

To: Department of Treasury

Re: Enhancing Australia's Foreign Investment Framework – Government response to the evaluation of the foreign investment reforms and discussion paper

21 March 2022

Introduction

AMEC appreciates the opportunity to provide a submission to the Commonwealth Department of Treasury's discussion paper, following the evaluation of recently implemented reforms to Australia's foreign investment framework. The ability of Australia's mineral exploration and mining industry to continue attracting investment in a highly competitive investment environment, is contingent on a regulatory framework that acknowledges the importance of, and welcomes, foreign investment. This ongoing investment is vital to continue discovering the mines of the future.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 460 member companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over \$100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 256,800 people. In 2020/21 Industry generated a record high \$301 billion in mining exports, invested \$3.2 billion in exploration expenditure to discover the mines of the future, and collectively paid over \$39.3 billion in royalties and taxes. In WA, a record 148,395 people were employed in mining and exploration in 2020/21, and \$2.1 billion was spent on mineral exploration in 2020/21, representing a 21% increase from 2019/20, accounting for 65% of Australia's overall mineral exploration expenditure.

Discussion Paper – evaluation of foreign investment reforms

General Comments

AMEC made two prior submissions to reforms to Australia's Foreign Investment Review Board (FIRB) and foreign investment framework, highlighting the importance of balancing genuine foreign investment whilst protecting Australia's national security. COVID-19 highlighted the fragility of markets worldwide and provided State and Commonwealth Governments with increased focus to undertake policy and legislative reforms to respond to immediate threats, with a view of pre-empting a range of issues that could occur as the world emerged from the COVID-19 induced recession.

The changes outlined in this discussion paper present opportunities to understand key sectors which are more reliant on foreign investment, and how foreign investment in practice, has been affected by

the substantial reforms. Where there are opportunities to refine practices to allow business to operate more efficiently, they should be considered within the remit of these reforms.

Evaluation of the reforms and key findings

The key concerns arising from reforms to the foreign investment framework, were that genuine investors could view Australia as no longer welcoming to foreign investment, and that foreign investment could be rejected on the basis of national security, with no method for appeal and no transparency into the decision-making process. Given the broad scope of the changes and potential application to the minerals sector, especially in relation to critical minerals which can be utilised for defence applications, this was particularly concerning and posed a significant threat to the sector's investment index.

The discussion paper states the Evaluation (of the FIRB reforms introduced in 2021) found that the reforms achieved the Government's policy objectives in the first year of operation, with indications the reforms are striking the appropriate balance between supporting foreign investment and protecting national interest. Industry again requests more transparency into this statement, and insight into the number of foreign investment applications into Australia's minerals sector that were approved, not approved, or withdrawn during this period? Similar to reforms undertaken in other jurisdictions, an explanation of why these applications have been rejected, whilst upholding commercially sensitive and national security related information, would enable investors greater insight into regulatory decision making, prior to commencing the voluntary referral of applications pathway for foreign investment.

Transparency of this type of information is paramount to maintaining a jurisdiction that welcomes non-sensitive investment. Consistency in regulatory decision-making provides potential investors and project proponents with necessary elements of certainty in volatile markets, competitive market conditions, and higher-risk profile projects, which greenfield mineral exploration typically constitutes. Investment into this sector is crucial to discovering Australia's future mines, and should not be inadvertently discouraged or diverted to competing jurisdictions due to potential perceptions of policy bias.

Tranche 1

AMEC welcomes, through the initial tranche of regulatory amendments to the *Foreign Acquisitions and Takeovers Regulation 2015 (FATR)*, the consideration of avenues to reduce regulatory burden on investors, to ensure Australia's minerals sector remains internationally competitive for foreign investment. The proposed 1 April 2022 commencement of these changes provides a relatively limited opportunity for the consideration of feedback.

Moneylending exemption

The provision for the moneylending exemption for new entities as per Section 27 of the FATR, to be available to foreign moneylenders upon the establishment of a new entity to enter into an agreement for the purpose of lending, is recognised as a common lending practice. The current drafting of the exemption enables applicable foreign debt financiers to operate without obtaining FIRB approval for

the acquisition and enforcement of security interests over Australian assets, however, is limited in its application as it does not reflect typical debt financing practices.

Industry broadly supports the proposed expansion of the exemption to expand the pool of eligible parties that will be able to utilise this exemption, reflective of moneylending practices.

Rights Issue

FIRB approval requirements are not currently required for acquisitions by foreign persons of interests in an entity's securities, pursuant to a prorated rights issue. However, the term 'rights issue' is yet to be defined for the purpose of this framework, creating ambiguity as to the potential extent and application of this exemption.

The proposal to adopt the same definition for rights issue as utilised in the *Corporations Act 2001* (Corporations Act) could create further uncertainty as ASIC has recently amended the definition via the *ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84*, however this change has not been reflected in the associated Regulations¹.

The ASIC amending instrument appears to take a conservative approach, potentially applying to the acquisition of additional securities in an Australian entity under a rights issue. This exemption has typically been applied to rights issues by both Australian and non-Australian entities. Further ambiguity arises when considering the definition of a rights issue under the Corporations Act, which requires offers to be made to registered security holders in Australia or New Zealand. This requirement may exclude such security holders under foreign company requirements and local laws.

AMEC seeks clarity that this provision will not diminish the extent of the application of the Rights Issue exemption clause, and that further clarity is provided to address crossover with other legislation and legislative instruments.

Additionally, this provision adds the objective tests of whether or not there will be 'reasonable grounds' to believe the percentage interest the person holds in the relevant entity will not increase as a result of the acquisition².

Tranche 2

The broader package of legislative and regulatory reforms for implementation in the second half of 2022 will expectedly, be parked until after the Federal Election. There is opportunity through this tranche for the incoming Government to introduce well-consulted upon reforms, that balance the need to protect Australia's national interest, without risking its ability to continue attracting foreign investment.

¹ https://www.allens.com.au/insights-news/insights/2022/02/Proposed-changes-to-FIRB-approval-rules/?utm_source=linkedin&utm_medium=organic_social&utm_campaign=organic_social

² <https://www.herbertsmithfreehills.com/latest-thinking/finessing-australia%E2%80%99s-foreign-investment-rules-new-reforms-following-treasury>

Areas to reduce regulatory burden

Australia's regulatory framework is renowned for being robust. With this rigor, unfortunately there is an associated elevated cost and high administrative burden. There is opportunity to review and streamline processes to reduce administrative and time burdens, to ultimately, reduce the cost of doing business.

AMEC welcomes opportunities to participate in further reviews of the FATR, including exploring the concept of expanding voluntary notifications to encompass minerals-related foreign investments. These investments are typically less-sensitive, and shouldn't trigger review for national interest or national security risks, when outside of designated defence areas and zones, or stipulated monetary thresholds. Reforms to reclassify foreign investments into mineral exploration and mining projects outside of declared defence interests, that meet current foreign investment screening thresholds, could be voluntarily notified rather than approved, similar to notifiable actions that are not significant actions. Expanding the scope of voluntary notifications to include minerals-related investments is considered to reduce regulatory burden and simplify foreign investment compliance requirements, while maintaining appropriate national interest safeguards, commensurate with the level of actual risk posed.

Investments requiring further scrutiny

Industry has consistently presented, through the course of the FIRB and FATA reform process, a pragmatic approach to the need to balance national interests with foreign investment. The effectiveness of the framework too, needs to be regularly reviewed in line with shifting geopolitical developments, to ensure measures are appropriate, current, and can best achieve the overall policy objectives.

We are concerned with the proposal to consider foreign acquisitions of rural water entitlements in Tranche 2 of the FATR reforms; transactions which would typically not warrant foreign investment screening or approval, unless tied to a business or land transaction which of its own accord, is subject to such processes. Water entitlements are already required to be reported on the Water Register, the Commonwealth Government's Register of Foreign Ownership of Water. There is sufficient oversight of the ownership of water entitlements at a federal level, and the outcome sought from creating an additional layer of approval, is unclear. Is the level of foreign ownership of water entitlements in Australia, 10.9% as of June 2020, posing a significant threat to the broader community, or is this limited to selected areas, where water resources are scarce and trading of water rights is a known, ongoing issue?

Of particular concern for Industry with this proposal, is that lack of detail to support this question that is currently available. For example, if foreign investment approval is required before rural water entitlements can be acquired, but the water entitlements are attached to a mining project, would the whole project then be subject to foreign investment review? Would activity be permitted to continue while this review is ongoing? What if it is a farm-in investment, or a joint venture, two common investment practices unique to the mining sector? This proposal has the potential to hinder core business activities for the mineral exploration and mining sector, and in its current form, is not supported.

Exemption certificates

Measures to provide up-front certainty to investors and project proponents alike, while reducing regulatory burden, particularly for lower-risk investments, are broadly supported. The 'specified period' approach is also viewed more favourably in this context than single applications per project, as a means of supporting the initiative to speed up processes and reduce red tape.

AMEC seeks more information on how exemption certificates for exploration tenements and interests in mining, production and exploration entities has worked since introduction, particularly the time taken to apply for exemption, time taken from application to grant (or non-grant), costs, how many were applied for, how many applications were successful, how many were unsuccessful and why?

Once we have had a chance to review this information, we will be in a more informed position to provide recommendations to enhance the use of exemption certificates. Currently, we are supportive of broadening their scope to allow more people to use them and frontload certainty where possible, however in application, there is limited information publicly available to demonstrate their effectiveness.

Final comment

AMEC was a strong contributor to the FIRB reform process, and seeks continued engagement with the Department of Treasury given the importance of foreign investment to Australia's mineral exploration and mining sector. There is a need to balance priorities to ensure legislative frameworks are robust and fit for purpose, adequately balancing the needs for protecting national interests and national security, while maintaining a jurisdiction that is welcoming of foreign investment.

The reform process via tranches one and two, are a good opportunity to review the effectiveness of the most significant changes to Australia's foreign investment framework, introduced in 2021, and reshape policies and processes to drive us through the next stage of economic recovery. There are a number of measures in this submission we consider will reduce administrative processes whilst maintaining the rigour of foreign investment regulatory practices, to deliver short-and-long-term benefits to our economy.

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