To: RevenueWA, Department of Finance WA

Re: Revenue Ruling DA 25.0 – Substantially One Arrangement

26 July 2021

Introduction

AMEC appreciates the opportunity to provide a submission to RevenueWA's consultation process on draft Revenue Ruling DA 25.0, "Substantially One Arrangement." Financial transactions are a key element of the mineral exploration and mining industry. The Ruling is highly technical requiring expert practitioner input to understand the potential consequences for Industry. AMEC appreciates the extension granted by RevenueWA, for our submission.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 375 member companies across Australia, with the majority having project interests in Western Australia. Collectively, AMEC's member companies account for over $100 billion of the mineral exploration and mining sector's capital value.

The mining and exploration industry make a critical contribution to the Australian economy, employing over 255,000 people, and in 2019/20, collectively paid over $39 billion in royalties and taxation. In 2019/20 resources companies invested $35 billion in new capital and generated more than $176 billion in mineral exports. $2.8 billion was spent on minerals exploration in 2019/20, representing an 18% increase from the previous year. In Western Australia, in 2020 the mining sector employed a record 140,940 workers, and generated $148 billion from the sale of minerals.

Revenue Ruling DA 25.0

General feedback

AMEC acknowledges the intention of the Ruling, under the *Duties Act 2008* (Duties Act) to provide guidance when two or more transactions are taken to form, evidence, give effect to or arise from substantially one arrangement for duties purposes. As an Association representing a large number of member companies, AMEC has a key interest in ensuring that this guidance is as practical and robust as possible, so as not to disadvantage junior entrants to the market.

Given the complexity of understanding specialist tax advice and ensuring compliance, we appreciate that mining-specific examples have been provided, noting that the factors outlined in the ruling are not exhaustive.

We are concerned that this Ruling will introduce increased duties payable requirements to Industry, thus increasing the cost to Industry to operate in Western Australia. This contrasts with the objectives of Streamline WA, to reduce administrative burdens and costs to businesses in WA. AMEC has longstanding objectives to reduce regulatory red tape and the cost to Industry to operate in the State,

and seek clarity as to the intent of the changes, and an outline of what these changes will entail for Industry.

We would welcome the addition of more Industry specific examples so companies can more easily determine if the Ruling will be applicable to them, and ensure they comply with requirements that would previously not be applicable.

Amendments to the *Duties Act 2008 (WA)*

In June 2019, significant amendments were made to the Duties Act. It is understood the feedback provided varied in comprehensiveness, due to the extent of the changes made. Section 162 of the Duties Act is of particular relevance to this discussion, falling within landholder provisions. These amendments are applicable to certain acquisitions of shares and units which hold land, including mining tenements within Western Australia.

There was a noticeable shift in the amendments, towards a more stringent framework in which the onus is now on taxpayers to disprove the assumptions under the legislation, as outlined in the Industry specific examples within this draft Ruling. This methodology has not been used in Western Australia before, and our understanding is it is similar to Queensland's Tax and Duty framework. Understandably, there is concern across Industry as to why these changes were made, and the impact they are expected to have on Industry, likely introducing additional duties requirements.

The amendments removed the ability of the Commissioner to assess parties deemed to be related under section 162(1)(h) or (i) as not related, in the event of certain conditions not being met. Following the amendments, the Commissioner's discretion to make this determination is no longer applicable. As such, section 162(1)(h) now, by default, treats persons who acquire interests in a landholder as being related where the acquisition of these interests by virtue of acquisitions that together form, evidence, give effect to or arise from what is, substantially one arrangement.

Under section 162(1A) currently, in effect, parties will not be regarded as related persons under section 162(1)(h) or (i) where:

- The acquisitions result from a public float; or
- In prescribed circumstances.

Regulation 5 prescribes that where acquisitions are made as part of a listed entity demerger or hybrid demerger, the relevant parties will not constitute related parties under section 162(1)(h) or (i). A listed entity demerger and a hybrid entity demerger both concern transactions involving a listed entity, however, there are no other relevant Regulations that could apply.

Entities which acquire interests in a landholder by virtue of acquisitions that together form or arise from substantially one arrangement, will be regarded as related in all circumstances, unless the arrangements is subject to one of the above exempt scenarios. However, these scenarios are limited and only involve certain arrangements which include a listed entity (or an entity which will be listed).

If an acquisition is made in a widely held company or unit trust pursuant to the same offer document by a number of entities who are otherwise unrelated, under section 162(1)(h), unless the entity will be listed, all of the entities could be potentially regarded as related. The Commissioner will have no

discretion to determine that these entities are not related, so they will be subject to the provisions and requirements of related entities.

Annexure 4, example 14 of the draft Ruling addresses such a situation, for large acquisitions, but Industry requests further clarity by way of an example outlining the determination in the event of smaller interests being acquired. Example 14 relates to acquisitions in a company involving a small number of acquirers, each acquiring a large interest in the company, at 25% each, to a total of 75% of the company. In the event a large number of acquirers each acquires a small interest in the company (for example, interests of no more than 10% each), if the acquirers are otherwise unrelated, will the outcome be different to the outcome in Example 14?

Inferred arrangements and agreements

Industry is concerned that for the purpose of this draft Ruling, arrangements can be inferred. This is subjective and with the discretion of the Commissioner to determine entities as not related removed under section 162, could result in higher levies on Industry. In the event transactions are considered to be substantially one arrangement, entities should have the opportunity to appeal the determination, as informally and directly as possible, to negate the need for litigious processes that increase timeframes and costs to business.

Further, point 14 (page 4 of the draft Ruling) states that the determination if transactions are substantially one arrangement are a "question of fact involving matters of degree, taking into account all relevant circumstances" including the "intentions, actions and conduct of the party liable to pay the duty, along with any other persons involved." As arrangements aren't required to be written agreements, in the event of a dispute, who can confirm there was actually an arrangement in place, and the terms of the arrangement? If something can't be proven, then by definition, it is not a fact. Instead, will the determination be dependent on the assessment and judgement of relevant circumstances by a regulatory body? Additionally, how can an acquirer demonstrate to the regulator that it is an unrelated transaction?

Proximity of mining tenements for the determination of a single transaction

AMEC questions, what is the pre-determined proximity of mining tenements that will be used to determine whether a transaction constitutes a single transaction or not?

Example 7 for instance, provides no measurements or quantitative details as the proximity of tenements, nor the commodities being mined. Industry seeks to understand under what grounds this determination was made?

It is regular practice for a mining company to seek to acquire multiple tenements that will form a large project. This intent, would constitute substantially one arrangement. However given the limited details as to the actual proximity and intention of the mining company, this example cannot be readily understood and applied by companies in decision making.

We request that more details be provided for this example, and there is sufficient time to review.

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Final comment

AMEC appreciates the opportunity to provide comment to this important draft Ruling. The draft Ruling introduces additional elements of detail and complexity to what is already a complex area, requiring specialist knowledge to fully appreciate the intricacies of changes. This is expected to result in additional costs to Industry to firstly understand, and secondly, comply with.

It also reverses the onus of proof, placing a greater responsibility on the taxpayer.

Previous proposed amendments in these areas have always sought not to create further administrative or cost burden on these arrangements, aligning with a broader Government policy driver to ensure that ongoing mineral exploration expenditure would not be discouraged as a result of increased complexity or cost. In viewing the proposed changes, it is clear that additional complexity and cost will be incurred by companies. However, it is not yet clear, what further impact this will have on this common commercial practice within Industry. In AMEC's view, more work is required to understand the impact of these changes and whether it will become a deterrent to a common practice which enables critical investment into exploration projects, which underpins the ongoing strength of the state's minerals and mining industry.

AMEC would appreciate RevenueWA accepting an invitation to discuss these changes and how they will affect Industry with our members, as has previously been done. Workshops and round-table activities present opportunities for regulators and Industry to discuss, in real-time, issues that may otherwise not have been raised. AMEC would be please to facilitate such a workshop with RevenueWA.

We look forward to the next steps in this consultation process.

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