imposed court ordered penalties for each contravention totalling AU$800,000 and AU$400,000 respectively.

In handing down the judgment, Justice John Middleton remarked that the penalties "reinforce the message that equal access to market sensitive information is paramount in ensuring that markets operate on an informed, and equally informed, basis".

A class action claim for aggrieved shareholders has also been commenced against Newcrest, alleging that between 13 August 2012 and 6 June 2013 the company engaged in misleading or deceptive conduct by providing production guidance without reasonable grounds.

FINANCIAL SERVICES REGULATION

FOFA Changes: What is the Law Now?

The Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (Cth) has been registered to give effect to the Government's proposed amendments to the FOFA legislation on an interim basis until the *Corporations Amendment (Streamlining of Future Advice) Bill 2014* is passed by the Australian Parliament. These regulatory amendments have made the following changes to the FOFA legislation, effective 1 July 2014:

- removal of the Opt-In requirement;
- requiring Fee Disclosure Statements to apply prospectively – for new clients from 1 July 2013 only;
- effectively removing the requirement to satisfy section 961B(2)(g) (the 'catch-all' provision) from the best interests duty;
- specifically providing for scaled advice;
- banning commissions on personal advice for investment and superannuation products and eliminating the possibility of a re-introduction of these commissions through the previously proposed general advice exemption; and
- amending the grandfathering regulations in order to remove the current restrictions on trade for financial advisers who may change employers/licensees, and enable fair market competition for financial advisers selling their business.

With the exception of the grandfathering regulations, the regulations for each of the above measures are required to be implemented through legislation by 31 December 2015. The regulations can be read on the Australian Government's ComLaw website. If you need any assistance in understanding current FOFA measures, please contact Michelle Segaert.

ASIC Shuts Down Unlicensed Foreign Exchange Business

Online financial services businesses operating in Australia should be aware of the risks of operating without an Australian financial services licence (**AFSL**) or otherwise under a valid exemption. ASIC has recently commenced action against Vault Market Pty Ltd in the Supreme Court of NSW to prohibit this company and its sole director from continuing an online foreign exchange business under the domain name 'www.kiwifxbank.com' (**KiwiFx Bank**). ASIC reported that the website appears to facilitate foreign exchange trading for users and is improperly using the word 'bank' in its name. ASIC has obtained interim court orders restraining the company and its sole director from carrying on a financial services business without holding an AFSL, or holding out that they hold an AFSL, and to use best endeavours to remove all content on the website and to publish a notice for clients and potential clients stating that the company is not licensed with ASIC and does not hold an AFSL and KiwiFx Bank is not a foreign bank regulated by APRA.

If you need assistance or advice in relation to applicable financial services laws in Australia for operating an online financial services business, including in relation to the application of the pass-porting exemptions and other exemptions, please contact Michelle Segaert.

TAX DEVELOPMENTS

Thin Capitalisation Changes Proposed

The legislation to implement the proposed thin capitalisation changes has been introduced into Parliament. The proposed changes are still proposed to apply from 1 July 2014. Thin capitalisation rules seek to deny interest deductions to foreign controlled entities, or Australian entities which have offshore activities. There is good news for small to medium enterprises as thin capitalisation rules will no longer apply to entities whose total debt deductions (e.g. interest) are less than AU$2 million p.a. There is also a new "worldwide gearing" test for foreign controlled entities which might be able to be used as an alternate to the "safe harbour" rules. However, the bad news is that the maximum allowable debt under the safe harbour thresholds is proposed to be reduced to 60% of the group's Australian assets (formerly 75%).

The thin capitalisation calculations required are complex, and many companies may need to restructure their debt and equity arrangements in order to comply with the new ratios. We can assist companies in calculating their current thin capitalisation position, and restructuring debt and equity arrangements if necessary to comply with the new rules.

Please contact Louise Boyce for more information.

ATO to Target Property Developers

The ATO has issued a Taxpayer Alert and indicated that it plans to investigate several hundred property developers using special purpose trusts to undertake developments. Taxpayer Alerts are designed to be an early warning to taxpayers of arrangements which the ATO considers to be high risk and are currently being targeted by the Tax Office.

The first Taxpayer Alert to be issued for 2014 is targeted at property developers who are undertaking developments in special purpose trusts. The type of arrangement highlighted involves a property developer using a new or special purpose trust to carry out a development. In some cases the trust deed specifies that the purpose of the trust is to develop and hold the asset to generate rental income. The property is in fact developed and sold soon after completion and the profit on sale is treated as a capital gain. The capital gain is distributed to the beneficiaries and those beneficiaries who are individuals or superannuation funds claim the capital gains tax discount to reduce the tax payable on the capital gain.

The Tax Office considers that the profit should in fact be treated as ordinary assessable income subject to full tax rates. They have commenced a number of audits and are issuing amended assessments. Any special purpose trust which has sold land which has been developed by the trust might be affected by the Tax Office's investigations. We can assist in determining the correct treatment of the arrangement and give advice on how to deal with the matter, including whether a voluntary disclosure should be made.

Please contact Louise Boyce for more information.