To: Australian Treasury

Re: Mining, Prospecting and Quarrying Rights

9 February 2024

Introduction

The Government is consulting on legislation that will update the Petroleum Resource Rent Tax (PRRT) Gas Transfer Pricing arrangements, anti-avoidance updates, and the treatment of Mining, Prospecting and Quarrying Rights (MPQR).

AMEC feedback only considers the MPQR portion of the proposed amendments.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 570 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 274,000 people. In 2021/22 Industry generated a record high $413 billion in resources exports, invested $3.86 billion in exploration expenditure to discover the mines of the future, and collectively paid over $63 billion in royalties and taxes.

General Remarks

The exposure draft amendments to the Income Tax Assessment Act 1997 outline the tax treatment of 'exploration' and MQPRs. The amendments will ensure the income tax legislation operates according to the Australian Tax Office's interpretation of the Full Federal Court's decision in *Commissioner of Taxation v Shell Energy Holdings Australia Limited* (Shell Decision).

AMEC continues to voice concerns with the Australian Tax Office's interpretation of this decision, considering the interpretation too narrow. As the interpretation of the ordinary meaning of 'exploration' is so central to its application under the Income Tax Act and PRRT Act, this decision will guide income tax and, broader Petroleum Resource Rent Tax outcomes.

AMEC provided a submission to the ATO in February 2023 to the Decision Impact Statement (DIS) for the Shell Decision. The proposed legislative amendments wholly reflect the DIS.

Our views remain unaltered, namely:

1. The ATO should not seek to take a narrow interpretation of the Shell Decision, nor quarantine it to the facts of the case, given the strength of the judgement handed down.

2. The Government has chosen to leave various open issues 'on the table', such as those noted by the following DIS excerpts, which were implicitly addressed by the ultimate outcome of the Shell Decision. These unanswered issues have now flown through to the drafting of legislation:

   a) *"However, as no argument was advanced before the Courts that any difference in area was not significant for the purposes of paragraph 40-77(1B)(c) of the IT(TP)A, neither decision provides authority for the meaning of the phrase 'any difference in area is not significant' as it appears in paragraph 40-77(1B)(c) of the IT(TP)A."*

   b) *"Accordingly, whether or not an interest in joint venture property arises merely by virtue of the acquisition of a participating interest in the joint venture remains an open question."*

AMEC considers that the provision of further explanation in the Explanatory Memorandum or the second reading speech to address these two matters would be beneficial to the mining and mineral exploration industry.

Mining, Prospecting, Quarrying Information

The ITAA Section 330.240 details distinct definitions for Mining Prospecting, Quarry and Rights and for Mining, Prospecting, Quarrying Information (MQPI). The definitions are replicated below, as this difference is crucial for mining and mineral exploration industry:

(1) A mining, quarrying or prospecting right is:

(a) an authority, licence, permit or right under an *Australian law to mine, quarry or prospect for *minerals or *quarry materials in a particular area; or

(b) a lease of land that allows the lessee to mine, quarry or prospect for *minerals or *quarry materials on the land; or

(c) an interest in such an authority, licence, permit, right or lease; or

(d) any rights that:

(i) are in respect of buildings or other improvements (including anything covered by the definition of *housing and welfare) that are on the land concerned or are used in connection with operations on it; and

(ii) are acquired with such an authority, licence, permit, right, lease or interest. However, a right in respect of anything covered by the definition of

*housing and welfare in relation to a quarrying site is not a mining, quarrying or prospecting right.

(2) Mining, quarrying or prospecting information is geological, geophysical or

technical information that:

(a) relates to the presence, absence or extent of deposits of *minerals or *quarry materials in an area; or

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(b) is likely to help in determining the presence, absence or extent of such deposits in an area; and has been obtained from *exploration or prospecting, or *eligible mining or quarrying operations.

However, the legislative amendments remain unclear as to whether MPQI receives the same treatment as MPQR. In Section 40-42 the Government details when a MPQR is considered first used, however, not MPQI. Clarification is needed, is a similar definition of use for MPQI implied, or not?

Examples

The Explanatory Memorandum would be improved by the Government including examples derived from ATO guidance provided when this matter was last considered by the ATO, e.g. TD 2019/1. Specifically, if the examples from TD 2019/1 could be updated to detail on how S40-42 will be treated that would reduce the opportunity for a misinterpretation in the future.

Transitional provisions

How will the amendments as drafted apply to a new right that is deemed to be a continuation of an old (pre-9/5/2023) right under s40-30(6)? Clarification would be welcome as the current drafting does not appear to consider that possibility.

Final comments

The withdrawn TD 2019/1 explained what the ATO constituted 'first use' of a mining, quarrying or prospecting right (MQPR), that is a depreciating asset, for the purposes of subsection 40-80(1) of the *Income Tax Assessment Act 1997.* How the ATO, following these amendments, will now interpret the use of an MQPR will be crucial for future companies, and a commitment through the legislative process to future guidance to a similar scale and detail as TD 2019/1 would be welcome.

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