



10 October 2020

Committee Secretariat  
Senate Standing Committees on Economics  
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Canberra ACT 2600

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Dear Committee Secretariat

## FOREIGN INVESTMENT REFORM (PROTECTING AUSTRALIA'S NATIONAL SECURITY) BILL 2020

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.<sup>1</sup> Commodity export earnings from the resources sector is likely to support the Australian economy's recovery through the largest downturn since the 1930s.<sup>2</sup>

This submission reiterates the views and recommendations previously made by the Association of Mining and Exploration Companies<sup>3</sup> (AMEC) and Minerals Council of Australia<sup>5</sup> (MCA) in their submissions to the Department of the Treasury's consultation on Tranche 1 and Tranche 2 regulatory reforms to the Foreign Investment Review Framework. In aligning views with other related peak bodies, CME has also liaised with the Australian Petroleum Production and Exploration Association (APPEA).<sup>7</sup> Although CME did not make a submission to Tranche 1, CME has subsequently made a high-level submission to Tranche 2 to draw attention to areas of concern for the WA resources sector.<sup>8</sup>

In making this submission to the Senate Standing Committees on Economics (the Committee) on the referred provisions of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* and *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020* (the provisions), CME seeks again to provide in-principle support to the submissions made by these peak bodies to the Committee. The underlying themes are consistent, however, the Committee should note CME has made additional commentary due to differences in membership composition and size.

In the absence of upfront guidance material, the provisions fail to acknowledge or address the unintended consequences for business investment which constitute 'implications for Australia's national security'. For example, battery and critical mineral commodities have become of increasing strategic and geopolitical priority with resource scarcity. It is therefore a useful case example to ensure trade policy and regulatory settings are appropriate in attracting appropriate investment to bring forward new sources of supply. While

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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>.

<sup>4</sup> AMEC, *Re Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020*, submission to Tranche 2, 30 September 2020: [https://treasury.gov.au/sites/default/files/2020-11/association\\_of\\_mining\\_and\\_exploration\\_companies.pdf](https://treasury.gov.au/sites/default/files/2020-11/association_of_mining_and_exploration_companies.pdf).

<sup>5</sup> MCA, *Re Major reforms to the Foreign Investment Review Framework*, confidential submission to Tranche 1, 31 August 2020.

<sup>6</sup> MCA, *Submission to the Treasury on major reforms to Australia's Foreign Investment Review Framework*, submission to Tranche 2, 8 October 2020: [https://treasury.gov.au/sites/default/files/2020-11/minerals\\_council\\_of\\_australia.pdf](https://treasury.gov.au/sites/default/files/2020-11/minerals_council_of_australia.pdf).

<sup>7</sup> APPEA, confidential submission to Tranche 1.

<sup>8</sup> CME, *Foreign investment reforms – Tranche 2 regulations*, submission to Tranche 2, 2 October 2020: [https://treasury.gov.au/sites/default/files/2020-11/chamber\\_of\\_minerals\\_and\\_energy\\_wa.pdf](https://treasury.gov.au/sites/default/files/2020-11/chamber_of_minerals_and_energy_wa.pdf).

CME acknowledges the overall regulatory impact across business may be low, the impact however will be disproportionately felt by specific 'sensitive' sectors – such as battery and critical minerals – where the proposed streamlined investment application processes does not seek to apply. It therefore follows that more investor time and expense will be required to navigate the upfront financing process in Australia for such affected sectors. The increased cost of navigating trade and facilitating investment for these affected sectors should be factored into the Regulation Impact Statement as an externality of introducing the provisions – for both potential investors, the project proponent seeking financing and all levels of government seeking to facilitate diversified trade and investment in this sector.

It is recognised the new provisions will place additional demand on time and resourcing effort by agencies such as the Critical Minerals Facilitation Office, Australian Trade and Investment Commission, Export Finance Australia and the WA Department of Jobs, Trade, Science and Innovation to provide assistance in facilitating sources of foreign investment for these affected sectors. This increased demand on facilitation will affect timeliness of obtaining an 'approval' by the Foreign Investment Review Board (FIRB). Given the opaqueness of such complex markets, successfully diversifying trading relationships that would not be 'contrary to the national interest' will require a long-term commitment and support by both the Australian and WA Government. The Committee should consider the delayed or missed capital and financing flow-on effects the provisions may have on achieving tangible outcomes for a sector considered a strategic priority by the Modern Manufacturing Strategy's National Manufacturing Priorities, the Australia's Critical Minerals Strategy and the recently revised WA Future Battery and Critical Minerals Industries Strategy.

Amidst a highly uncertain global economic and investment environment there is increased need for clarity. CME therefore strongly recommends the Committee responds to the repeated requests for additional guidance through the following extracted paragraphs in the updated Explanatory Memorandum (EM). The Committee should ensure they are sufficiently covered within the final provisions:

- 1.7, page 12 – *"The national interest test is not defined in the legislation but indicative criteria are set out in guidance material."*
- 1.127, page 33 – *"... If necessary this could be supplemented by additional guidance for applicants."*
- 6.47, page 161 – *"The Government intends to provide guidance material on the definition of 'national security business' and 'national security land' to clarify the application of the definition and to support investors in navigating the reforms more broadly."*
- 6.49, page 161 – *"The use of the 'call in' power will be time-limited and public guidance will be provided on the type of investments where the 'call in' power is most likely to be used. This is consistent with existing practice, where guidance material is provided on the FIRB website."*
- 6.141, page 178 – *"For example, the use of the 'call in' power will be time-limited, investors will be able to voluntarily notify to extinguish the ability to be called-in, and public guidance will be issued on the types of investments that may be 'called-in'."*
- 6.238, page 198 – *"In line with current practice, and building off the relationships generated during the consultation on the reforms, we will hold dedicated information and engagement session with key stakeholders, provide additional written guidance on the FIRB website, and utilise Treasury's social media channels to raise awareness of the changes. We will also leverage existing whole-of-government networks – such as the Department of Foreign Affairs and Trade and Austrade's international engagement programs – to ensure as many stakeholders as possible are directly informed of the changes."*
- 7.16, page 215 – *"... However, if it becomes necessary to address recurring trends in negotiations with applicants, the application of the [common law] concept to particular categories of situations could be clarified by the Treasurer through additional guidance for applicants."*

The Committee should consider if foreign investors will need a minimum level of transparency assured through the provisions, rather than relying on comments made via the EM. For example, the recently assented *Payment Times Reporting Bill 2020* refers to 'Rules' which can be prescribed from time to time via section 58. Introducing flexibility in this manner would be supported.

The Committee should also be aware there is currently no Guidance Note materials provided on the FIRB's website related to arrangements typical of the battery and critical minerals sector. For example, offtake

agreements, debt financing, equity investments, transfer of intellectual property or strategic access to narrow and vertically-integrated markets.

Before COVID-19, 'sensitive' sectors did not expressly include critical minerals. The Committee should note this is a fundamental change in the foreign investment environment for the WA resources sector, and more broadly the Australian resources sector. This is despite governments worldwide recognising the strategic importance of securing access to battery and critical minerals, with some also identifying bauxite as critical. It is therefore crucial that clearer guidance is provided on the definition of 'sensitive' and 'national security' as this can evolve over time. The Committee should also note each battery and critical mineral will have its own risk profile according to trade policies, markets and other issues at the time of assessment.

As highlighted in the EM, the reliance on common law concepts may be insufficient in overcoming such uncertainty. In recognition of this self-assessment uncertainty for example, the Australian Government has recently refreshed its 'Guide to Interpretation' for accessing the Research and Development Tax Incentive, which combines examples and content from recent Federal Court and Administrative Appeals Tribunal decisions. Similar guidance will need to be made available as soon as possible to give effect to the above paragraphs in the EM.

In summary, CME supports the provisions but welcomes an increased weighting towards upfront guidance by FIRB for sectors such as the WA battery and critical minerals sector which are likely to be disproportionately affected. This will assist in mitigating potential unintended consequences.

Should you have questions on the matters raised in this letter, please contact Ms Linh Nguyen, Policy Adviser – Economic Competitiveness, on [REDACTED] or at [REDACTED]. CME also consents for the Committee to publish this submission on the internet.

Yours sincerely

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**Paul Everingham**  
Chief Executive Officer