

2 October 2020

Manager
Policy Framework Unit
Department of the Treasury
Langton Crescent
Parkes ACT 2600

Sent via email: FIRBStakeholders@treasury.gov.au

Dear Sir or Madam

FOREIGN INVESTMENT REFORMS – TRANCHE 2 REGULATIONS

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia (WA). CME is funded by member companies responsible for more than 86 per cent of the State's mineral and energy workforce employment.¹

The value of royalties received from the sector totalled \$9.3 billion in 2019-20,² accounting for 28.8 per cent of the WA Government's general revenue.³ In addition to contributing 40 per cent of the State's total industry Gross Value Added⁴ and 54 per cent of Australia's mining new capital expenditure in 2019-20,⁵ commodity export earnings from the sector is likely to support the Australian economy's recovery through the largest downturn since the 1930s.⁶

This letter broadly echoes the views and recommendations previously made by the Association of Mining and Exploration Companies⁷ (AMEC) and Minerals Council of Australia⁸ (MCA) in their submissions to the first tranche of reforms. Although CME did not comment during the first tranche, this letter serves to draw attention to areas of concern for the WA resources sector.

CME also notes and provides in-principle support to their second tranche submissions.

Overview

CME welcomes the opportunity to provide input on the second tranche of proposed major reforms to modernise and strengthen Australia's foreign investment framework. Like other stakeholders have highlighted to date, however, given how significant the proposed reforms are for sectors now deemed sensitive, CME recommends consultation is extended to minimise the potential for negative externalities to such industries reliant on foreign investment.

As the uncertainty of the pandemic's scale and depth of impact on the global economy continues, CME asserts utmost importance in maintaining a sustainable, competitive and stable foreign investment framework in promoting future growth of the WA resources sector. Since the 1960s, foreign investment has underwritten

¹ Full-time employees and contractors onsite in 2019-20, excludes non-operating sites. Government of Western Australia, *2019-20 economic indicators resources data*, Safety Regulation System, Department of Mines, Industry Regulation and Safety, 25 September 2020.

² Ibid.

³ Government of Western Australia, *2019-20 Annual report on State finances*, Department of Treasury, 25 September 2020.

⁴ Duncan, A. and Kiely, D., *BCEC briefing note – WA economic update*, Bankwest Curtin Economics Centre, 15 November 2019, p. 4.

⁵ Excludes Division C manufacturing of mineral and petroleum commodities. Government of Western Australia, *Western Australia economic profile – August 2020*, monthly release, Department of Jobs, Tourism, Science and Innovation, 3 September 2020.

⁶ Commonwealth of Australia, *Resources and energy quarterly – September 2020*, Office of the Chief Economist, Department of Industry, Innovation and Science, 28 September 2020, p. 4.

⁷ AMEC, *Re Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*, submission to Tranche 1, 31 August 2020: <https://treasury.gov.au/sites/default/files/2020-09/amec.pdf>.

⁸ MCA, *Re Major reforms to the Foreign Investment Review Framework*, submission to Tranche 1, 31 August 2020.

the development of major WA projects. The success of the next wave of projects across a range of commodities may depend on the continued ability to attract foreign investment into Australia, i.e. in securing offtake agreements and a position in complex global markets.

With global supply chains increasingly becoming vertically integrated, in the resources sector as well as other industries, foreign investment may play a more significant role in underwriting future opportunities. CME maintains the Australian Government should continue to advocate for open markets and global trade, whilst also continuing to explore diversification into additional trading partners.

Reinstatement of monetary thresholds

CME strongly supports reinstatement of the pre-COVID-19 monetary thresholds for determining if there is a notifiable or significant action. However, considerable ambiguity still exists on the required pathway for sensitive sectors, of which the reinstatement of monetary thresholds would not apply.

A clearer definition of a sensitive national security business

Due to COVID-19, critical minerals are now expressly excluded from the classification of non-sensitive sectors (Guidance Note 53). Before this, it was captured indirectly as 'sensitive land' under 'a mining operation will operate on the land'. CME considers this change in the definition may materially affect investor confidence, of which supply in such markets is already constrained.

It is unclear what constitutes a sensitive 'national security business'. Crude metals, alloys and other products exported from the WA resources sector may be unduly captured if considered to be in the supply of 'critical' goods for the defence of another country. CME, therefore, recommends increased clarity in guidance on how the Defence and Strategic Goods List 2019 is applied. For example, if it is not contrary to the national interest, any delineation that defence-related raw materials does not include specific minerals or processed minerals would be appreciated.

The proposed reforms will disproportionately impact the resource industry, such as the critical minerals sector given its higher risk profile and reliance on foreign investment to finance projects. Tightening of international capital and limited opportunity for travel (due to COVID-19) to attract investors exacerbates these difficulties. It is also important to note this risk profile will differ for each commodity, i.e. the geopolitical and market risks associated with lithium are distinct to rare earths and will require a clear nuanced assessment. The reforms in their current state will complicate obtaining equity-based participation in strategic global lithium-ion battery supply chains,⁹ hampering the achievement of progress against WA's Future Battery Industry Strategy and other similar government initiatives like WA's Asian Engagement Strategy 2019-2030 and Australia's Critical Minerals Strategy.

To provide upfront clarity and certainty to prospective investors, CME recommends a new Guidance Note is established for affected sensitive sectors. CME notes there is limited guidance currently available in the public realm relevant to commercial models favoured by the mineral sands and critical mineral sectors (Guidance Note 24 and 26), i.e. offtake agreements, debt financing and equity investments. Acknowledging this is highly subjective and will be determined on a case-by-case basis, any increased transparency on the assessment process will help reduce the legal, commercial and administrative burden of navigating the system.

CME also supports stipulating investments in funds must be passive and not able to influence investment or management decisions. Excluding the investor's influence over broad investment strategies to divest from sectors is also welcome. As AMEC indicates, however, there needs to be a clearer distinction between control and financing. Like other tests of influence or control, CME recommends the development of industry-specific examples which will make it easier to distinguish passive investment. Allowing streamlined passive investment for non-'national security business' into 'sensitive land' should also be considered.

⁹ Australian Venture Consultants, *A case for building resilience into Western Australia's lithium industry*, commissioned by CME and AMEC, June 2020: <https://cmewa.com.au/wp-content/uploads/2020/08/CME-AMEC-Lithium-Study-June-2020-1.pdf>.

Call-in power

Without a clearer definition of sensitive 'national security business', CME does not support the level of discretion provided to the Treasurer to call-in an action if it poses a national security concern at any time within ten years of the action.

Further to the above comments, CME recommends discretion in decision making is made more transparent through guidance or publicly publishing decisions on applications where a national security concern exists or not. CME also urges reducing the ten-year period to align with other mechanisms wherever possible.

Increased burden

While CME understands the second tranche of reforms propose to streamline less sensitive and passive investments, it does not purport to do this for applications which may be caught by the definitions of 'sensitive sectors' or 'national security business'. Prospective investors in these sectors may be caught by these subjective definitions and ineligible for exemptions or otherwise. It places a high onus of burden on them to engage proactively. In an increasingly globalised economy, a perceived increase in regulation may impede competitiveness.

CME recommends closer, increased engagement between the Foreign Investment Review Board, Critical Minerals Facilitation Office, Export Finance Australia, AusTrade and the WA Government, as well as expanded advisory and educational functions to reduce the likelihood of non-compliance under the new framework.

In defining 'national security business', it appears a new Register of Foreign Ownership and an annual report of registrations will need to be developed. In line with the Australian Government's Deregulation Taskforce and WA Government's Streamline WA, CME reiterates the importance of minimising compliance burdens, particularly where it may overlap with other existing registers or reporting mechanisms. CME notes the Register of Critical Infrastructure Assets may change as a result of current consultation processes, which may also influence the definition of 'national security business'. Maintenance of such a register and other administrative costs may also need to be factored into the cost recovery of application fees.

Fees imposition

CME supports the use of users-pay application fee to administer the system; directly linking cost with service delivery. To justify this imposition of fees; however, it will need to be underpinned by open, transparent risk-based assessments and timeliness of the process for both complex and non-complex applications across sensitive and non-sensitive sectors. Otherwise, like other assessment and approval processes, it may become unproductive and inefficient for either regulator or investor.

Integrity, technical and other amendments

Subject to the 'national security land' test, CME supports the following proposed amendments to exclude:

- Any interest in land acquired by a private investor as a result of obtaining a right in an exploration tenement from a significant or notifiable action;
- Acquisition of revenue streams of mining and production tenements from a significant or notifiable action.

Conclusion

In summary, CME supports improving the integrity and effectiveness of the Australian foreign investment framework. Introduction of a vastly different framework, however, should be carefully considered to minimise the unintended consequences on sectors and jurisdictions sensitive to its changes.

Should you have questions on the matters raised in this letter, please contact Ms Linh Nguyen, Policy Adviser – Economic Competitiveness, on 0439 488 672 or at L.Nguyen@cmewa.com.

CME also consents for this submission to be published on Treasury's website.

Yours sincerely

A handwritten signature in dark ink, appearing to read "Paul Everingham". The signature is written in a cursive, flowing style.

Paul Everingham
Chief Executive Officer