

Changes to China's foreign investment regime following China's accession to the World Trade Organisation and the implications for Australian investors

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After intensive negotiations, the People's Republic of China agreed to give a lengthy list of commitments to change its existing trade and investment practices when it joined the World Trade Organisation ("WTO") in December 2001. For foreign investors in China and potential participants in the China's markets, the commitments which were of the greatest interest which those pursuant to which China agreed further to open up various sectors of its economy to foreign investment. A discussion of all of these commitments and of the numerous legislative changes which have been for the purpose of WTO implementation is too detailed for this paper. It is clear, however, that the Chinese government has taken – and continues to take - significant steps towards making the legal changes necessary to fulfil its obligations.¹

Although Australia is not one of the largest investors in China, Australian investment in China is significant. According to figures issued by the Australian Embassy in Beijing, as at 30 June, 2003, Australian companies and individuals had invested an aggregate of \$1.2 billion in China, with investments in areas including building and construction, manufacturing, food technology, advertising and design, as well as services including law, banking, insurance, education and tourism.² As many Australian investors are small to medium sized companies, changes to the Chinese investment regime which open up the service sector and facilitate and simplify foreign investment are potentially very significant.

¹ As of the end of 2002, the National People's Congress and its Standing Committee had enacted or revised 14 recent laws, the State Council had formulated or revised 37 administrative regulations, repealed 12 administrative regulations, and stopped implementing 34 other relevant documents; and the relevant departments of the State Council had enacted, revised or repealed about 1000 department rules and other measures. The Supreme People's Court had repealed 20 relevant judicial interpretations and made relevant interpretations for the adjudication of new administrative cases that may arise after the accession. On a local level, the local regulations and local government rules revised or repealed by the 31 provinces, autonomous regions and municipalities directly under the Central Government and 49 larger cities, together with the relevant documents and other measures the implementation of which was stopped by the foregoing localities were in total more than 190,000, including 1,130 local regulations and 4,490 local government rules. *Fully Performing Commitments for Accession to WTO and Effectively Improving Transparency of Legal Systems*, Speech Addressed at the Sino-American Legal Exchange Seminar by Deputy General-Director Li Yue-De, Research Department of the Legislative Affairs Office of the State Council, P.R. China., quoted in [http://www.uscc.gov/researchreports/2004/stewartpaper/complianceefforts\(II-a\).htm](http://www.uscc.gov/researchreports/2004/stewartpaper/complianceefforts(II-a).htm)

² Australian Embassy site: <http://www.austemb.org.cn/relation2.htm>

In this paper, I provide an overview of changes to the foreign investment regime, and a discussion of changes in some specific industry sectors which are likely to be significant for Australians operating in China.

Changes to the foreign investment regime

Controls over investment in industry by sector

One of the first steps taken by the Chinese government after accession to the WTO was the reissue of the *Catalog Guiding Foreign Investment in Industry*³ (the "Catalog") and the related *Regulations on Foreign Investment Guidelines*.⁴ The Catalog sets out lists of industries in which (or from which) foreign investment is encouraged, restricted or prohibited. Investment in an industry which is not included in the list is considered to be permitted (although there may be other restrictions or prohibitions which are not included in the Catalog). The Catalog issued in 2002 also set out the timetable within which existing limitations would be lifted in relation to certain industries, in accordance with China's WTO commitments. Item III (18) (1) on the encouraged list, for example, is "complete automobiles and complete motorcycles". The Catalog states, however, the foreign equity stake may not exceed 50%. Similarly, the provisions relating to wholesale and retail trade, which are included in the restricted list, set out in some detail the various sectors in which participation will be permitted only after a specified date.

The legislation to implement these concessions is not found in the Catalog itself. Since accession, the Chinese government has followed a policy of implementing industry specific legislation in many cases to open up particular sectors. Thus there has been a plethora of specific regulations dealing with foreign investment in fund management;⁵ insurance,⁶ book and magazine distribution,⁷ education⁸ and so on, each of which is issued by, or with the involvement of, the government agency in charge of that sector. As a result, in addition to the general foreign investment rules which apply where foreigners plan to invest in China, the foreign investor may also have to familiarise itself with, and follow the provisions of, specific foreign investment legislation relating to a particular

³ Issued by the State Development Planning Commission, the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation, MOFTEC Order [2002] No. 21 on 11 March, 2002.

⁴ Order of the State Council No. 346, promulgated and effective 1 April, 2002.

⁵ *Rules Governing the Establishment of Fund Management Companies with Foreign Investment*, issued by the China Securities Regulatory Commission on 1 June 2002 and effective 1 July 2002.

⁶ Including the *Detailed Rules for Implementation of Rules of the People's Republic of China on Administration of Foreign-invested Insurance Company* issued by the China Insurance Regulatory Commission on 13 May 2004 and effective 15 June 2004.

⁷ *Regulations on the Management of Foreign-Invested Book, Magazine, and Newspaper Distribution Enterprises* issued by the Press and Publication Administration, Ministry of Foreign Trade & Economic Cooperation on 17 March 2003 and effective on 1 May 2003.

⁸ *Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools* and the *Measures for the Implementation of the Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools*. See notes 11 and 12 below.

industry sector. An architect, for example, planning to take advantage of the opening of the market in relation to construction and engineering design must refer to the *Provisional Rules on the Administration of Foreign Enterprises Engaging in Design Activities for Construction Projects within the People's Republic of China*⁹ if he plans to participate in design work in China from outside China. If he plans to set up a permanent operation in China, he must attempt to set up a foreign investment enterprise under the *Regulations on the Administration of Foreign-Invested Construction and Engineering Design Enterprises*.¹⁰ and the applicable foreign investment laws. An educational institution planning to enter into a cooperation arrangement in China must comply with the provisions of the *Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools*¹¹ (which deal with the establishment of permanent educational institutions) and the *Measures for the Implementation of the Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools*¹² (which deal with cooperative arrangements of various kinds).

In contrast, an investment in an industry area in which foreign investment is permitted, and which is not the subject to special legislation, proceeds under the existing foreign investment regime, which, although far from perfect, has the considerable advantage of being well documented and well understood by local authorities. Since the areas which are now being opened up to investment tend to be those where foreign investment has long been resisted, it is perhaps not surprising that these are the areas in which legislative controls are most enthusiastically retained. The proliferation of legislation dealing with foreign participation in certain sectors, however, can serve to complicate, rather than simplify, foreign investment, particularly for investors who are not familiar with the regime.

Retention of the foreign investment regime

There are a number of points to make about the way in which the Chinese government has broadened the categories in which foreigners may invest. The principal issue is that it appears that the Chinese authorities are far from ready to give up the policies which impose a strict demarcation between foreign investment entities and Chinese companies. Under the basic structure which has been in effect since the 1980s, if a foreign investor wishes to operate in China, it must generally go through the process of setting up a foreign investment enterprise¹³ under the existing framework. If it wishes

⁹ Issued by the Ministry of Construction on 10 May, 2004 and effective 10 June, 2004.

¹⁰ Issued by the Ministry of Construction and the Ministry of Foreign Trade and Economic Relations on 27 September 2002 and effective 1 December 2002.

¹¹ Promulgated by the State Council on 1 March 2003 and effective 1 September 2003.

¹² Issued by the Ministry of Education on 2 June 2004 and effective 1 July 2004.

¹³ That is, it must establish an equity joint venture under the *Law of the People's Republic on Chinese-foreign Equity Joint Ventures*, promulgated by the National People's Congress on 8 July 1979, as amended on 4 April, 1990 and 15 March, 2001; a cooperative joint venture under the *Law of the People's Republic of China on Chinese-foreign Cooperative Joint Ventures*, promulgated by the National People's Congress on 13 April, 1988 and amended on 31 October 2000, or a wholly foreign owned enterprise under the *Law of the People's*

to buy into an existing Chinese company, it must go through the procedures of the applicable merger and acquisition laws and regulations and convert the Chinese company into a foreign investment enterprise. Although the laws have been recently amended to allow for the possibility of a foreigner owning an interest that is less than 25%, and thus, strictly speaking, being an investor in an entity which does not satisfy the traditional requirements of a joint venture, the Chinese policy which restricts foreign investors to the traditional investment structures has not changed since WTO. There are, of course, advantages for foreign investors in this bifurcated system, since foreign investment enterprises continue to enjoy tax exemptions and reductions and other forms of preferential treatment.

There are, however, a number of disadvantages in the foreign investment structure. Most foreign investment enterprises are joint ventures or wholly foreign owned enterprises, which have "registered capital" rather than shares. Particularly in the case of a joint venture, which resembles an incorporated partnership more closely than a western limited liability company, the structure presents a number of difficulties for the foreign investor: requirements for the unanimous consent of the partners in relation to merger, amendment of the constituent documents of the company, liquidation and dissolution and changes in registered capital, mean that even a small minority party has significant control over the joint venture; the right of first refusal given to other shareholders in relation to transfers of equity means that the company is illiquid. In event of a dispute between the partners, it is very difficult for one partner to force the dissolution of the company or to obtain a final resolution of the dispute without government intervention of some kind. Except in the case of a foreign investment joint stock company (which must be approved at a central government level), the foreign investment enterprise structure is not suitable for multiple investors and hence structuring joint venture capital investment where there is more than one investor becomes much more complex. Although the period since China acceded to WTO has seen major changes in the mergers and acquisitions regime which facilitate foreign investment in state-owned¹⁴ and privately owned domestic enterprises,¹⁵ this basic regime has not changed. Many of these issues also arise in the case of a Chinese limited liability company. The unanimity requirements in the joint venture structure, however, considerably reduce the flexibility available to foreign investors in this structure.

Another issue which has added difficulty, cost and time to the investment process in China is the approval process. First, an investor must determine at which level of government approval for the project can be granted, since, to date, all foreign investment projects have required government approval before they can proceed. Secondly, the parties have been obliged to go through an approval procedure which requires that a

Republic of China on Wholly Foreign Owned Enterprises, promulgated by the National People's Congress on 12 April, 1986, as amended on 31 October 2000, and their implementing regulations.

¹⁴ *Provisional Regulations on Reorganizing State-owned Enterprises Using Foreign Capital*, issued by the State Economic & Trade Commission, Ministry of Finance, State Administration for Industry & Commerce, State Administration of Foreign Exchange Control on 8 November, 2002 and effective on 1 January 2003.

¹⁵ *Provisional Rules for Foreign Investors' Merger & Acquisition of Domestic Enterprises*, issued by the Ministry of Foreign Trade & Economic Cooperation, State Administration of Taxation, State Administration for Industry & Commerce, State Administration of Foreign Exchange on 7 March, 2003 and effective on 12 April 2003.

project approval is obtained, a memorandum of understanding is signed, and an application, together with a feasibility study, environmental report, asset appraisal (in some cases), joint venture contract, articles of association and so on, is submitted to the relevant approval authority under the Ministry of Commerce (previously the Ministry of Foreign Trade and Economic Relations). After approval is given, the company can be registered with the State Administration for Industry and Commerce. This process can be time-consuming (particularly the review of the feasibility study in the case of a large project), and is particularly wearing for a small or medium sized enterprise.

Recent developments

In this regard, however, there has been a recent more promising development in the form of the recent *Decision of the State Council concerning the Reform of the Investment Regime*.¹⁶ The decision gives considerably more power to provincial governments to approve projects on the encouraged and restricted lists, by raising the approval thresholds (the level of investment at which a project must be referred for approval to the central government) from US\$30 million to US\$100 million in the case of an encouraged or permitted project, and to US\$50 million in the case of a project on the restricted list.

Very significantly, the Decision introduces a major change to the entire approval process. Approval of government authorities will in future be required for projects will utilise government funds and government investment projects. Certain listed projects, which are mainly those which relate to economic security, the rational utilisation of resources, protection of the environment and the public interest, optimisation of distribution and prevention of monopoly will be subject to "verification", as opposed to approval.¹⁷ For other projects, only filing "on the record" will be required.

Although the implications of the change are not clear at this stage, it appears that the process of verification will be considerably more straight-forward than the approval process. It will no longer be necessary, for example, to produce a detailed feasibility study for such a project. Sponsors of other projects will only be required to file documents with the relevant authorities, rather than to seek approval or verification. Although there are as yet no implementing regulations setting out the new procedures, the Decision represents a major move towards liberalising and simplifying foreign investment. It remains to be seen, however, how this new policy will affect the many new items of legislation setting out procedures requiring the approval of specific government agencies for investment in particular industry sectors.

The requirement of improved transparency and the Administrative Licensing Law

As part of its WTO commitments, China agreed that it would significantly improve the transparency of its licensing system (particularly important in a system where

¹⁶ Promulgated by the State Council on 16 July 2004.

¹⁷ See China Economic News (No. 34) 6 September, 2004, pp 10-12; Development and Reform Commission official on reform of investment system; reporter Dong Jian.

approvals, permits, registration and other government requirements are numerous).¹⁸ The *Law of the People's Republic of China on Administrative Licences*¹⁹ has not, as yet, attracted a great deal of attention, but it is likely to constitute one of the most far-reaching changes to Chinese regulatory procedures resulting from China's accession to the WTO. The Administrative Licensing Law sets out procedures for licensing (defined as the acts that administrative organs permit citizens, legal persons or organizations to engage in).²⁰ The law sets out of the basic principles of publicity, fairness and impartiality and requires that regulations relating to an administrative licence must be published and the grant of a licence must be disclosed.²¹ Regulations relating to licensing must be published (Article 5) and applicants have the right to apply for reconsideration or take legal action (Article 7). The law defines the circumstances in which licensing requirements may be imposed (Article 12) and sets out strict procedures and time limits to control the licensing process (Chapter IV).

The law is quite comprehensive, and it is not possible to do more than provide an overview of its contents here. Its significance for foreign investors, as for Chinese individuals and enterprises, is that it opens up the licensing and approval process to monitoring by the public, grants a right of appeal against an adverse decision and imposes strict time limits on the handling of applications. The implementation of the law has been taken very seriously by government departments. The State Council for example, has recently issued its third list of matters, encompassing 409 items, for which an administrative licence is no longer required.²² Government departments, including the State Administration of Taxation,²³ the General Administration of Customs²⁴ and the State Administration of Foreign Exchange,²⁵ have issued rules or notices relating to the implementation of the law.

It is not completely clear yet to what extent these changes will improve the licensing process for foreign investors. As competition between local authorities for new foreign investment projects has increased, many approving authorities have already moved to expedite their approval processes. The reduction of the number of licences that

¹⁸ See World Trade Organization *Report of the Working Party on the Accession of China* WT/ACC/CHN/49 1 October 2001 Item 306 et. seq.

¹⁹ Promulgated by the National People's Congress on 27 August 2003 and effective 1 July 2004.

²⁰ Article 2.

²¹ Article 5.

²² *Decision of the State Council concerning Canceling and Adjusting the Third Batch of Items for Administrative Examination and Approval*, issued and effective 19 May 2004.

²³ For example, *Circular of the State Administration of Taxation concerning Implementation of "Law of the People's Republic of China on Administrative Licences"* issued 1 December 2003.

²⁴ *Measures of Customs of PRC on Implementation of "Law of PRC on Administrative Licences"* issued 18 June 2004 and effective 1 July 2004.

²⁵ *Circular of the State Administration of Foreign Exchange concerning Implementation of "Law of the PRC on Administrative Licences"* issued 4 December 2003.

must be sought for operational issues such as imports, foreign exchange remittance, tax, land use and related issues, and the imposition of a fairly strict timetable for the grant of licences should, however, be very helpful in the long term in reducing the time and cost of operations in China. The efforts which are being made by individual departments which have a considerable influence on foreign trade and investment activities, such as Customs and the State Administration of Foreign Exchange, are particularly promising.

Discussion of specific changes affecting foreign investment

Foreign Trade Law

The Foreign Trade Law²⁶ was originally issued in 1994 and was reissued on April 6, 2004, with significant changes made in order to comply with China's WTO commitments. The law deals with foreign trade (which includes the import and export of goods, technology and trade in services) and foreign trade related intellectual property. The major changes which have been made are for the purpose of adopting WTO principles, including national treatment, most-favoured nation treatment and so on.

Probably the most important change from the point of view of foreigners and foreign investors is the removal of the requirement of an approval for a Chinese entity to engage in foreign trade - a requirement which meant that, because trade was directed through a number of entities with import-export rights, a foreign investor entering into a trade contract with a Chinese entity, had to deal through (and pay commissions to) an entity which did have the ability to sign a contract with a foreign company. The revised law, by contrast, provides for a system of registration for Chinese entities and individuals that propose to enter into international trade contracts. Although it can also be expected that specialist trading corporations will continue to play a role in the case of contracts with Chinese companies and individuals that have no expertise in trade or the foreign exchange regime. The effect of this should ultimately be that the costs of trading with China will be reduced, with the removal of the level of intermediaries that had a monopoly over international trade matters. The change also has the effect of placing Chinese enterprises on more equal terms with foreign investment enterprises, which have always had, by virtue of their status, the right to engage directly in international trade. The *Provisions on Recording and Registering Foreign Trade Operators*²⁷ further expand on the Foreign Trade Law by setting out the rules pursuant to which a person or entity planning to engage in foreign trade can register as a foreign trade operator in China.

Other changes to the Foreign Trade Law include the clarification of the circumstances in which quotas or licensing requirements will be imposed on imported and

²⁶ *Foreign Trade Law of the People's Republic of China*, promulgated by the Standing Committee of the National People's Congress on April 6, 2004.

²⁷ Issued by the *Ministry of Commerce* on 25 June 2004 and effective 1 July 2004.

exported goods (Chapters 3 and 4) Provisions are also included which relate to infringement of intellectual property protection in relation to imported goods (not exports) (Chapter 5), prohibition of anti-monopolistic behaviour and anti-competitive behaviour (Chapter 6) and provisions relating to foreign trade investigations (Chapter 7).

Commercial Distribution Law

One of the long standing complaints of foreign businesses and foreign investors has been the prohibition on foreigners and foreign investors engaging in domestic trade within China. The inability of a foreign company or a foreign investment enterprise to obtain a licence to distribute goods in China has meant, for example, that a manufacturing joint venture can distribute its own products within China, but cannot import and sell the products of its parent or even a related Chinese joint venture. A foreign company planning to sell its products in China must work through Chinese distributors or a complex range of arrangements in order to control its own distribution – it cannot set up its own company to do so. As part of its WTO commitments, the Chinese government agreed that it would liberalize trading rights over a period of three years from accession.²⁸ The *Regulations on Management of Foreign Investment in the Commercial Sector*²⁹ are intended to implement these concessions.

The Regulations refer to commission-based agencies, wholesalers, retailers and franchises. In order to carry out any of these activities in China, the Regulations require that a foreign investment enterprise must be established in China (Article 3). The prohibition on foreign companies operating directly in China (which has been part of China's policy (with some limited exceptions) since the inception of the open-door policy) has been retained. The implications of this requirement are that a foreign company which wishes to operate in these areas must set up a foreign investment company, and must pay in registered capital in order to capitalize the entity. For small and medium size companies, depending on the amount of capital required, this can be a strong disincentive. As part of its WTO commitments, however, the Chinese government agreed to reduce the amount of registered capital which would be required for the establishment of a commercial entity. Pursuant to Article 7 of the Regulations, the minimum required registered capital for a commercial entity is the same as that set out in the Company Law in relation to Chinese companies (pursuant to the system of non-discrimination). At current levels, this means capitalization of a minimum amount of RMB500,000 (approximately AUD87,760) for enterprises engaging in wholesale distribution and RMB300,000 (approximately AUD52.660) for enterprises engaging in retail distribution.³⁰ The Regulations encourage foreign investors with strong economic power, marketing skills and marketing networks (Article 6), but the main formal requirement is a good reputation and no previous breach of Chinese laws and regulations. Approval is granted at the central government level, after an application is made through the provincial authorities, although the Ministry of Commerce may delegate approval authority to the provinces.

²⁸ See Working Paper Report, above, Chapter IV(A).

²⁹ Issued by the Ministry of Commerce, Notice [2004] No. 8, on April 16, 2004 and effective 1 June 2004.

³⁰ Article 23 of the *Company Law of the People's Republic of China*, issued by the National People's Congress and effective on 1 July 1994 (as amended).

In accordance with China's WTO commitments, foreign investment in distribution activities in certain sectors (such as the wholesaling of pharmaceuticals, fertilizers, crude oil and so on) will not be permitted until the date set out in the Regulations (Article 17); wholly foreign owned enterprises will not be permitted in the distribution area until 11 December 2004.

Article 24 provides that foreign investment enterprises other than commercial enterprises that engage in commercial activities may alter their business scope by complying with the Regulations. For existing operations in China, this provision is of great significance, as it means that they will be able to apply to extend their existing manufacturing and other operations in China to include distribution as long as they comply with the Regulations.

In summary, the Foreign Trade Law and the *Administrative Regulations on Foreign Investment in the Commercial Sector* represent a major step forward in facilitating trade with, and trading within, China for foreign investors and traders.

Other provisions

As I mentioned above, it is not possible in the space of this paper to cover the many areas in which changes have been made to the foreign investment regime by the Chinese authorities in order to implement China's obligations under WTO. I do, however, wish to touch upon two areas in which Australian investors have shown a particular interest – design work and the education area.

As noted above, there have been a number of legislative developments in both of these areas. For architects in particular, however, these legislative developments have not been as helpful as was hoped.³¹ As an example, the *Regulations on the Administration of Foreign-Invested Construction and Engineering Design Enterprises*³² set up the framework regime for the establishment by architects and design firms of a foreign investment enterprise in China. In practice, however, the Rules create a number of significant barriers to such a proposal. For example, the rules require that at least 12.5% of the required architects and engineers for the joint venture company must be foreign architects and/or engineers qualified in China in the case of a joint venture and at least 25% in the case of a wholly foreign owned enterprise. They must live in China for at least 6 months of every year. There is no information available at this stage as to how the foreign architects and engineers can qualify in China. It is also not clear at this stage how a foreign investment design stage could obtain the appropriate categorization for the sort of work which it plans to undertake. A Chinese design firm must start with lower level work and work its way up to a categorization which entitles it to undertake major projects. It is not clear from the Rules whether a foreign investment firm would have to follow the

³¹ China committed as part of its accession to WTO not to impose limitations on foreign participation in scheme design. With this exception, architects working in China must co-operate with Chinese professional organizations is required. Joint ventures were to be permitted, with wholly foreign owned enterprises permitted 5 years after accession. See Annex 9 to the Protocol on the Accession of the People's Republic of China, Schedule CLII – People's Republic of China: Part II – Services Item II (A) (d) WT/ACC/CHN/49/Add.2, p. 7.

³² Issued by the Ministry of Construction on 10 May, 2004 and effective 10 June, 2004.

same procedure or whether, on the basis of its parent's foreign experience, it would be able to apply for a Grade A categorization at establishment. As a consequence, the Rules have not so far been as useful for foreign design firms working in China as they might have hoped.

In addition, the *Provisional Rules on the Administration of Foreign Enterprises Engaging in Design Activities for Construction Projects within the People's Republic of China*³³ have recently been issued in relation to construction and design projects where the foreign construction and design firm is based outside China. The Rules are quite restrictive. They require a foreign design firm to work in conjunction with a Chinese design firm; the foreign firm cannot sign contracts independently, as any contract must be signed by the Chinese partner. Foreigners cannot work on confidential projects, projects closed to foreigners and projects related to natural disasters. The effect of the Rules seems to be further to restrict the activities of foreign firms providing design services to Chinese companies even from outside China, instead of increasing opportunities for cooperation. In this sector, therefore, despite WTO, steps forward seem to be quite slow.

There have also been developments in the educational sector (an area in which many Australian institutions have an interest).³⁴ The *Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools*³⁵ deal with the establishment of permanent educational institutions. For the moment they are therefore of limited relevance to many Australian educational institutions which aim to expand their activities in China, but do not intend to set up a permanent institution. The *Measures for the Implementation of the Regulations of the People's Republic of China on Chinese-foreign Cooperation in Running Schools*³⁶, which deal with cooperative arrangements of various kinds, are likely to have greater impact. The Measures require execution of a formal cooperation agreement between the cooperating foreign and Chinese educational institutions, and approval of that agreement by the authorities (at a central level in the case of an agreement as a result of which a foreign degree is issued to students). They reiterate the existing requirement that (for most projects) education is a non-profit-making activity. They also contain provisions relating to financial accountability. Overall, the Measures will have an impact on Australian universities offering courses in China, but also serve the useful purpose of clarifying the rules and procedures relating to cooperative projects in China.

Summary

In conclusion, Chinese authorities have put tremendous effort into the legislative implementation of China's WTO commitments. One of the results of the methods

³³ Issued by the Ministry of Construction and the Ministry of Foreign Trade and Economic Relations on 27 September 2002 and effective 1 December 2002.

³⁴ Under WTO, China committed to allow joint venture schools, with majority foreign ownership, in educational sectors other than compulsory primary and secondary education. See Annex 9 to the Protocol on the Accession of the People's Republic of China, Schedule CLII – Item II (5)A-E People's Republic of China: Part II – Services WT/ACC/CHN/49/Add.2, p.27

³⁵ Promulgated by the State Council on 1 March 2003 and effective 1 September 2003.

³⁶ Issued by the Ministry of Education on 2 June 2004 and effective 1 July 2004.

adopted to open up various sectors to foreign investment, however, has been the proliferation of industry specific legislation, which adds to the overall complexity of understanding and dealing with investment in China. For Australian investors, or Australian companies aiming to contract with Chinese parties, the rapidity of the changes means that there are may be new opportunities opening up. There may also be changes affecting existing operations or requiring changes to well-established ways of dealing with Chinese partners. Certainly, given the frequency of new legislation, keeping abreast of Chinese legal developments has been a constant challenge since well before China acceded to WTO.

Although much of the legislation represents a welcome clarification and implementation of China's commitments, some of the legislative steps taken suggest a certain reluctance in some sectors to opening up China to foreign investment and participation. On the other hand, the major steps taken in terms of reducing licensing requirements and increasing transparency at the government level will, if carried through, have a major impact on simplifying interaction with government at all levels in China. The recognition in the *Decision of the State Council concerning the Reform of the Investment Regime* that investment decisions should be market driven and that government involvement in the approval process should be reduced indicates an acceptance by the Chinese government post-WTO that the reform process to reduce government involvement in licensing and other aspects of business activity should be continued whether or not it is required by the terms of China's WTO accession. Although it remains to be seen whether local government authorities will fully embrace transparent, fair and accountable licensing practices and the reduction of government involvement in all areas of investment in the near future, the commitment of the Chinese government to the reform program through its legislative program is very impressive. As a result, China offers an increasingly open and flexible investment regime for Australian investors.