

**To: Senate Standing Committees on Economics – Senate Economics Legislation Committee**

**Re: Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020 [Provisions]**

9 November 2020

## Introduction

AMEC appreciates the opportunity to provide a submission to the Senate Economics Legislation Committee inquiry regarding the recently announced draft *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (FIRB), the associated draft Regulations, to give effect to the *Foreign Acquisitions and Takeovers Act 1975*, and subsequent draft *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020*. The Bills, due for implementation from 1 January 2021, present an overhaul to existing legislation that will have a significant impact on Australia's economy, particularly the mineral exploration and mining industry.

## About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 345 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 2018/19, these companies collectively paid over \$39 billion in royalties and taxation, invested \$36.1 billion in new capital and generated more than \$283 billion in mineral exports. In 2019/20, \$2.8 billion was spent on minerals exploration, representing an 18% increase from the previous year.

## Proposed reforms

### General Feedback

AMEC made two submissions to the Department of Treasury's FIRB reforms consultation process; we are yet to see a response to our legitimate concerns regarding financing of projects<sup>1</sup>. In our submissions, we highlighted concerns with the extent of the reforms, representing an almost complete overhaul of the current foreign investment framework, risking the viability and future prosperity of Australia's mineral exploration and mining industry.

AMEC supports the need to protect Australia's national interest and security while simultaneously acknowledging the importance of foreign investment. Foreign investment benefits industry both

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<sup>1</sup> <https://secureservercdn.net/198.71.233.51/0h5.0cf.myftpupload.com/wp-content/uploads/2020/09/Submission-to-FIRB-review.pdf>

directly and indirectly, particularly through job creation, a skilled workforce and high export market, translating to benefits for the communities where these projects are located, and the wider Australian economy.

In 2016 the Department of Treasury reported that less than 10% of Australian mining projects underway at the time were solely Australian owned<sup>2</sup>. AusTrade also reported in 2018 that Australia's mining sector held \$366B of foreign investment, equating to 38% of the total stock value of foreign direct investment in Australia<sup>3</sup>. These statistics reflect Australia's minerals and mining sector's investment attractiveness to date.

The level of foreign investment into the mining and quarrying sector is almost triple that of the next closest industry, manufacturing. It is probable with the extent of reforms proposed, mining and quarrying will be the most adversely impacted sector. A reduction in investment attractiveness through these reforms will be to the detriment of the industry that has been credited by State, Territory and Commonwealth Governments as the industry to support Australia's economy through the COVID-19 recession much of the world is experiencing.

Australia's investment environment is already considered restrictive; to further restrict it raises concern that Australia's existing, relatively stable foreign investment environment will be destabilised and perceived to discourage foreign investment. In 2012 a paper produced by Treasury estimated that a reduction in capital inflow and investment equal to 1% of Gross Domestic Product (GDP) would reduce Australia's gross national income by approximately 0.5% per year, over a ten-year period<sup>4</sup>.

Measures to restrict Australia's economy will likely result in a reduction of the wellbeing of citizens. Industry is concerned the significant proposed reforms will have widespread, yet to be identified, negative impacts that will risk Australia's current strong economic position and standards of living.

Protecting national interests should be a Government priority. Given the majority of foreign investment into Australia is legitimate and does not threaten sensitive industries or national security, to subject all of these applications to possible review under the proposed reforms will provide very marginal benefits for the excessive requirements. Industry also questions the Department's ability to process applications in a timely manner, so as not to create further delays and additional costs for business and Government alike.

### **Role of the Commonwealth**

AMEC has asked the Commonwealth Government to answer a significant policy concern, as to what their responsibility is should FIRB decide to reject an investor? The rejection will delay and potentially derail a project from proceeding, foregoing substantial economic and social benefits, with the State and local community bearing the cost.

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<sup>2</sup> <https://www.tai.org.au/content/undermining-our-democracy-foreign-corporate-influence-through-australian-mining-lobby>

<sup>3</sup> <https://www.austrade.gov.au/news/economic-analysis/global-investors-stay-keen-as-australia-s-fdi-stock-reaches-a-970-billion>

<sup>4</sup> Gali, J. and Taplin, B, 2012, *The macroeconomic effects of lower capital inflow*, Economic Roundup Issue 3, 2012.

Sourcing early capital investment required to develop mineral exploration and mining projects is a challenging task. Mineral exploration, required to discover new mines to replace depleting existing resources, is an inherently risky and long-term investment. Certain countries have shown a greater risk appetite and willingness to commit to investments at an early stage, and agree to offtake and other commercial arrangements. If the Commonwealth will reject these early investments under the proposed new FIRB powers, conversation about how this investment will be replaced is necessary. Both tranches of proposed FIRB reform materials have not considered this reality, nor have they acknowledged that foreign investment does not directly result in control.

### **Protecting Australia's national security**

Protecting Australia's national interest and security is supported, as is the concept that foreign investment should not risk either of these priorities. AMEC welcomes more consideration of measures that will protect the nation's priorities without inadvertently diminishing foreign investment attractiveness. Industry's serious concerns about the extent of proposed FIRB reforms and the unintended repercussions their application will have on the sector, and more broadly, Australia's economic position, are yet to be addressed.

Australia already has broad and relatively low thresholds for foreign investment screening, considered among the most restrictive of advanced economies. Screening foreign investment applications to protect national security is a concept AMEC supports in theory, however the new provisions are considered to extend beyond reasonable expectation. The new national security test to specifically consider foreign investment under new categories defined as "sensitive national security business" and "national security concerns" can be broadly applied, due to limited guidance as to their interpretation. It is this broad interpretation that concerns industry; specifically, that any foreign investment application could be deemed by FIRB to compromise national security by involving a 'sensitive' industry at any point along the supply chain.

### **Critical minerals**

Critical minerals are a priority of Commonwealth and State Governments, the subject of recent announcements and incentives into their downstream and manufacturing potential. Growth in this sector could, but should not, be restricted by FIRB reforms.

Under the proposed provisions and broad definitions, all transactions could be subject to review regardless of their actual or implied threat to national security. As demand for renewable energy sources to power computers, mobile phones and cars increases, all of which are used by intelligence and defence agencies, there is no certainty that these industries will not be hampered by the new FIRB requirements.

Australia's great critical minerals resources and industry needs foreign investment, or the Commonwealth to guarantee alternate sources of funding, in order to achieve the growth required to meet demand, and solidify Australia as a world-leading critical minerals supplier and developer. Legitimate investment should not be discouraged by the rushed introduction of extensive regulatory reforms.

Importantly, as Australia tries to secure its place as a leading nation in the critical and battery minerals global supply chain, creating restrictions that may limit our ability to develop strong commercial

partnerships, built around investment, processing and offtake with overseas partners, is not to Australia's short or long term benefit.

### **Need for investor certainty**

The possibility that any foreign investment into industry will constitute grounds for review under the guise of national security removes the level of certainty investors require, without applicants needing to voluntarily notify; the voluntary notification process adds significant administration to an already complex process. Without this transparency into decision making, there is legitimate concern that investors will seek alternate jurisdictions who provide certainty minimise administrative burden to their investment regimes. The mine discovery to production timeline is already considerably long, averaging 13 years. We do not support reforms that will create further delays and costs, prolonging the discovery of future mines to replace depleted resources.

Industry generally prefers non-prescriptive, risk-based assessments; however, the need for an element of certainty so as not to discourage genuine investment into industry is called for in this situation. Tightening and providing more clear and detailed policy guidance about sectors that will predominantly be subject to national security screening will provide industry, regulators and potential investors with the basic element of confidence required to commit to an investment decision. AMEC would as an example, welcome the identification of a specific list of commodities FIRB is not interested in, to provide necessary investor and industry confidence.

### **Final comments**

Australia's mineral exploration and mining sector has a strong history and great future prospects, reliant on the ability to raise capital to fund the discovery and development of future mines. These mines provide the royalties and tax revenues that create schools, hospitals and public resources.

Any measures to restrict investment into industry will jeopardise Australia's investment attractiveness, diminishing the certainty required for developing minerals projects to attract subsequent investment, and increase Australia's current low sovereign risk rating. To retain this rating, more clarity as to the intent and application of the FIRB reforms is required by businesses and potential investors alike.

Legitimate, non-compromising investments need to remain welcomed, aligning with the Government's acknowledgement that foreign investment provides many benefits to the Australian community.

AMEC continues to advocate to Government the need to run adequate consultations to give due consideration to the implications the extensive proposed FIRB reforms will have on industry, local communities, and the wider Australian economy.

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**To: Department of Treasury**

**Re: Foreign Investment Reform (Protecting Australia's National Security) Bill 2020**

**31 August 2020**

## Introduction

AMEC appreciates the opportunity to provide a submission on the recently announced draft *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (the Bill). The proposed reforms will have a significant impact on Australia's economy, particularly the mining and mineral exploration industry. It is important for AMEC, a key industry stakeholder, to participate in holistic, ongoing consultation for the first release (discussed herein) and any subsequent releases and technical amendments, due to be released in September, before the introduction of the Bill into parliament in the Spring sitting.

## About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 300 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 paid over \$31 billion in royalties and taxation, invested \$36.1 billion in new capital and generated more than \$250 billion in mineral exports.

In 2017/18 Australian mining and exploration companies invested \$1.97 billion to discover the mines of the future.

## State of the Industry

Towards the end of 2019, Australia's mineral exploration sector was well placed to be in a period of substantial growth, with the last two years of exploration activity starting to pay dividend. Australia's significant advantage in the production of resource commodities over other nations, driven by rich and diverse natural mineral resources, advanced mining and exploration technologies, skilled workforce, favourable geographic positioning and relatively low sovereign risk make for an attractive investment environment. Driven by favourable commodity prices and solid investment decisions, 2019 ended with a quiet boom underway in Australia. The real GDP grew by 2.2%, with the mining industry directly accounting for 28% of that growth, and indirectly employing over 1 million people. The job creation, combined with the royalties that support the development of new roads, schools, hospital and Police, will be supported by Government initiatives to ensure mineral exploration receives the required investment to continue discovering the mines of the future. AMEC has been involved in ongoing advocacy efforts and consultation with State, Territory and Commonwealth Governments to convey the importance of greenfield mineral exploration, and the need for Government incentives and grants to facilitate this critical activity, generally wholly reliant on capital raising.

## Mineral Exploration Attractiveness and Recent Trends

Recent mineral exploration discoveries have continued the trend of declining average sizes of deposits discovered in recent years, at a greater depth. Independent research indicates only 1 in 135 mineral exploration projects will develop into a producing discovery. Successful discoveries which are developed into producing mines have an average delay between discovery and production of 13 years. The significant lag and the increasing difficulty at which discoveries are being made means the industry is depleting resources at a much faster rate than they are being replaced.

On average, Australian mineral exploration companies spend roughly \$1M/year on administration, salaries, and other overheads before investing in mineral exploration. With smaller, equity-funded mineral exploration companies responsible for over 70% of recent economic discoveries nationally, they simply do not have the producing revenue to provide critical cash flow to fund mineral exploration without Government assistance.

In 2019, only three jurisdictions in Australia, Tasmania, the Australian Capital Territory, and the Northern Territory, did not open a new mine. This figure demonstrates the great geological opportunities still available in Australia. All of the largest mineral discoveries started with greenfield exploration. Mining and mineral exploration is an industry that can provide sustained economic growth to create short-and-long-term opportunities, to limit the effects of the likely COVID-19 driven recession facing much of the world, and incentivising investment in this sector should be seen by Government as a priority. The harder it is to raise capital to fund mineral exploration, the longer the road to recovery will be.

## COVID-19

COVID-19 has created an unprecedented impact on all industries and economies across the globe. The need to halt or completely stop mining, drilling and mineral exploration activity, with heavy restrictions in Commonwealth Biosecurity Areas was necessary to protect remote communities from the virus.

Although many commodity prices remain volatile, Australia's major mining exports have remained robust. AMEC heavily advocated and saw most State and Territory Governments providing fee or tenement rental relief or deferrals. However, mineral exploration companies were locked out of the Commonwealth's JobKeeper program, leaving the sector with limited support and many companies standing down employees and ceasing exploration. Somewhat paradoxically, the mining and exploration sector was labelled "essential" by State, Territory and Commonwealth Governments.

The most vulnerable in the Australian mining community are the small mineral exploration companies who are entirely dependent on the ASX for raising capital and are finding it increasingly difficult to raise needed funds. This is not unique to Australia, with small mineral exploration companies in South Africa and Canada also struggling to raise needed financing. Mineral exploration companies are in a critical period, from which they may not emerge without cost and regulatory assistance from Government.

## Proposed reforms

### General Feedback

The proposed reforms to the Foreign Investment Review Framework and Foreign Investment Review Board (FIRB) powers are extensive, representing an almost complete overhaul of the current framework. While supportive of protecting Australia's national interest and security, industry acknowledges the importance of foreign investment, and the benefits it has and continues to afford our sector both directly and indirectly. These benefits, particularly job creation, a skilled workforce, and high export market, are then spread to the community and wider Australian economy.

As at 31 December 2019, the reported level of foreign investment in Australia reached \$3,844.5B, representing an increase of \$278.9B from the previous year<sup>1</sup>. A 2016 Treasury Paper on Foreign Investment in Australia reported that less than 10% of Australian mining projects underway at the time were solely Australian owned<sup>2</sup>. AusTrade reported in 2018, Australia's mining sector comprised of \$366B of foreign investment, representing 38% of the total stock value of foreign direct investment in Australia<sup>3</sup>. These statistics reflect the great investment potential our minerals and mining sector offers. The level of foreign investment into the mining and quarrying sector is almost triple that of the next closest industry, manufacturing.

With the extent of reform proposed, it is probable that mining and quarrying will be the most negatively impacted sector. To reduce investment attractiveness through FIRB reforms will adversely impact on the industry that has been credited by State, Territory and Commonwealth Governments as the industry to support Australia's economy through the COVID-19 recession much of the world has already entered.

The enormity of the changes proposed under the reforms, which will be discussed in greater detail below, raise concerns that Australia's already restrictive foreign investment environment will be inadvertently destabilised and discourage foreign investment. A paper produced by Treasury in 2012 estimated that a reduction in capital inflow and investment equal to 1% of Gross Domestic Product (GDP), would reduce Australia's gross national income by approximately 0.5% per year, over a ten-year period<sup>4</sup>. Any measures to restrict Australia's economy, will likely result in a reduction of the wellbeing of its citizens. As identified by the Productivity Commission in the submission on Treaty-Making in Australia, also applicable to the proposed FIRB reforms, changes can affect broad sections of the community with differing needs and interest, and their effects are not always easy to identify<sup>5</sup>.

An unanswered question of policy for the Commonwealth Government is what is their responsibility if FIRB decides to reject an investor? A project will be delayed and possibly not proceed at all because

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<sup>1</sup> <https://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>

<sup>2</sup> <https://www.tai.org.au/content/undermining-our-democracy-foreign-corporate-influence-through-australian-mining-lobby>

<sup>3</sup> <https://www.austrade.gov.au/news/economic-analysis/global-investors-stay-keen-as-australia-s-fdi-stock-reaches-a-970-billion>

<sup>4</sup> Gali, J. and Taplin, B, 2012, *The macroeconomic effects of lower capital inflow*, Economic Roundup Issue 3, 2012.

<sup>5</sup> <https://www.pc.gov.au/research/supporting/treaty-making/treaty-making.pdf>

of this decision. The significant economic and social benefits will be forgone, and the State and local community will bear the cost.

Sourcing early capital investment is an extremely challenging task. Certain countries have much greater risk appetites and willingness to invest at an early stage, agree to offtake and other commercial arrangements. If the Commonwealth Government is going to reject investment, there must be a willingness to have a conversation about how this investment will be replaced. The discussion paper does not consider this reality.

More broadly, Industry is concerned such significant foreign investment reforms will have widespread effects which have not yet been identified, risking Australia's strong economic position and standards of living.

### **Protecting Australia's national security**

AMEC acknowledges and supports the need to protect Australia's national interests and national security. We understand that foreign investment should not risk the nation's security, and support measures to protect this security, without unnecessarily averting foreign investment. We have serious concerns about the extent of the proposed reforms, and the unintended repercussions their application will have on our industry, and more broadly, Australia's economy.

Australia's current broad and relatively low thresholds for foreign investment screening are already considered one of the most restrictive among advanced economies. Foreign investment screening to protect national security is a concept that is supported in theory. The new provisions however, particularly the introduction of the new national security test to specifically consider foreign investment into a new category defined as "sensitive national security business" and "national security concerns" provide broad discretion and limited guidance as to their interpretation. The interpretation and application of these new definitions has created significant concern amongst industry. The concerns are particularly that any foreign investment application could be deemed by Government officials to compromise national security by involving "sensitive" industries. Under current rules, certain foreign investment applications wouldn't constitute grounds for review; yet under new provisions, all transactions could be subject to review, regardless of their actual or implied threat to national security, due to the broad new definitions.

The potential inclusion of any industry's investment under reviewable national security actions is far too broad. Specific examples and good quality guidance materials are required to give insight into what foreign investment applications and existing foreign investment will now be subject to investigation. Until such materials are provided, the inclusions under these definitions should be tightened to provide more certainty and transparency into Government decision making. While we generally do not advocate for prescriptive measures, the need for certainty so as not to discourage genuine investment into our industry is required in this situation. By tightening and providing more clear and detailed policy guidance about sectors intended to be subject to national security screening, Treasury will provide industry, regulators and potential investors with a basic level of confidence required when making investment decisions. For, example AMEC would welcome the identification of a list of commodities that the FIRB is *not* interested in as that will provide certainty for investment.

Under the current broad definitions, businesses that 'develop', 'manufacture' or 'supply' goods or services to a sensitive national security business could refer to the entire minerals sector at all stages of the supply chain<sup>6</sup>. Assurance is needed to ensure the appropriate application of these limitations will be employed, as based on the current papers relating to the FIRB reforms, there is no certainty that any good or service that isn't technically considered military in nature, will not be subject to review because it may be utilised at some point by defence or intelligence personnel.

The Treasurer's new 'call-in' and 'last resort' powers mean any investment can be reviewed even after acquisition has been completed, and can order conditions upon or a divestment of proposed investments even after FIRB approval has been granted. These powers expand to investments affecting 'national security concerns', a broader concept than 'national security business', which has not been defined in relation to the call-in and last resort powers of the Treasurer. Our concern is there is no current explanation of the level of risk required to trigger these powers under the national security context, and that 'national security concerns' will extend into minerals projects, particularly critical minerals, and compromise the viability of the sector by increasing unnecessary red tape for what should be a 'non-sensitive' industry.

Under the new provisions, mining and mineral exploration investors wishing to avoid lengthy decision-making periods should the investment become subject to the Treasurer's call-in, may need to voluntarily notify FIRB for investments they would not previously need to notify. This increases the administrative and legal costs, and can delay projects, particularly those of mineral explorers who are reliant on capital raising to fund exploration activity. The greater the cost and delay, the longer it will take to discover future mines. The mine discovery to production timeline is already considerably long, averaging 13 years. We do not support reforms that will create further delays and unnecessary regulatory burden.

By giving the Treasurer powers to review and re-examine previously approved transactions, Australia's proposed FIRB reforms go further than any other countries' foreign investment regimes. The trigger of circumstances or material changes to the market outside of the investor's control, since the original FIRB approval, may lead to investor uncertainty<sup>7</sup>. Market conditions are outside of the investor's control, and when unpredictable events like COVID-19 significantly impact, it is unreasonable the transaction would then be liable to re-review for something entirely out of its remit.

We welcome the opportunity to review the Treasurer's FIRB determinations by the Administrative Appeals Tribunal (AAT). To provide more integrity to the framework, we would like to see it expanded beyond its current limitation, where the review is only relevant to the Treasurer's decision on whether a national security risk exists, rather than on the appropriateness or merits of any orders made, or new or varied conditions imposed.

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<sup>6</sup> <https://www.dlapiper.com/en/us/insights/publications/2020/08/major-reforms-to-australias-foreign-investment-framework-b/>

<sup>7</sup> <https://www.allens.com.au/insights-news/insights/2020/08/Major-proposed-changes-to-FIRB-regime-national-security-test/>

### **Stronger penalties, compliance and enforcement powers**

The proposed increased civil and criminal penalties, in addition to increased monitoring and investigative powers, are anticipated to act as an effective deterrent to misconduct.

AMEC supports streamlining measures to reduce red tape and duplication, which create unnecessary costs. The development of a singular foreign investment data system proposes to address these shortcomings of the current FIRB framework. It should provide a single-source of information from which to track compliance across jurisdictions. However, the significant increased penalties and monitoring requirements could result in duplication in the materials required to be submitted to assessing authorities. In a jurisdiction which is already considered over-regulated, the requirement for even more information could be seen as too restrictive, and inadvertently detract reasonable, legitimate foreign investment applications.

Australia is the only nation proposing to introduce a range of new last resort and call in powers for the Treasurer, with the power to re-examine previously approved transactions<sup>8</sup>. Under the proposed reforms, the Treasurer will be given new, extensive investigation and enforcement powers. These powers are intended to detect, prevent and enforce compliance measures on foreign investors. The comprehensive amendments will impact a wide variety of sectors for investment and will undoubtedly investigate origins of foreign investment. Care will need to be taken to ensure financial decisions remain neutral to possible bias.

The expansion of the infringement notices regime to cover all types of foreign investments and powers to remedy no objection notifications or exemption certificates in breach of the FATA signify the increased amount of regulatory burden and duplication the reforms will introduce. Increased regulatory burden, combined with reduced investor certainty and an impression the Government is agnostic as to all sources of foreign investment, will likely reduce the prevalence of foreign investment into all Australian industries.

Industry questions what extent the Government will go to in investigating current foreign investment in Australia. The statement that 'an increase to civil penalty amounts and enabling penalties to be calculated as a proportion of the benefit gained by wrongdoing', raises concern that commercially sensitive information will be investigated for reasons under the expanded definition of national security, that would previously have been unaffected. This could have a significant detrimental impact on all industries and sectors, and Australia's future investment attractiveness.

Further, how will the proposed reforms operate should Australia's planned adoption of the Extractive Industries Transparency Initiative (EITI) proceed? The Standard promotes the open accountable management of natural resources, with the decision to implement the standard announced in May 2016 by Federal Ministers at the time. The reporting requirements for Australia's resources sector are already substantial, and the increased requirements for reporting under EITI and FIRB reforms would create excessive regulatory burden. Increasing the amount of already cumbersome reporting does not

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<sup>8</sup> <https://www.allens.com.au/insights-news/insights/2020/08/Major-proposed-changes-to-FIRB-regime-national-security-test/>

align with measures to promote streamlining, and could inadvertently encourage practices of questionable ethics.

### **Integrity of the foreign investment review framework**

Maintaining the integrity of Australia's foreign investment review framework is supported by industry. In addition to our concerns relating to the interpretation of the new national security and nationally sensitive industries and how they will be applied, the integrity reforms raise their own unique set of questions.

The idea to promote greater consistency and certainty by amending FATA and supporting regulations to increase integrity of the framework is questioned, as the Government has given little indication they will provide good quality guidance materials. Industry is concerned that the interpretation of regulations and assessment of applications will be dependent on the assessing regulator. In other legislative reforms currently ongoing, AMEC has consistently reminded Governments of the need for skilled regulators with relevant practical knowledge, and transparent decision-making to provide consistency and fair and equitable outcomes.

Industry supports the view that foreign investment should not jeopardise the secure and stable supply of, or ability to acquire materials required by Australian-owned firms, in particular those relating to rare earth elements and critical minerals.

The FIRB reform papers have acknowledged that reforms are not targeted at any one country and that all foreign investors will be treated equally under the new laws, however due to the nature of national security considerations, the source of investment will undeniably be relevant to the FIRB assessment procedure<sup>9</sup>. A review of Australia's foreign investment in 2019 identified the main foreign economies investing into Australia<sup>10</sup>. A non-discriminatory view as to the source of the foreign investment needs to be maintained to uphold integrity of the review framework.

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<sup>9</sup> <https://www.mccullough.com.au/2020/07/23/firb-reforms-article-series-part-1-national-security-businesses/>

<sup>10</sup> <https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia>

Which economies invest in Australia? 2019, A\$ billion

Rank in 2019	Economy	2017	2018	2019	% of total	% change 2018 to 2019	5-year trend % growth
1	United States	912.9	949.2	983.7	25.6	3.6	4.1
2	United Kingdom	498.4	584.0	686.1	17.8	17.5	6.8
3	Belgium	305.1	315.5	348.1	9.1	10.4	9.1
4	Japan	226.5	233.9	241.1	6.3	3.1	4.8
5	Hong Kong (SAR of China)	108.7	122.9	140.7	3.7	14.5	13.1
6	Singapore	87.1	89.8	99.9	2.6	11.2	0.9
7	Netherlands	82.0	84.2	86.7	2.3	3.0	8.2
8	Luxembourg	80.9	77.9	85.5	2.2	9.6	7.9
9	China	64.0	68.2	78.2	2.0	14.6	0.7
10	New Zealand	45.6	47.1	64.4	1.7	36.6	10.0

Source: Department of Foreign Affairs and Trade, investment statistics<sup>11</sup>

As mining and mineral exploration in Australia occur on Crown Land, will the new requirement for foreign persons to seek foreign investment approval for acquisitions of interests from the Commonwealth, State or Territory Governments or local Government bodies to perform Government services or functions that may raise national security risks, apply to mineral activities? Due to the broad guidelines and opaque interpretation of the reforms, industry is concerned the requirement for mandatory notification of any proposed investment by a foreign person will encompass all potential foreign investment into the minerals sector.

In 2014-15 in Australia, majority foreign-owned businesses operated 474 mining businesses, adding \$38,975.2M value to the market, with total assets of \$324,973.7M<sup>12</sup>. These figures represent the attractiveness of Australia's mining sector to foreign investors, due to our geological natural resources and extraction and manufacturing excellence. Under the Treasurer's new powers and the requirement for FIRB approval for companies which seek to expand in size and value, all of these companies could now be subject to screening. This would have a significant detrimental effect on our industry.

Our interpretation of the Discussion Paper is such that the acquisition of an interest in an exploration licence by a private investor will generally be exempt from FIRB's screening processes under the FATA. However, where the investment is into an exploration licence that raises national security

<sup>11</sup> <https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia>

<sup>12</sup> <https://www.austrade.gov.au/International/Invest/Importance-of-Foreign-Direct-Investment/economic-activity-of-foreign-owned-businesses-in-australia>

concerns, it will likely be subject to FIRB approval under the new national security test<sup>13</sup>. For integrity and consistency of the framework and its application, more guidance as to what constitutes a national security concern is required.

Under the reforms, critical minerals operations are said not to be classified as national security businesses unless they supply critical goods intended for a military end-use by defence and intelligence personnel in activities relating to Australia's national security or the defence force of another country in activities that may affect Australia's national security. As the definition triggering consideration as a sensitive national security business can be expanded to include any activity, particularly as we shift towards renewable batteries to power computers, mobile phones, and cars, which are all used by intelligence and defence agencies, there is concern these industries will all come under greater scrutiny.

Under the existing national interest test which will still apply moving forward, in April 2020 two applications from Chinese investors into critical minerals were rejected, worth \$20 million and \$14.1 million each. While the importance of developing Australia's critical minerals sector is an apparent priority of the Commonwealth and State Governments given the amount of recent announcements and incentives into the downstream potential, , realistically, this growth will be limited by the FIRB reforms, noting investment into them is already considerably over-regulated. Australia's federal Government established the Critical Minerals Facilitation Office (CMFO) to advocate for the critical minerals sector, while the Critical Mineral Work Plan endorses investment into the sector. This has been acknowledged by the Council of Australian Governments' (COAG) recognition that our critical minerals sector will be a vital part of the country's efforts to recover from the economic impacts of COVID-19.

Australia has great critical minerals resources and manufacturing potential, but without foreign investment these industries will not be able to grow to meet demand. There is a significant opportunity for Australia to emerge as a leading jurisdiction with a stable critical minerals supply, however in order to capitalise on this opportunity, legitimate foreign investment should not be discouraged by the rushed introduction of extensive regulatory reforms.

### **More coordinated information gathering and sharing**

AMEC is broadly supportive of the establishment of the proposed Register of Foreign Ownership, and measures to increase information sharing between Government agencies and international counterparts. The reform measures to streamline and reduce delays and duplication in the requirement of information for assessment are supported. The current processes and potential overlap between the existing national interest test can create duplication and delays to a complex regulatory environment. The new processes will need to be regularly reviewed to ensure they are working as intended. Industry calls on the Government to share the industries included under these reforms as non-sensitive business, to provide transparency and consistency for future applications.

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<sup>13</sup> <https://www.mccullough.com.au/2020/08/20/in-this-edition-of-our-firb-reforms-article-series-we-consider-how-the-commonwealth-governments-proposed-changes-to-the-foreign-investment-rules/>

The Register, set to be administered by the Australian Taxation Office (ATO), should encourage a more collaborative and coherent review of applications. Appropriate timeframes and lead agency authority will need to be developed, to ensure agencies are adhering to specific and realistic timeframes, to provide a much-needed degree of investor certainty given the extent of the reforms.

In an effort to undertake a comprehensive review and analysis of foreign investment data, AMEC was unable to find sufficient publicly available information providing specific breakdowns of foreign investment into the mining and mineral exploration sector. In the 2011 to 2012 financial year, it was reported that FIRB approved 241 applications for foreign investment into the mining sector, totaling \$51.65B, and accounting for over 30% of the value of all approved foreign investment applications into Australia that year<sup>14</sup>. There is limited more recent data available to compare to, in terms of FIRB applications. In 2019 the Department of Foreign Affairs and Trade (DFAT) reported the current foreign direct investment into Australia's mining and quarrying sector was \$360.1B, representing 35.3% of all foreign direct investment into Australia that year<sup>15</sup>. There were no further details explaining what minerals and jurisdictions were invested into, for us to analyse the trends relating to the sector. With more detailed information we would be able to identify which particular areas of the sector will likely be the most affected by the FIRB reforms. A comprehensive understanding of what the impacts on our industry is needed, to forecast the likely broader impacts of restricting foreign investment.

The limitations to the available foreign investment data also raise concerns that the FIRB reforms were possibly made based on broad inferences using skewed data, that does not accurately reflect the level of foreign investment all industries in Australia. It is largely due to foreign sources of investment that Australian industries have been able to develop at the rate and quality that they have.

### **A fairer and simpler framework for foreign investment fees**

In the overview and context for foreign investment reforms section of the Bill, these reforms are said to streamline requirements, striking the right balance between facilitating and attracting foreign investment while protecting the national interest. Industry disagrees. The concept of streamlining is one that is generally supported by industry, to reduce impediments to development through regulatory burden and duplication. The new requirements and call in and last resort powers of the Treasurer will significantly increase the time for applications to be under consideration, creating inevitable delays and increased red tape. The cost of these delays will ultimately fall onto industry and slow the rate of mineral discovery and production.

Consideration should also be given to the implications of undertaking reforms outside of current capacity to implement. While the importance of transparent, methodical, achievable regulatory reforms cannot be understated, the same can be said for regulator expertise to conduct fair, consistent, and transparent examinations. Steady governance and implementation of new legislation will protect investor confidence through lower perceptions of sovereign risk. In order to maintain low

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<sup>14</sup> <https://www.hfw.com/downloads/HFW-Asia-Miner-article-November-2013.pdf>

<sup>15</sup> <https://www.dfat.gov.au/trade/resources/investment-statistics/Pages/australian-industries-and-foreign-investment>

sovereign risk, the Government needs to provide stability via considered, implementable regulatory change, and enable regulators to reliably apply the law.

Over the last few years, particularly from 2017 to 2019, Australia has ranked in the top 10 global destinations for foreign direct investment, now attracting a greater share of foreign direct investment than many major developed and developing economies<sup>16</sup>. To continue Australian economic growth this attractiveness must be maintained.

### **A timely, consistent and reliable investor experience**

AMEC recommends conducting meaningful consultation to ensure a holistic view of the economy is considered, before implementing regulatory changes, to maintain a stable, measured approach to reforms. Compromising political and regulatory stability by introducing one-off, rushed reforms resulting in the repatriation of investment will likely impede future investment and investor confidence.

The Productivity Commission's Resource Regulation Report highlighted that "abrupt changes to Government policies and objectives, a lack of consistent long-term policy direction, as well as inconsistent application of existing legislation and policies can increase investors' perception of regulatory risk and impede investment"<sup>17</sup>. Due to the extent and rapid implementation timeline of the reforms, we are concerned that genuine foreign investment will inadvertently reduce as a result of the extensive reforms and new requirements.

According to the World Bank's 2020 Doing Business Report, Australia is ranked 14<sup>th</sup> out of 190 countries in the ease of doing business<sup>18</sup>. While other nations such as New Zealand and Canada, ranked 1<sup>st</sup> and 23<sup>rd</sup> respectively, have also recently tightened their foreign investment framework, none have gone as far as Australia.

Canada, comparable due to their strong mining industry, gradually raised the threshold triggering a review under the Investment Canada Act for foreign private acquisitions. From 2012 to 2018, 15 proposed investments were subject to national security review; with all 15 either blocked, abandoned, or subject to conditions<sup>19</sup>. Of note, the majority of the 15 proposals had Chinese or Russian origins. Since the introduction of new reforms, limited data exists to analyse if the changes have had a significant impact on foreign investment applications. It will be difficult to quantify the effect these reforms for some time, and to sufficiently determine if the current amount of foreign investment applications has decreased as a result of stricter requirements, or due to the COVID-19 related recession.

The Treasurer is proposed to have the power to extend the consideration period to a maximum of 90 days. For the company waiting this decision in limbo, three months of FIRB consideration will be not

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<sup>16</sup> <https://www.austrade.gov.au/news/economic-analysis/australia-a-top-10-foreign-investment-target-unctad-report-shows>

<sup>17</sup> <https://www.pc.gov.au/inquiries/current/resources/draft> (Pg 222)

<sup>18</sup> <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>

<sup>19</sup> <https://www.whitecase.com/publications/insight/foreign-direct-investment-reviews-2019-canada>  
<https://www.dentons.com/en/insights/alerts/2019/march/27/report-sheds-new-light-on-canada-foreign-investment-review>

only a strain on resources but could also be a deterrent to other future investors. It is vital that this consideration period is as short as possible.

It is recommended Australia employs a similar transparency measure to Canada, by publishing the details of the 15 foreign investment applications subject to national security review over a six-year period. The draft reforms indicate that due to privacy and threats to national security, Treasury is not obliged to explain why an application may have been blocked. As already discussed, due to the broad interpretation of national security under this legislation, there is no evident limit to the scope of investment these reforms will impact. In order to promote transparency and reduce uncertainty, we recommend the Government provides reasoning as to why an application may have been blocked. Not only will this create understanding into the Government's decision-making process to investors, but also to project proponents who may need to re-work their business models to accommodate the increased uncertainty under the proposed reforms.

AMEC advocates to the Government to provide case studies and guidance materials to assist proponents, regulators and potential investors to understand the complex and broad changes. Case studies serve as explanatory documents, demonstrating possible situations to address uncertainty. Good quality guidance will underpin the applications submitted to Treasury. The guidance documents should be comprehensive, promoting consistency and quality in the preparation of applicants, to ensure all relevant information required by statutory decision makers fits the criteria and is appropriately presented. Should the extent of the proposed reforms proceed, the availability of high quality guidance will be a positive step to encouraging investment, which will have a flow on effect to increasing the quality of life Australia is accustomed to.

### **Revenue Streams exemption**

AMEC is supportive of the proposed exemption of certain revenue streams, such as royalties, where they do not entail rights to occupy the land or have direct control or influence over the land. There is need for greater guidance about how this exemption will be applied so that companies do not inadvertently trigger FIRB consideration.

### **Exploration Licences exemption**

The broadening of the current exemption for the acquisition of exploration licences to include NT and offshore exploration licences is supported. However, again, greater technical guidance is needed to clarify how this exemption applies to exploration tenements subject to the new national security test, and those acquired by Foreign Government Investor.

### **FIRB staffing and resources**

Recommendation 20 discusses an intention to adhere to commercial deadlines. It is crucial to industry that the FIRB does meet commercial deadlines and expectation. The commercial reality is that most investments considered by the FIRB are of a scale that will determine the future of a project. When a project has historically attracted the attention of the FIRB this has also garnered negative publicity and speculation.

FIRB must be sufficiently staffed and resourced to meet the anticipated demand created by these reforms and the effects of the temporary reduction to \$0 for the monetary screening thresholds for all foreign investments subject to the *Foreign Acquisitions and Takeovers Act 1975*.

### **Final comments**

AMEC and our members acknowledge the complexities in the governance and administration of foreign investment. Australia's popularity as a foreign investment destination has resulted in a drastic increase in foreign investment over the last decade. We understand the need to protect our nation's interest and security by ensuring foreign investment applications come from legitimate sources.

The primary concerns relating to the substantial proposed reforms are that Australia's already significant regulations will have further restrictions added to it, and this will likely discourage foreign investment, particularly legitimate investors who wish to avoid excessive regulatory burden and further uncertainty.

AMEC strongly advocates to the Government, the need for transparency into decision-making processes, and the importance of providing investors with a level of confidence so as not to discourage foreign investment from Australia. Increasing regulatory burden and red tape, while decreasing investor certainty will likely reduce the foreign investment interest into Australia, and the effects of even a minor reduction will be wide-spread and long-lasting.

Australia's minerals and mining sector has great potential but relies on raising capital to fund the discovery and development of mines, to provide the royalties that create schools, hospitals and public resources. We urge the Government to continue consulting with a broad variety of the Australian market who will likely be negatively impacted by these stringent reforms, prior to their blanket introduction.

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