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Mr Adrian Gebers
Director
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Corporate and International Tax Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: HydrogenProductionTaxIncentive@treasury.gov.au;
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Dear Mr Gebers,

Hydrogen and Critical Minerals Production Tax Incentives

As the representative of over 150 large corporates that operate across 22 industries, the Corporate Tax Association (**CTA**) welcomes the opportunity to make a submission to Treasury in relation to the *Hydrogen Production Tax Incentive Consultation Paper (HPTI Consultation)* and the concurrent consultation on the Critical Minerals Production Tax Incentive (**CMPTI**).

Both tax incentives were announced in the 2024-25 Federal Budget as part of the Government's Future Made in Australia agenda. We understand that there are potentially a number of commercial issues which may impact the efficacy of the proposed incentives for which relevant industry bodies or individual taxpayers may make appropriate representations upon. As such, this submission generally focuses on the design and structure of the tax incentives from a tax administration perspective.

Precedent being set for similar tax incentives in the future

The design of the HPTI and the CMPTI may set a precedent for any future tax incentives, whether by the current or a future government, designed to encourage investment in renewable energy and critical minerals. Therefore, it is essential that the design of these incentives gives effect to the policy intent to support the Government's Future Made in Australia agenda in the context of Australia's current tax regime and its relative uncompetitive position¹. Unnecessary complexities and compliance burdens may discourage this kind of investment and should be avoided wherever possible.

¹ See OECD report on [corporate effective tax rates](#).

Comments on Design Features

1. Eligibility requirements

The eligibility requirements to access the incentives need to be simple and clear. There should be no restriction on the size of entity (e.g. by turnover or assets value, size of investment in a renewable hydrogen project, size of the project itself² etc.) able to access the tax incentive.

a) Entity type

The policy rationale for limiting the HPTI and CMPTI to ‘corporations’ is not clear. As a tax offset, they can be designed to give the tax offset at the entity or entity shareholder/level as is the case with the US Advanced Manufacturing Production Credit (**AMPC**) rules (see further below). Restricting the incentives to corporations may be at odds with how projects will be undertaken via arrangements that include corporate groups, trusts, unincorporated joint ventures, consortiums or partnerships and may limit the scope of entities that engage in projects as a result. In our view, the measure should be ‘entity agnostic’ and be available to projects that meet the eligibility criteria regardless of the nature of the holding structure for the project.

b) Exception for entities ‘fully exempt’ from paying corporate income tax

Treasury should confirm the expression “except entities that are fully exempt from paying corporate income tax³” does not include entities that have no tax liability due to the application of tax losses reducing their tax liability.

c) Final Investment Decision (FID) requirement

While not specifically a tax administration issue, the FID is an important threshold element for eligibility. The FID made for projects being undertaken in different industries will have different elements that need to be considered prior to the FID being made.

Rather than trying to develop a list of factors for the FID for inclusion in legislation, we consider that the FID should be dealt with in detailed guidance, taking into account the variety of factors relevant to particular industries. Development of this guidance would need to be undertaken via consultation with relevant industry bodies.

d) Pillar Two requirements

Provision of the incentives as refundable tax offsets should ensure there is no adverse impact on a taxpayer’s Effective Tax Rate amount for the purpose of the Pillar Two rules. In this

²The ‘minimum capacity’ requirement (p3 of the HPTI Consultation Paper) states that the production facility must include a minimum capacity equivalent to a 10 megawatt (MW) electrolyser. Our understanding is hydrogen facilities currently in the market have a maximum capacity of 2 megawatts. As this is emerging technology and an emerging market, we suggest a project size not reflective of current market conditions should not apply.

³ See p4 of the HPTI Consultation Paper

regard, the HPTI and CMPTI should be drafted to meet the definition of a “Qualified Refundable Tax Credit” for the purpose of the Pillar Two rules⁴.

e) Eligible Processing Costs under the CMPTI

While the CMPTI is designed to be similar but not identical to the AMPC rules, we note that depreciation is not included as an eligible cost under the CMPTI. With respect, the policy rationale for not including depreciation costs in particular is not clear and seems more driven by revenue concerns than incentivisation. We submit ensuring “public investment is targeted at the value adding processing activity”, as noted in the CMPTI consultation paper, will require expenditure on capital equipment used in the processing of the value-added product. As such, costs reflected in depreciation of such equipment should be included. We note the US Federal tax rules already provide for 100% accelerated depreciation, and as such already incentivise advance manufacturing, unlike Australia’s depreciation regime. We also note the AMPC regulations state in addition to the existing 100% depreciation write-off that:

“[a] wide range of costs that are attributable to the production of an electrode active material would be taken into account as a cost incurred in producing the electrode active material, including, but not limited to, labor, electricity used in the production of the electrode active material, storage costs, **depreciation or amortisation**, recycling, and overhead.”⁵

In our view, excluding depreciation from the CMPTI significantly impacts its utility, particularly in the context of the AMPC providing such incentives in the global search for capital.

2. Co-administration

It is proposed that the Australian Taxation Office (**ATO**) and the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) co-administer the HPTI and the ATO and Department of Industry, Science and Resources (**DISR**) co-administer the CMPTI.

Taxpayers considering the incentives will need to obtain certainty of their eligibility to access the tax offsets. It is recommended administrative processes/legislative design is put in place for the non ATO co-administrators to be able to provide advance guidance (similar to an advance finding under the R&D regime undertaken by DISR) on eligibility, and the ATO on eligible costs under existing ATO ruling processes.

Also, we note that the Guarantee of Origin Scheme does not yet exist. It would also be useful to understand what other accreditation schemes Treasury is contemplating a hydrogen producer could leverage.

⁴ Refer to paras 3.76, 3.77, 4.59 and 4.60 of the [EM to the Pillar Two Subordinate legislation](#) which discuss the impact of refundable tax offsets on a taxpayer’s Effective Tax Rate that in turn has a flow on effect on liability to Top-Up Tax.

⁵ See [Federal Register: Section 45X Advanced Manufacturing Production Credit](#)

3. Proposed Transparency and Disclosure Reporting Requirements

Under the Community Benefit Principles “transparency and disclosure reporting requirements will be established as part of accessing the taxpayer support”. It is suggested these disclosures could take the form of:

- a) annual ATO reporting on the recipients of the HPTI and/or CMPTI and the amount of credit each recipient has received; and (possibly)
- b) requirements for recipients to demonstrate compliance with their tax obligations that could be modelled on the existing Statement of Tax Record requirements when tendering for government contracts (or alternative models).

Annual ATO reporting on the recipients of the HPTI and the amount of credit each recipient has received

It appears this disclosure requirement will require the ATO to annually disclose the amount of credit a recipient has received. If so, any information required to be disclosed should be limited to the amount of offset claimed and any commercially sensitive data (e.g. costs of production) should be excluded.

Careful consideration of the means of disclosure will be needed, in consultation with impacted taxpayers. For example, this should include how and where the ATO will report these amounts. Such disclosures should, where possible, leverage existing disclosure infrastructure such as the annual Corporate Tax Transparency Report⁶ or the R&D tax incentive disclosures based on tax returns as lodged. Taxpayers may also wish to publish this information as part of other disclosures.

We note that the tax impact of both measures will be incorporated in the Corporate Tax Transparency Report the ATO publishes, given the latter measure includes total tax paid and may also form part of the disclosure made by a corporate under the Board of Taxation’s Voluntary Tax Transparency Code⁷ to the extent that the incentives reduce the tax payable amount. It may also form part of the Public Country-by-Country reporting disclosures soon to be required to be published by taxpayers⁸.

Requirements for recipients to demonstrate compliance with their tax obligations that could be modelled on the existing Statement of Tax Record requirements

Given the ATO is a co-administrator of the HPTI and CMPTI, it will be best placed to validate statement of tax records using existing processes. This would save on additional compliance for taxpayers and the ATO.

⁶ <https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/corporate-tax-transparency/corporate-tax-transparency-reports>

⁷ <https://taxboard.gov.au/current-activities/corporate-tax-transparency-code-and-register>

⁸ The public Country-by-Country reporting will be required from relevant taxpayers for all reporting periods from 1 July 2024 – see [Treasury Laws Amendment \(Responsible Buy Now Pay Later and Other Measures\) Bill 2024](#).

We are mindful that large corporates are already subject to early and ongoing engagement (such as Justified Trust) with the ATO, which are aimed at ensuring taxation and compliance obligations are met. Any additional requirements introduced which require taxpayers to demonstrate compliance with their tax obligations should be balanced with processes already in place.

The engagement and support of local communities are essential for the success of the energy transition. When considering how the eligibility requirements for the HPTI and CMPTI are to align with the Future Made in Australia Community Benefit Principles, Treasury should consider existing requirements for community benefits in Federal, State, and Local government approvals. This includes compliance with Industry Participation Plans, Environmental Management Plans, Stakeholder Management Plans, and Cultural Heritage Management Plans. There are already established principles and frameworks to ensure community benefits. While Treasury should ensure a fair energy transition, the benefits-sharing process should utilise these existing frameworks to avoid redundancy and ensure coherence.

4. Other issues

- a) **Transitional issues** – given both incentives are limited to projects reaching the Final Investment Decision before 2030 and eligible producers from the 2027-28 income year (to the 2039-40 income year), it would be useful if Treasury could advise what happens to projects already underway where the FID has either already been made or will be made prior to the 2027-28 (see further comments above related to the FID as a threshold eligibility requirement).
- b) **Eligible project sold during its life** - consideration may also need to be given to the circumstance where an eligible project is sold. We would suggest that as the incentives are production based, eligibility for the incentives should not be impacted by a change of ownership.
- c) **Arrangements other than single corporations claiming the incentives** – as noted above, potentially projects will be undertaken by a number of different structures/arrangements that include corporate groups, trusts, unincorporated joint ventures, consortiums or partnerships. It would be useful if Treasury could confirm if these arrangements will still be able to access the incentives.
- d) **Tax consolidated groups** - where a tax consolidated group exists, it would be useful if the taxpayer could make a single claim for the group where different projects may be being undertaken by the group, so long as all the projects met the eligibility criteria.
- e) **Interaction with the R&D tax incentive** – it would be useful to understand if, and how, the R&D tax offset and HPTI and CMPTI would operate and interact. Accessing the R&D tax incentive should not restrict eligibility to access either of the proposed incentives.

- f) **Refundable Tax Offsets and the imputation system** - as the HPTI and CMPTI have been designed as refundable tax offsets, this means they will reduce a taxpayer's tax liability. In the Australian context, this outcome needs to be considered within the economics of the imputation system. Unlike incentives in the US upon which we understand the HPTI has been modelled, for domestic investors in Australia, any reduced tax paid at the corporate level is recouped at the shareholder level at the shareholder's marginal tax rate when a dividend is paid.

In this regard, the HPTI and CMPTI can in this sense be seen as a 'timing difference' for domestic investors. In contrast, a foreign investor, depending on the relevant double tax treaty, may not pay any additional withholding tax on the part of the dividend that is unfranked. To ensure a level playing field, we recommend consideration be given to providing a refundable tax offset at the ultimate domestic shareholder level, to the extent any dividend received from a project eligible for the HPTI or CMPTI is unfranked because of the HPTI or CMPTI as relevant.

Should you have any questions, please do not hesitate to contact me on 0408 028 196 in the first instance.

Yours faithfully,



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