To: Department of Treasury

Re: Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020

30 September 2020

Introduction

AMEC appreciates the opportunity to provide a submission on the recently released draft *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (draft Regulations) and the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (draft Fees Regulations). The second tranche of reforms to Australia's foreign investment framework support the first tranche of reforms, presenting an almost complete overhaul of Australia's existing foreign investment framework. These reforms will have a direct, significant impact on the mining and mineral exploration industry, which drives Australia's economic prosperity.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 325 mining and mineral exploration companies across Australia.

The mining and exploration industry make a critical contribution to the Australian economy, employing over 255,000 people. In 2017/18, these companies collectively payed over $31 billion in royalties and taxation, invested $36.1 billion in new capital and generated more than $250 billion in mineral exports.

In 2019/20, $2.8 billion was spent on minerals exploration to discover the mines of the future, representing an 18% increase from the previous year.

In 2020 the mineral exploration industry has made a number of discoveries. The Australian Stock Exchange (ASX) Initial Public Offering (IPO) continues to grow, from 15 in 2019, to nearly 60 being currently worked on in 2020 thus far.

Proposed reforms

General Feedback

The second tranche of FIRB materials give further effect to the impending foreign investment reforms, announced by Commonwealth Treasury in June 2020.

AMEC made a submission to the Department of Treasury regarding the first tranche of reforms, in August 2020[1]. The primary issues highlighted in our initial submission remain relevant and applicable to the second tranche of FIRB reform materials.

AMEC acknowledges and supports the need for reforms to protect Australia's national interest and security; however, recognises the importance of foreign investment, due to the direct and indirect benefits it delivers to Australia's economy. Foreign investment enables mineral explorers to discover and develop future mines at a much faster rate than if they were to solely depend on domestic financing, which is often limited. Mineral discoveries converted into producing mines create job opportunities, a skilled workforce, a high export market, and can pay the royalties that develop and support the Australian community. The combination of these factors increases the quality of life of Australians and increases the nation's fiscal position.

In 2016 it was reported that less than 10% of Australian mining projects underway at the time were solely Australian owned[2]. Data from Austrade stated that the mining and quarrying sector represented 38% of the total stock value of foreign direct investment in Australia in 2018, at $366B[3]. Reforms to the foreign investment framework will expectedly have the largest adverse effect on industry, which receives over three times the amount of foreign direct investment than the next largest sector.

Prior to the announcement of FIRB reforms, Australia was already considered a restrictive and relatively low threshold nation for foreign investment reviews. In 2018-19, Chinese investment into Australia plunged by almost 50%, falling from $4.8B to $2.5B. While industry recognises the importance of maintaining a diverse investment framework to prevent reliance on a limited range of foreign markets, we should not limit a major source of capital, without having secured alternate sources.

Mineral exploration, required to discover the mines of the future, is an inherently risky and long-term investment. Sourcing early capital investment is a challenging task. It is often only investors from countries who have a much greater risk appetite that are willing to undertake early investment, agree to offtake and other commercial agreements required to develop projects. With the tightening of FIRB requirements, an unintentional consequence could be destabilizing Australia's attractive investment prospectivity. If foreign investment is limited, the Government must be willing to discuss how this funding will be replaced; this is yet to be addressed in the two tranches of FIRB reform materials.

The probable outcome of the extensive reforms is they will significantly hinder the development of Australia's future mines, as current mine reserves are depleted. Despite the mining and mineral exploration sector being acknowledged by State, Territory and Commonwealth Government's as supporting Australia's economy through the COVID-19 related recession much of the world is

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[1] https://secureservercdn.net/198.71.233.51/0h5.0cf.myftpupload.com/wp-content/uploads/2020/09/Submission-to-FIRB-review.pdf
[2] https://www.tai.org.au/content/undermining-our-democracy-foreign-corporate-influence-through-australian-mining-lobby
[3] https://www.austrade.gov.au/news/economic-analysis/global-investors-stay-keen-as-australia-s-fdi-stock-reaches-a-970-billion

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experiencing, to undertake reforms which are expected to hinder foreign investment into Australia's minerals sector, especially with no plan for alternate funding, is counterintuitive and concerning.

Protecting Australia's national security

A major cause for concern in AMEC's initial submission to the first tranche of FIRB reforms was the broad definition of national security concerns and sensitive national security business. Under these broad new definitions, all transactions could be subject to review, regardless of their actual or implied threat to Australia's interests and national security.

The time delays and additional costs this will impose on potential investors is significant. These factors have the potential to discourage genuine investment into our industry, which will have wide-ranging consequences, unless certainty can be provided that there are alternate sources of funding available, to bolster the likely reduction in foreign investment.

AMEC again iterates the need to provide tighter definitions and more clarity as to the intent of these considerations. The removal of investor certainty as a consequence of the FIRB reforms should be carefully analysed. Protecting Australia's national security is supported, but the significant cost to the nation's economy needs to be assessed against the likely limited benefits of these broad definitions.

More clarity is required on the distinction between control and financing; not all foreign investment threatens Australia's national security and control over industries, however the FIRB reforms do not acknowledge this. The Government also needs to consider an allowance for passive investment into Australia.

Reinstating existing review thresholds

AMEC welcomes the Government's announcement that from January 2021, the existing, pre-COVID-19 monetary thresholds will be reintroduced, at an indexed rate. The zero-dollar threshold was intended to be in place for the duration of COVID-19. As there is no end to the pandemic in sight, and now Government officials have had time to grapple with the challenges COVID-19 poses, there is no longer the immediate requirement to stringently review every single foreign investment regardless of perceived levels of threat.

There is limited publicly accessible Australian foreign investment data to underpin the extent of the reforms. However, reporting indicates that since the introduction of the COVID-19 induced zero-dollar threshold, Australia's appetite for foreign investment has been questioned, and has had a "chilling effect on foreign investment"[4].

The second tranche of FIRB papers acknowledge the significant economic benefits that foreign investment provides, and that reforms need to maintain Australia's investment attractiveness. In order to do so, a robust framework which provides business and investor certainty is required.

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[4] https://www.afr.com/politics/federal/firb-crackdown-had-a-chilling-effect-on-foreign-interest-20200922-p55y0v

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Treasurer’s call-in power

AMEC welcomes reforms that reduce regulatory burden and red tape, and provide transparency and certainty. The proposal that the Treasurer, whose new call-in powers go further than any other foreign investment powers, has the ability to call-in transactions for up to 10 years after they commence, is not supported by industry.

The Treasurer’s new powers are already extensive, particularly given that other avenues for review co-exist with the FIRB reforms, under the existing national interest tests. To have the ability to review decisions for 10 years after they have been granted, and likely operational, significantly increases uncertainty. For mineral exploration in particular, over the average 13 year period from discovery to production, and with an average of four companies required to undertake exploration before a producing discovery is made, this is an unrealistic impost of regulatory burden that does not align with the mining cycle.

Industry recommends this time frame is shortened to five years, in line with the sunset clause of most jurisdictions, and the ATO’s own record keeping requirements for businesses[5].

Measures to streamline FIRB applications

The proposed measures to streamline FIRB applications and provide an element of certainty via pre-clearance is a welcome initiative.

Protecting Australia’s national interests should be a priority for the Government, but the majority of foreign investments into Australia are from legitimate sources, which do not threaten sensitive industries or national security. Currently, all of these applications are subject to review, yet there are very marginal benefits for these excessive requirements.

Removing regulatory burden and red tape in a destination which is already considered quite restrictive is a welcome measure by the Government, to provide investors and developers with the certainty required to attract further investment to develop projects. These projects will deliver ongoing benefits to the Australian community, and the faster they can commence, the sooner these benefits can be realised.

Capacity to undertake assessments

The significant increase in materials to be presented for foreign investment application assessments will create increased costs, regulatory burden, and time delays for investors, projects, and the Government.

The capacity of the Government to assess these applications in a timely manner will be critical to ensuring investment applications do not decrease once these reforms are implemented. Industry is concerned that the current staffing of the regulator is not sufficient to meet demand, increasing the likelihood of delays.

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[5] https://www.ato.gov.au/business/record-keeping-for-business/overview-of-record-keeping-rules-for-business/

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Given the increased fees being charged to prospective and existing foreign investors, the Government needs to ensure they have the capacity to undertake timely assessments, commensurate with the new fee structure.

Final comments

Australia's natural minerals resources are abundant, and plenty of the continent remains underexplored. The benefits mineral exploration and mining provides to the local and greater communities, and Australian economy, lead to our nation's consistently strong financial position.

Any measures to inhibit investment into our resources sector jeapordises Australia's investment attractiveness, diminishes the certainty required for project development and attracting further investment, and increases Australia's low sovereign risk. The scope of reforms proposed under the guise of national security are extensive. More certainty and transparency into the Government's decision making process is required by businesses and potential investors alike, to retain Australia's popularity as a foreign investment destination. The majority of foreign investments into Australia are for legitimate and non-compromising investments; they need to remain welcomed, because as acknowledged by the Government, foreign investment provides many benefits to the community.

The Australian Government need to ensure it effectively communicates the intent of these reforms is not to discourage investment. Due to the scope and speed at which the reforms are being pushed, it could be misinterpreted by some that Australia no longer welcomes foreign investment. Even a minor reduction in the amount of foreign investment Australia currently receives will have wide-spread and long-lasting consequences, industry would like to avoid.

Industry provides jobs, upskilling, benefits to local communities, and pays the royalties that create schools, hospitals, and public resources. AMEC strongly advocates to the government not to rush extensive reforms that will ultimately hinder our liveability and prosperity.

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