



First Nations Clean Energy Network

Submission in response to the proposed formulation of the:

- Critical minerals production tax incentive
- Hydrogen production tax incentive

July 2024



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Overview and background

The [First Nations Clean Energy Network](#) (the **Network**) welcomes the opportunity to provide a submission in response to The Treasury's Critical Minerals Production Tax Incentive consultation paper and Hydrogen Production Tax Incentive consultation paper.

Given our comments are relevant to the general design of these initiatives and how they could incorporate First Nations outcomes, we have combined our responses on both consultation papers.

Since being launched in November 2021, the Network has advocated for an energy system that ensures First Nations participation and benefit.

The commitment by all Australian Energy Ministers through the National Energy Transformation Partnership to the development of a First Nations Clean Energy Strategy underscores the importance of ensuring First Nations have a say in policies and programs as Australia transitions its energy system. Increasingly this has included providing direction on the design of industrial policy and supply chain linkages associated with the energy transition.

The Network, for example, has provided input to the design of the [Capacity Investment Scheme](#) and also has recently released a report on [Powering First Nations Jobs in Clean Energy](#).

Establishing incentives through industrial policy - like production tax credits - (and like the auction process associated with the Capacity Investment Scheme) provides an opportunity to consider and design and deliver mutually beneficial outcomes for proponents and First Nations communities by incentivising First Nations partnerships and genuine First Nations participation in projects - thereby providing opportunities to decrease risk for proponents and add significant shareholder value.

We [have noted that overseas jurisdictions](#) have seen the benefit of taking such an approach, and consider that Australia must likewise come to realise that incentivising First Nations partnerships and participation in the energy transition and through industrial policy is an investment decision, not an additional cost.

About the First Nations Clean Energy Network

The [First Nations Clean Energy Network](#) is made up of First Nations people, groups, community organisations, land councils, unions, academics, industry groups, technical advisors, legal experts, renewables companies and others - working in partnership to ensure that First Nations share in the benefits of Australia's clean energy transition.

The Network is led by a [Steering Group](#) of First Nations leaders.

As a national, First Nations-led coalition, the Network aims to enable and empower First Nations to participate in, benefit from, respond to, and shape clean energy projects that impact their communities, land, waters and Sea Country.

The Network's approach is built on three pillars:

- **Community** The First Nations Clean Energy Network supports First Nations communities to shape the design, development and implementation of clean energy projects at every scale.
- **Industry partnerships** The First Nations Clean Energy Network acts as an innovation hub, promoting best practice standards and principles that companies should adopt and investors should require before committing capital to a clean energy project.
- **Policy reform** The First Nations Clean Energy Network advocates to lift significant federal and state regulatory barriers and stoke government investment, provide meaningful opportunities for energy security and clean energy generation for First Nations.

The Network was established to ensure that First Nations people play a central role in and harness the opportunities from Australia's clean energy transition.

After being launched in November 2021 on Arrente country in Mparntwe (Alice Springs), the Network has [learnt and achieved a lot](#) in just over 2 years, supported by our Steering Group, over 1000 First Nations members (individuals and organisations) and our thousands of other supporters.

First Nations communities and the impacts on land, waters and culture and through supply chains must be considered in the design of these production tax incentives

The Network has observed the growing interest in critical minerals since our launch - which has included observing and learning how other jurisdictions are developing systems to include First Nations outcomes and Free, Prior and Informed Consent, whilst also developing their critical minerals industries.

Some of these we discuss in our [submission in response](#) to the discussion paper for the development of Australia's Critical Minerals Strategy in February 2023, which has been cited numerous times. Indeed, parts of our submission [are quoted](#) in the subsequently released Critical Minerals Strategy 2023-2030, and 'First Nations engagement and benefit sharing' is identified as one of six focus areas outlined in that Strategy.

Meanwhile, through rigorous analysis, [academics at the University of Queensland's Sustainable Minerals Institute have published work](#) highlighting that '*some of Australia's most disadvantaged areas host the highest number of critical minerals mines and mineral deposits*' and that '*without*

major reforms in policy and practice, the inequitable distribution of mining's impacts and benefits will persist.'

Whilst noting that The Treasury's Critical Minerals Production Tax Incentive consultation paper and Hydrogen Production Tax Incentive consultation paper are about downstream processing, and not about upstream activities *per se*, we make the points above for two reasons:

1. to emphasise the inevitable impacts on Traditional Owners and First Nations communities in the supply chains for activities associated with these activities (and to highlight then that in providing opportunities for firms to receive beneficial tax offsets that the design of these tax arrangements should not be blind to impacts in supply chains); and
2. to note that despite First Nations being identified as a 'focus area' and critical participants in both the development of Australia's critical minerals industry and our hydrogen industry, there is no specific funding for First Nations capacity development in the critical minerals sector and very limited funding in the hydrogen sector - whilst conversely, significant sums are being directed towards proponents in both industries.

Jurisdictions with which we are competing for investment have incorporated and incentivised First Nations outcomes and partnerships through taxation arrangements, and Australia must do likewise

As the Network [recently noted](#) on the introduction of the Future Made in Australia Bill, like the United States' Inflation Reduction Act, the intent of the Future Made in Australia plan is to drive investment into renewable energy and cleantech manufacturing, regional and remote employment, and export opportunities - i.e. to secure sovereign capabilities.

The Inflation Reduction Act introduced seismic shifts to the Indigenous energy development landscape - particularly through the use of tax incentives. In addition to direct payment of tax credits to Indigenous organisations (allowing Indian Tribal governments and Alaska Native Corporations to benefit from income tax credits even though they may not owe federal income taxes), the Inflation Reduction Act also introduced tax bonuses that incentivise energy projects to be developed in partnership with Tribal communities (and moreover, bonuses can be 'stacked' so that a Tribal government, developing its own project on Tribal land would be eligible for a range of credits to offset income taxes).

Future Made in Australia plan similarly could stimulate and incentivise First Nations outcomes and provide significant scope for First Nations communities who wish to pursue opportunities.

And given that the Future Made in Australia plan is about competing globally and attracting investment to Australia, there is no reason that similar beneficial arrangements for First Nations communities - through the tax system - should not similarly be deployed in Australia and in the design of the Critical Minerals Production Tax Incentive and Hydrogen Production Tax Incentive.

Indeed, a failure to genuinely incorporate and incentivise positive First Nations outcomes into the design of these proposed production tax incentives would effectively mean that First Nations communities in Australia are being asked to forego opportunities that Indigenous communities in

the international jurisdictions with which Australia is competing for investment are able to benefit from.

Suggestions to improve the design of the production tax incentives

Broader eligibility requirements - the Community Benefit Principles and the need for including a specific point on First Nations outcomes in the Future Made in Australia Bill

The Network notes the development of the Community Benefit Principles associated with the Future Made in Australia Bill, and that eligibility for the production tax incentives will require alignment with these principles.

The Network considers, however, that as presently framed, the Community Benefit Principles do not adequately prioritise and focus decision-makers and proponents on achieving First Nations outcomes, and the following point must also be included in clause 10(3) of the Future Made in Australia Bill:

- *ensuring First Nations communities and Traditional Owners can participate in and benefit from Future Made in Australia initiatives*

The Network has similarly highlighted the importance of separating out First Nations outcomes [in our assessment](#) of the design of the Capacity Investment Scheme - and that there is precedent for taking this approach (i.e. of causing specific focus on First Nations outcomes as distinct from general community outcomes) in the Net Zero Economy Authority Bill (at clause 16) and in the *National Reconstruction Fund Corporation Act* (at s 4).

The incentive - proponents should be incentivised with bonuses (additional tax offsets) to partner with First Nations communities and achieve First Nations outcomes

The Network notes that to receive the refundable tax offset for each of the proposed production tax incentives (critical minerals processing or hydrogen production), all eligibility criteria must be met in order to qualify.

The Network considers that particular behaviours could be further incentivised by offering proponents bonuses if their project achieves specific outcomes. Bonuses (providing an additional tax offset) could, for example, be offered if the following outcomes are part of a project:

- the project is owned or co-owned (above a certain minimum percentage) by a relevant Traditional Owner corporation
- the project uses only source materials (e.g. energy, water, critical minerals, etc.) in its supply chains that are subject to agreements concluded through a process of Free, Prior and Informed Consent with Traditional Owners
- the project is subject to an agreement with Traditional Owners concluded through a process of Free, Prior and Informed Consent

- the project meets First Nations targets for First Nations participation (employment, training, procurement and key decision-making roles) - noting that such targets should be ambitious and set in consultation with host First Nations communities.

Eligible entities - proponents should be required to demonstrate cultural competence

In our [submission on the expanded Capacity Investment Scheme design paper](#) the Network proposed that a threshold eligibility requirement should be that only project proponents who can demonstrate cultural competency and cultural capability should be able to participate in and progress through the Capacity Investment Scheme tender process.

The Network considers that similarly in the design of these production tax credits that firms must be able to demonstrate cultural competency in order to be eligible (just as firms bidding into the Capacity Investment Scheme must demonstrate they are not exposed to matters like corruption, modern slavery, gender inequality, etc.).

Our contact details

First Nations Clean Energy Network

info@firstnationscleanenergy.org.au