

Submission on the Australia-China FTA Negotiations – Clayton Utz

Rick/Dene,

Thanks for your presentation earlier this week in Brisbane. Following up on some of the comments made, and in no particular order, could I suggest the following issues for consideration:

1. Establishment of joint venture law firms in the PRC

Project specific - these would be those that may be formed for a specific obviously large infrastructure project and would be temporary in the sense that they would operate for the life of the project utilising offshore (Australian) expertise in conjunction with a local PRC firm. Frequently it is a local firm who will obtain the government mandate, usually through having a "home town advantage" but will not have the resources or expertise to carry out that project, particularly where it interfaces with offshore entities such as financiers and construction companies.

General - these would be of a more enduring character and follow the role model used by the large US and English firms in Singapore, with varying degrees of integration with some only sharing premises and/or staff and some following a more fully integrated financial model.

Obviously, issues of reciprocity will be involved so far as anything requested by Australia will invite a reciprocal response from China.

2. Right of practice in China

This covers different areas and would involve consideration of the right of Australian law firms to maintain an office and practice:

Australian law in China.

Third country law in China.

Arbitration proceedings in China, though the nature of commercial contracts are such that these are usually referred to Singapore or elsewhere.

Chinese law in China (this last one may well not be desirable in the overall scheme of things but could be something that could be given way on for other concessions. (The comment was made at the consultation that basically "who would want to do this anyway?" and there is some truth in that comment.)

The issue of professional indemnity insurance for Australian firms practising in China would also need to be considered as to whether, in fact, cover (if any) can be had either locally in the PRC or through an Australian insurance company or through local Law Societies though I suspect the latter understandably do not want to have a bar of it.

3. Legal education

The opportunity to set up reciprocal chairs between leading Australian and PRC Universities to investigate and offer courses in interaction and comparison between Australian/PRC legal systems with exchange of academics and students should be an issue that is worthy of exploration.

4. Reciprocal recognition of judgments of superior courts

As mentioned in the consultation, there is probably some reluctance from the Australian end to recognise Chinese court judgments (even though they may originate from a Chinese superior court), in Australia due to the at times somewhat lax approach in China to what common law countries refer to as "the rule of law". However, there may be opportunity for recognition of non-adversarial type court orders such as grants of probate where those grants would simply be re-sealed in the non-grant jurisdiction where assets are held; matters such as

this will become of increasing importance with the growing number of migrants from China and indeed Australians working in China who will have assets in both jurisdictions that will need to be dealt with in the administration of that person's estate.

These are just a few preliminary considerations.

Regards,

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