Tel: +61 7 3237 5999
Fax: +61 7 3221 9227
www.bdo.com.au

Level 10, 12 Creek Street
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

Via email: CriticalMineralsProductionTaxIncentive@treasury.gov.au

Director
Production Tax Incentives Unit
Corporate and International Tax Division
Treasury
Langton Crescent
PARKES ACT 2600

12 July 2024

Dear Sir/Madam

CRITICAL MINERALS PRODUCTION TAX INCENTIVE CONSULTATION PAPER

We are pleased to provide you with BDO's feedback and comments in response to the design of the proposed Critical Minerals Production Tax Incentive (CMPTI). The following document includes responses to the questions raised by Treasury. In summary, BDO supports the Government's efforts to introduce the proposed CMPTI. BDO believes that the proposed program will need to be simple to administer to attract companies to capture more critical minerals value onshore. Our key observations are as follows:

- Clarity is required in relation to if and how the program would support companies that are in a tax loss position or for newly established companies that have not existed for a full income year
- Clarity is required around the interaction of the CMPTI with other government incentives.
- There are a series of expenditures that have not been considered for example supplementary employment costs for FIFO workers, and the disposal of hazardous waste.
- The dual regulator model is appropriate however, clear legislation is required to define the delegation of responsibilities from the ATO to the DISR.

We welcome the opportunity to further contribute to the development of the CMPTI legislation.

* * * * *

Should you have any questions or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on 07 3237 5648 or Nicola.Purser@bdo.com.au.

Yours sincerely

Nicola Purser
Partner

Eligible entities

1. *Please provide any feedback on the proposed eligibility criteria.*
2. *What key factors would need to be accounted for in a definition of Final Investment Decision (FID) for the purposes of the CMPTI?*
3. *How long do you expect it will take for processing and refining facilities to reach first production following FID?*

Q1. Proposed Eligibility Criteria

BDO believes the identified categories are appropriate. However, BDO would like to seek some clarity in relation to the following matters:

1. Program refundability and new entities

The consultation paper indicates that program is intended to be a refundable tax offset, however it also states that *"The CMPTI will be available to corporations that <u>are subject to Australian income tax</u> throughout the <u>relevant income year</u>"*. [Emphasis Added]

BDO would like to seek clarity on how the refund mechanism will operate for taxpayers with a current tax loss or carry-forward losses, that are <u>not</u> currently subject to Australian income tax. Failure to provide the CMPTI to companies in a tax loss position would run contrary to the purpose of the CMPTI to drive investment in the critical minerals sector. New entrants will naturally have significant up-front costs that may result in a tax loss lasting multiple years. These new entrants will be severely disadvantaged compared to companies with existing operations.

The Hybrid Mismatch rules also have the concept of "subject to Australian income tax", which does not require tax to be payable in a particular year but rather the entity's income has to be included in its assessable income i.e. not exempt from income tax. Therefore, loss entities are considered to be "subject to Australian tax "for the Hybrid mismatch rules. Similarly, the Tax Consolidation rules require for a company to be part of a consolidated group it must have all or some of its taxable income (if any) taxed at the corporate tax rate i.e. it does not have to pay tax. Accordingly, we would recommend that the definition of "subject to Australian income tax" for the HPTI utilises similar concepts to the Hybrid Mismatch rules or Tax Consolidation.

Similarly, we would like to seek clarity on how the program will support newly established entities that have not existed for a full income year.

2. Foreign investment caps and eligibility

Within the summary of proposed details, the consultation paper indicates that *"foreign investment will continue to be subject to Australia's foreign investment settings"*. However, we believe that this has not been clearly communicated within the detailed eligibility criteria. We therefore recommend that the effect of foreign investments on a corporation's eligibility to the tax incentive program to be clarified.

3. Interaction with other government incentives

We acknowledge that the introduced tax incentive aims to provide support for Australian critical mineral processing facilities in an environment with various other government incentives. Accordingly, we recommend the inclusion of additional clarifications of the interaction with the CMPTI and other government incentives including the Research and Development Tax Incentive (RDTI), the Junior Minerals Exploration Incentive (JMEI) and Fuel Tax Credit (FTC). We note the following interactions with respect to each program:

- *Research & Development Tax Incentive*

The rapid growth and evolving nature of the critical minerals industry will likely lead to overlapping expenditure between the CMPTI and the Research & Development Tax Incentive (RDTI). The research and development activities conducted by these taxpayers are critical to ensure that the facilities are operating at the maximum efficiency and capacity, thereby maximising the Treasury's return on investment from the CMPTI.

Accordingly, it is our recommendation to allow certain expenditure to be claimed under both programs. We note that the RDTI already has a "Feedstock Adjustment" under Subdivision 355-G of the ITAA 1997, that "claws-back" the additional tax benefit where a taxpayer receives income for the sale of "feedstock outputs". Therefore, when correctly claimed a taxpayer will only receive an additional tax benefit through the RDTI for activities that directly support the improvement of production processes and activities.

- *Junior Minerals Exploration Incentive*

Generally, the definition of exploration activities for the purposes of the Junior Minerals Exploration Incentive (JMEI) and production activities for the CMPTI should prevent the duplication of expenditure across the two programs. However, we recommend the inclusion of a provision in the CMPTI legislation that prevents the inclusion of expenditure claimed under the JMEI.

- *Fuel Tax Credit*

Certain expenditure incurred on fuel for transportation will be covered by the Fuel Tax Credit (FTC). Accordingly, we recommend a provision requiring taxpayers to reduce the value of transportation fuel claimed by the value of the FTC available to the taxpayer. This net fuel costs will reflect true value of expenditure incurred on the production activities.

Q2. Key Factors of Final Investment Decision

BDO has interpreted the final investment decision (FID) as the final milestone of a project prior to the implementation and substantial financial commitments. Execution of the informed decisions detailed in a corporation's FID should ensure the project goals and scope are met, thereby achieving successful completion of the project. We therefore recommend that the following factors are considered with health, safety, environment (HSE), and industrial and local regulations in mind:

A. Engineering Drawing (P&ID)
B. Equipment Specifications
C. Infrastructure

D. Economic Analysis

BDO believes that the FID is a necessary part of a project’s timeline. Upon reviewing the paper, the following uncertainties were raised:

- *Interactions with FID*

In the various sections of the consultation paper, it had not been addressed how the Australian Taxation Office (ATO) and the Department of Industry, Science, and Resources (DISR) will use the FID in the application process. Thus, we recommend that additional information to be provided as to how FID will affect the outcome of the tax incentive.

As detailed in our response to Question 20 we believe the responsibility for evaluating industrial technical documentation should be the responsibility of DISR and its delegates. Typical ATO case officers do not necessarily hold the required qualification or industry knowledge to interpret the FID documents.

- *Disadvantages for new facilities*

The consultation paper indicated that the incentive is available for *“up to 10 years”* and FID is *“required with respect to each facility on or before 30 June 2030”*. This leads BDO to interpret that corporations that must undergo construction and commissioning of the facilities may be disadvantaged in comparison to corporations who will be able to produce saleable critical minerals throughout the 10 years. We therefore recommend considering situational circumstances of a taxpayer to the 10-year limitation. Adjustments may be made to tax incentive to consider the first 10 years of sale-able production.

Q3. Project Timeline

The typical timeline from FID through to production operations is typically 1-3 years, subject to the lead times on large production assets. We recommend that the CMPTI legislation provide taxpayers with the opportunity to apply for provisional certificates to support investment decisions. We have addressed this in further detail in our response to Question 20.

Eligible processing expenditure

4. *Please provide feedback on the proposed eligible expenditure.*
5. *Please provide feedback on where you draw the line between mining and primary processing and midstage processing.*
6. *Are there any competitive neutrality considerations to ensure the CMPTI treats different projects fairly and does not distort commercial decision-making? For example, how should capital costs for power generation be treated for facilities that produce their own power?*
7. *What, if any, transport costs should qualify? How could a sensible boundary between eligible and ineligible transport costs be drawn?*
8. *What reagent costs should be eligible?*
9. *What costs associated with the treatment, enrichment or disposal of waste should be included? Why?*
10. *What structures are likely to be adopted in critical minerals processing that could give rise to related party transactions? How should related party dealings be treated under the CMPTI?*
11. *What intellectual property (IP) arrangements are adopted by critical minerals processers? What treatment should apply to the payment of royalties? What measures could be put in place to manage integrity risks?*

Q4. Proposed Eligible Expenditure

BDO believes the identified categories are appropriate. However, we believe it would be appropriate to include provisions for the following:

- *Labour Safe-Harbour*

BDO would like to recommend the inclusion of a safe harbour where, if the taxpayer can demonstrate an employee spends at least 80% of their time on qualified production activities, that 100% of the individuals labour expenditure is an allowed eligible expense. The purpose of this safe harbour is to remove the administrative burden associated with determining whether the remaining 20% of an employee's time is associated with production, when it is clear the primary purpose of their role is qualified production. The balance of their time will typically involve administration or travel (i.e. FIFO workers) conducted for the purpose of the production activities.

- *Recruitment, training, and employment on-cost expenditure:*

The paper indicates that one of the primary community benefits is to *"promote a diverse workforce and secure jobs"*. We therefore recommend the inclusion of costs incurred on the recruitment, training and certification of employees that are directly involved in the production activities. Similarly, costs for continuing education and the provision of PPE should be covered by the program.

In the Australian mining industry, it is common for a majority, if not all, of a facility's workforce to be made up of fly-in-fly-out (FIFO) workers. This is the case particularly for sites located in remote and rural areas of Australia. BDO believes that expenditure incurred to support operational FIFO staff should be supported eligible under the CMPTI as they would not be incurred regardless of the production activities.

We therefore recommend that airfares, shuttle services and accommodation expenditure should be included to the extent the taxpayer can establish a nexus to the qualifying production activities.

- *Safe disposal of waste by-products*

This is a necessary, and often significant, expenditure that is incurred directly on processing activities. Further, this expenditure would not be incurred regardless of the level of processing.

For completeness, this is not intended to cover overhead costs associated with complying with DCCEEW or State-level environmental regulations or orders.

- *Depreciation on assets acquired for the sole purpose of production.*

We accept that Treasury would like to ensure public investment is targeted and does not include costs incurred regardless of the level of processing. However, for many taxpayers, it will be necessary to acquire assets for the sole purpose of processing. These assets would not be acquired regardless of the level of processing. Therefore, we believe it is reasonable to include the depreciation for these assets, to the extent they were used during the year for the production activities.

Q5. Process Stages

BDO's interpretation of the mining, mid-stage and primary processing in the context of critical minerals are detailed below:

- *Mining Processing*

The mining process refers to the extraction of raw ore from in situ position to produce run of mine ore (ROM). This can be performed via various surface-mining or underground mining techniques. Prior to production ROM, other stages that take place include the exploration and prospecting of land, discovery, and development of the mining site.

- *Mid-Stage Processing*

The mid-stage process refers to the steps involved to improve the quality of the ROM to a high-quality mineral extraction or concentration. The key stages of this process include:

1. Comminution: Mining deposits, or ROM, are crushed and/or grinding down in size to liberate the ore and gauge material
2. Screening: Ore and gangue mixture undergoes size filtration through the employment of physical screens to the desired particle size. Larger particles are recycled to the comminution stage to decrease the particle size. The waste of stream within this step is referred to as tailing and is predominately composed of gangue material.

- *Primary Processing*

Having undergone mid-stage processes the mineral extraction undergoes further processing to produce a stream of high purity mineral and waste material. Common techniques employed in mineral processing include and are not excluded to flotation and leaching.

Q6. Program Neutrality

For taxpayers in remote location it would be reasonable to provide a provision to allow for the claiming of power generation infrastructure. Our recommendation is that the taxpayer should be allowed to calculate a reasonable basis for the cost of its utilities based on expenditure for fuel, other operating costs such as maintenance and the depreciation or lease costs for power generation equipment.

We note that this could add an excessive administrative burden for the taxpayer to first calculate the cost of energy production, and then apportion said energy expenditure between eligible and ineligible activities. Accordingly, we recommend that the program include a safe harbour that allows these taxpayers to calculate the costs based on the average price per MWh as tracked by the Australian Energy Market Operator (AEMO) via the National Electricity Market (NEM).

Q7. Transportation Costs

Upon reviewing the paper, CMPTI states that the eligible entities will be able to apply for tax incentives for *"eligible expenditure for processing and refining"* of the 31 minerals. This implies that the costs associated with the distribution of the high-purity mineral beyond the boundaries of the facility are not within the scope. BDO has identified various examples of eligible and ineligible transport expenses that can be found below:

- *Eligible*
    - Leases for, or depreciation of, heavy vehicles used in production activities
    - Transportation fuel (less any Fuel Tax Credits)
    - Maintenance
    - Insurance
    - Driver labour costs
    - Airfare for FIFO workers
- *Ineligible*
    - Non-transportation fuel
    - Maintenance and purchase of light vehicles
    - Transportation of high-value minerals to customers

Q8. Eligible Reagents

BDO considers the identified reagent and other consumables cost category to be appropriate. However, we recommend that the following specifics and provisions that should be included are as follows:

- *Direct material costs & inbound freight*

In general context, reagents refer to chemicals that undergo a chemical reaction. Within the context of mineral refining, reagents are crucial during primary processing as they are directly related to the process efficiency and product quality. This stage consumes the largest proportion of reagents. The specific choice of reagents consumed during the production process is dependent of mineral produced.

Common inorganic reagents that are used during mineral refinement include lime, sulphuric acid, cyanide, and caustic soda.

- *Hazardous chemical training and safety*

BDO believes that the occupational health and safety of the workforce are crucial to the productivity of value-adding processing activities. Hence, it is recommended that the costs associated with the continuous education, personal protective equipment (PPE), and engineered solutions to reduce the risks of potential hazards should be covered by the program.

- *Storage of chemical consumables*

The costs incurred by the taxpayer to install, purchase and maintain the appropriate storage vessel and kit for each reagent has implications on the overall operational efficiency of the facility. By ensuring suitable policies and practices are in place, in turn there is reduced safety incidents, contamination and degradation of the raw material. Thus, improving the quality and rate of output of the facility. Hence, it is recommended that incurred costs of chemical consumables be covered by the program.

Q9. Treatment, disposal, and enrichment of waste

BDO recognises that the largest source of waste is the tailing produced during mid-stage processing. During the disposal of this waste, the incurred costs are driven predominately by operations and maintenance of the tailing storage facility (TSF).

The TSF is dynamic in nature as it continues to grow throughout the lifespan of the facility. Within recent years, developments have been made to improve the geotechnical and geochemical stability of the tailing by installing dewatering devices such as hydro-cycloning, thickening or filtration systems. Hence, it is recommended that the incurred expenditure associated with TSF should be covered by the program.

Eligible outputs

12. *Which critical minerals are currently processed in Australia? To what grade?*
13. *Of Australia's 31 critical minerals, what are the current common market requirements for processed outputs?*
14. *What is the form of the raw critical mineral when it arrives at your facility and what is its state when it leaves your facility?*
15. *Can you provide details on the full workflow process to convert the raw critical mineral to the end product(s) in your facility? Does the workflow process involve beneficiation?*
16. *What are the associated costs (e.g., reagents and consumables, labour, utilities, maintenance, logistics/transport, waste, etc.) for each processing stage undertaken in your facility?*
17. *Does the end product undergo any further processing after it leaves your facility? Can you provide more details regarding the next steps and/or process?*
18. *To what extent are different minerals processed together e.g., from the same raw material? What considerations does this give rise to for the application of the CMPTI?*
19. *What is a sensible approach to apportionment of mixed-use costs?*

The questions raised in the consultation paper in relation to the eligible outputs are highly specific to the individual mineral processors, BDO is therefore unable to comment on these matters.

Administrative arrangements

20. *Please provide feedback on the proposed administration arrangements.*
21. *What testing certifications of processed minerals are common in industry?*
22. *Do businesses regularly rely on commodity contracts to evidence the purity of the commodities being exchanged?*
23. *Do current facilities fail processed mineral purity tests? If so, how often?*

Q20. Dual Agency Model

BDO considers a dual agency model consisting of DISR and the ATO to be appropriate given the requisite technical knowledge required to assess eligible expenditure and eligible outputs. We believe that the delegation of responsibilities from the ATO to DISR must be enshrined in the tax law, ideally supported by a supplementary program charter.

<u>Program Compliance</u>

The CMPTI will require professionals with relevant industry experience to evaluate expenditure and assess whether the identified expenditure is associated with the manufacture of the defined critical minerals, and therefore qualifying production expenditure.

To this end, our recommendation is that the CMPTI follows a similar model to the Digital Games Tax Offset (DGTO) where it is the responsibility of the Arts Minister and their delegates to assess the "Qualifying Australian Development Expenditure" and issue a certificate to the taxpayer including the allowable production expenditure.

This will require the taxpayer to submit an annual application to DISR detailing the qualifying production activities and expenditure. To the extent that DISR determines that the activities and expenditure qualify for the purposes of the CMPTI, it may issue a certificate with a registration number and total qualifying production expenditure to be entered into the Company Tax Return.

Certificates may be subject to revocation in the event that DISR is satisfied that the certificate was issued based on inaccurate information or obtained by fraud or serious misrepresentation.

ATO Request for Review

Similar to the DGTO, the Commissioner may have the ability to request DISR to review a certificate in the event it has concerns certain expenditure may be ineligible within the ordinary statutes (i.e. four years after the return is lodged/amended).

This model establishes clarity around the responsibilities of both regulators, and prevents the duplication of administration, review and audit activities.

Provisional Certificates

Similar to the DGTO, we also recommend that the DISR provides taxpayers with the opportunity to apply for provisional certificates prior to a final investment decision. This should be a streamlined application detailing the front-end engineering design (FEED) and project economics. This provisional certificate should provide potential CMPTI recipients with confidence to proceed with the FID. These provisional certificates will also allow DISR to streamline its review of final certificate applications.

Due to the extended lead times in the industry, we also recommend that the program allow taxpayers to apply for provisional certificates prior to the 2027-28 financial year.

We recommend that Treasury review the legislation in Division 378 of the ITAA 1997 for sample language regarding the review of applications and, the issuance, amendment and revocation of certificates.

Q21. Testing Certifications

The following certifications are common across industry:

- Certificate of Analysis (COA)
- Safety Data Sheet (SDS) / Material SDS (MSDS)

We recommend that the new law require the certificates to be issued by a qualified, independent laboratory to provide transparency and rigor to the program.

Community benefit principles

24. *What obligations should be imposed on potential recipients of the CMPTI to ensure the community benefit principles are met?*
25. *What obligations are potential recipients of the CMPTI currently subject to that might support the community benefit objectives (noting these will be finalised under the Future Made in Australia Act)?*
26. *Are there any additional objectives that you consider important? What obligations might support these?*
27. *Recipients of the CMPTI may be subject to additional transparency and disclosure requirements in order to be eligible. What kind of requirements are appropriate? What are the key practical considerations to take into account when setting the requirements?*
28. *How should entities proposing to claim the CMPTI be required to demonstrate compliance with tax obligations?*
29. *What information do you think should be reported publicly on the recipients of the CMPTI and the amount of credit received?*
30. *Who should the reporting requirements be imposed on? For example, on the recipient entity, or central reporting through a regulator?*

Q24. Obligations and Integrity Measures

We believe the program requires integrity measures to ensure the program meets the community benefit principles. Specific examples include:

- *Anti-Abuse Rules*

Similar to the US Advanced Manufacturing Production Credit (AMPC), we recommend the inclusion of a general anti-abuse rule that would make the incentive unavailable in extraordinary circumstances in which, based on a consideration of all the facts and circumstances, the primary purpose of the production and sale of an eligible component is to obtain the tax offset in a manner that is wasteful, such as discarding, disposing of, or destroying the eligible product without putting it to a productive use.

- *Related Entities*

As briefly noted in the consultation paper, we believe integrity measures should be introduced to ensure there are protections where certain costs are incurred to related party entities.

- *Protections against excessive salaries*

We recommend the inclusion of an integrity measure that introduces an upper limit to the maximum salary claimable for an individual, that is commensurate with the typical maximum salary for professionals within the industry. The cap prevents the artificial inflation of salaries above typical industry rates purely for the purpose of maximising the CMPTI.

Q25. Current Obligations

Potential CMPTI applicants have preexisting obligations including:

- Tax, superannuation and employment obligations
- Workplace health and safety obligations
- Environmental safety obligations
- Anti-discrimination obligations

We are of the view that it would be reasonable to limit the availability of the CMPTI to taxpayers that currently meet these obligations.

Q26. Additional Objectives

As part of the announcement of the Future Made in Australia act the government has indicated that it is seeking to support “green metals” referencing the recycling of iron, steel, aluminium, etc. Over the life of the program, processes that recycle critical minerals from e-wastes may become viable. Accordingly, when drafting the legislation, we recommend that the definition of eligible production activities include the recovery and purification of critical minerals from consumer, business and industrial waste (e.g. lithium extraction from e-waste). Corresponding integrity measures would be required to prevent the unnecessary reprocessing of critical minerals where it is conducted for the purpose of obtaining the CMPTI.

Q27. Transparency and Disclosure

We agree that transparency measures are critical for trust in the program. However, they must be practical and cannot misconstrue the nature or purpose of production activities. Accordingly, we therefore recommend that:

1. The ATO and DISR jointly publish a list of CMPTI recipients with a 2-year delay following the end of the financial year (i.e. FY28 figures would be published in FY30). This provides taxpayers with an opportunity to amend or correct erroneous claims.
2. The published data should contain the following information:
    a. Entity Name and ABN
    b. Mineral/s Processed
    c. CMPTI Received

We believe it is important that the public disclosure includes the mineral category to provide the public with a level of confidence in the integrity of the program. However, we do not believe it is necessary to detail the purity or format. We would also recommend that DISR issue a supporting update that addresses program success stories and provides the general public with information about the positive uses of different critical minerals.

Q28. Evidence of Eligibility

To establish eligibility, we believe the taxpayer must maintain records consistent with its ordinary obligations under Section 262A of ITAA 1936. Specific examples include:

- *Qualifying Production Activities:*
    - Batching data from equipment programable logic controllers (PLC) and human machine interface (HMI).
    - Engineering drawing and models e.g. PFD, P&ID, etc.
    - Weighbridge records or similar demonstrating the mass of critical minerals produced.
    - Purchase orders and agreements establishing the supply of the critical minerals.
    - Laboratory certificates of analysis or similar.
- *Qualifying Production Expenditure:*
    - Labour:
        - PAYG records, contemporaneous timesheets, staff scheduling rosters, or similar demonstrating involvement in production activities. They may be combined with the production data to establish the nexus of the employee's role with the production of critical minerals.
        - Contracts and invoices for the provision of contract labour by third party employment agencies or similar.
    - Reagents & consumables:
        - Vendor purchase agreements and invoices for the supply of reagents and process consumables.
    - Recruitment & training:
        - Contracts and invoices establishing costs incurred on recruitment and training. These records must be itemised to describe specific roles and/or employees, to demonstrate the nexus between the employee on-cost, employee and the production activity.
    - Utilities:
        - Utility agreements and invoices. Where multiple eligible and ineligible production activities occur at a single site, we recommend method of apportionment based on separate metering or PLC records of utility usage.
        - Per Question 6, we believe taxpayers required to produce their own energy should develop a reasonable basis for calculating expenditure based on fuel costs, maintenance and depreciation of generation equipment. However, the reliance on a safe harbour would significantly limit administrative complexity.
    - Maintenance:
        - Invoices for maintenance costs and staffing records for maintenance personnel. Where multiple eligible and ineligible production activities

occur, we recommend a reasonable basis of apportionment based on maintenance records.

- Logistics/Transport:
  - Weighbridge data and logistic manifests establishing the nexus to production activities.
  - Where taxpayers operate their own vehicle fleet, they may rely on logbooks or vehicle telematic data to establish the nexus to the production activities.
- “Sole Purpose” Asset Depreciation
  - To the extent an asset is acquired for the sole purpose of production the taxpayer must maintain contemporaneous records establishing the equipment’s purpose at the time of acquisition. For example, process flow diagrams or models demonstrating the requirement for the asset, and correspondence with the vendor about the purpose of acquiring the asset.
  - The purpose may also be demonstrated based on the equipment specifications where a DISR delegate can readily establish the nexus to the production activities.

Q29. Data Publication

Please refer to the answer to Question 27.

Q30. Reporting

Please refer to the answer to Question 27.