DUTIES AMENDMENT (FARM-IN AGREEMENTS) BILL 2021: SECOND CONSULTATION DRAFT

The Chamber of Minerals and Energy of Western Australia (CME) is the peak representative of the Western Australian (WA) resources sector. CME has a diverse membership, covering over 70 mining and energy producing companies responsible for 88 per cent of the sector's workforce.

CME appreciates the granted extension to engage with our membership on the second consultation draft of the *Duties Amendment (Farm-in Agreements) Bill 2021* (WA) (the Bill). In preparing this response, CME will broadly comment on clauses where members have raised concern to date. Due to the competitive nature of farm-ins, we do not seek to provide feedback on every clause within the Bill.

With a general decline in grassroots exploration observed globally,[1] a lengthy average of seven years to convert a discovery into an operation[2] and predicted halved output from existing Australian mines,[3] CME welcomes and provides in-principal support to the Bill in its current format in facilitating exploration in WA. Since the former treasurer announced there would be amendments in 2018, progressing of the Bill provides much needed clarity and reduces the commercial and legal ambiguities of undertaking exploration in WA under a multi-stage farm-in arrangement.

Should there be an opportunity to review the draft guidance materials relevant to the matters raised in this response, it would be appreciated if CME can be involved.

Farm-in transactions – Section 91M

There may be ongoing revisions to the schedule of requirements or amounts over the life of a multi-stage farm-in arrangement. It is unclear how a variation to a specified exploration requirement or amount under a multi-stage farm-in agreement will be treated if it does not meet the definitions of an added farm-in transaction (section 91S) or causes the agreement to cease to be a concessional farm-in transaction (section 91T).

Cash in lieu of exploration amount – Section 91M(2) and 91M(9)(b)

CME supports the amendments to recognise cash options paid in lieu of fulfilling the specified exploration requirements. When cash is paid in lieu of the total exploration amount, it is clear the farm-in concession will be lost entirely.

It is however unclear how it applies when the purchase agreement allows for part cash option and exploration amount. For example, is the cash payment liable for duty when it is paid only, with the balance of the exploration amount eligible for the concession. Further clarity may be required.

Absence of consideration in purchase agreement – Section 91M(9)

Parties may mutually agree the timing of a requirement should be deferred to a later stage or cancelled because it is no longer deemed a condition. This could include postponing of the feasibility study to the next stage until there is more geological data collected or forgoing expending a specified amount because it will be borne separately or undertaken differently than specified.

The current definition of a purchase agreement is rigid and requires the farmee to provide consideration, failing to contemplate the above scenario where it is moved to a subsequent stage. In such circumstances where the requirement or amount is agreed in writing to be unfulfilled in the current stage but deferred to the next stage and there are no changes to the consideration, the farm-in concession should continue to apply without requiring the Commissioner to make a reassessment. That is, an ex-post variation to remove or delay a requirement or amount without affecting the economic substance (liability for duty).

CME acknowledges these circumstances have a low likelihood of occurrence. However, as global demand for precious metals and critical minerals continues to spur exploration in WA, it is probable complex agreements like multi-stage farm-ins will become prevalent. Introducing some flexibility in the definition of purchase agreement, variation or exemptions on when a reassessment is triggered for a set of facts like the above should be considered to simplify administration of future processes. As the complexity of commercial

[1] S&P Global, *World exploration trends 2021*, PDAC Special Edition, 9 March 2021.
[2] Schodde, R. and Guj, P., *Where are Australia's mines of tomorrow?*, Centre for Exploration Targeting, University of Western Australia, September 2012.
[3] Schodde, R., *Long term forecast of Australia's mineral production and revenue – The outlook for gold: 2017-57*, Centre of Exploration Targeting, October 2017.

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practices evolve, it is administratively unviable to require the Commissioner to reassess every instance where liability for duty may be unaffected.

Exploration expenditure – Section 91N

CME supports the Commissioner's continued use of regulation 96C of the Mining Regulations 1981 (WA) and discretion afforded by section 91N(5) to calculate expenditure expended on exploration. Maintaining the Commissioner's discretion to treat costs like administration and land access as expenditure on exploration is crucial as these types of costs can be significant in the earlier stages of farm-ins. It is however unclear if overhead expenditure can be treated as costs of administration incidental to exploration. In the absence of a statutory apportionment mechanism, it is also unclear how other expenditure which is only partly an exploration amount is treated for duty if not expressly stated in the farm-in agreement.

The explanatory notes indicate there will be a revenue ruling on when 'expenditure on the development of a mine or in connection with mining operations will not qualify as exploration'. Examples of when 'development', within its ordinary meaning, qualifies as facilitating or incidental to exploration is most welcome. Clarity on the ability to access the farm-in concession for such development expenditure would help progress more sophisticated and complex exploration projects. It would be appreciated if the draft guidance on this could be circulated with CME for consultation.

Farm-in transaction added – Section 91S

When a specified exploration requirement or amount is deferred to the next stage without a change to the consideration, it is unclear if this will fall under the definition of an 'additional farm-in transaction'. There does not seem to be flexibility to treat it as if it were made at the time of the initial farm-in agreement, albeit liability for duty is the same as when it initially arose.

Adding clarity to either section 91M, 91S or 91T will help reduce the likelihood of such genuine circumstances causing the agreement to not be a farm-in transaction via section 91M(2).

Variations to farm-in transactions – Section 91T

It is also unclear how this section applies when there is a variation or modification to the agreement, but the fulfilment of specified requirements or amounts are unaffected. Consultation on circumstances where the Commissioner could exercise discretion in deeming the concessional farm-in transaction has not ceased to apply would be welcome by industry. The guidance should be clearer on how an amendment to terms should be treated when it is not a variation to the consideration, exploration requirements or exploration amounts specified in the agreement.

DA 25.0 SUBSTANTIALLY ONE ARRANGEMENT

It is unclear if duty will extend to consideration for a small share placement when it is combined with a farm-in agreement, or if it will remain exempt on the basis it is a minority equity interest.

In an example where a joint venture interest into a tenement is earned via a farm-in agreement, it is unclear how duty is attracted when the interest of the other party is further diluted by expenditure of the joint venture. This ambiguity also applies when the other party converts their interest to a royalty. Further clarity on how these types of complex and outgoing joint venture transactions are assessed for duty would be appreciated.

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