

Via email: HydrogenProductionTaxIncentive@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

## HYDROGEN 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 Hydrogen Production Tax Incentive (HPTI). The following document includes responses to the questions raised by Treasury.

In summary, the key observations BDO have identified 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
- A dual agency model to administer the HPTI is welcomed to ensure streamlined administration. Notably, the proposed HDPI legislation will need to establish the responsibilities of both regulators, to prevent the duplication of administration, review and audit activities
- In terms of application practicality, entities receiving support under the Hydrogen Headstart program should have the ability to 'fast track' through the HPTI administration process.

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

## Who is eligible?

1. *Please provide any feedback on the impact this incentive may have on your community, facility or industry.*
2. *Please provide any feedback on the proposed eligibility criteria.*
3. *What key factors would need to be accounted for in a definition of an eligible facility for the purposes of the HPTI?*
4. *What key factors would need to be accounted for in a definition of Final Investment Decision (FID) for the purposes of the HPTI?*
5. *How long do you expect it will take for projects to reach first production following FID?*
6. *For foreign investors, do you currently encounter any impediments to investment in projects that would be eligible?*

### Q1. Proposed Community Benefit

BDO supports the commitment to “include community benefit principles” that have been outlined in the paper. In addition, the communities and areas that have been outlined, BDO believes that HPTI will have the following implications:

- *Acceleration of the Australian Hydrogen Industry and Supply Chain*

BDO believes that the introduction of HPTI will emphasise the impact of the Hydrogen Headstart program. It may accelerate acceptance of renewable energy as status quo through supplementing the cost for hydrogen as a sustainable energy source.

- *Growth of Sustainable Ammonia Production*

Implementing the HPTI will not only support the production of renewable hydrogen, but also blue/green ammonia that utilises hydrogen during the Haber-Bosch Process. Sustainably produced ammonia has become of interest in recent years for its potential as a hydrogen energy carrier, agricultural, manufacturing, and bunkering fuel. With this, BDO suggests consideration of other production pathways for hydrogen beyond conventional electrolysis.

- *Advancement in Technology*

Additional funding and interest into R&D projects aiming to improve the efficiency for sustainable hydrogen production - generally produced through the hydrolysis/electrolysis of water. Traditional means of producing hydrogen is energy intensive.

### Q2. 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 HPTI will be available to corporations that are subject to Australian income tax throughout the relevant income year”*. [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 not currently subject to Australian income tax.

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.

Failure to provide the HPTI to companies in a tax loss position would run contrary to the purpose of the HPTI 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 large companies with diverse operations.

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 foreign investments on a corporation’s eligibility to the tax incentive program to be clarified.

Even with the assistance of funds such as Hydrogen Headstart, set up of these production facilities for the private sector will require significant backing and therefore are likely to rely heavily on foreign investment.

- **Eligible Facilities**

BDO believes the identified characteristics of eligible facilities presented in the consultation paper are appropriate.

## Q3. Final Investment Decisions

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 consultation paper, the following uncertainties were raised:

- Interactions with FID

In the various sections of the paper, it had not been addressed how the Australian Taxation Office (ATO) and the DCCEEW 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 13 we believe the responsibility for evaluating industrial technical documentation should be the responsibility of DCCEEW 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 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 sale-able 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.

#### **Q4. Project Timelines**

The typical timeline from FID through to production operations is typically 1-3 years. This is subject to various factors that is not within the control of producers, such as lead time for large production assets and pipeline infrastructure. We recommend that the HPTI legislation provide taxpayers with the opportunity to apply for provisional certificates to support investment decisions. We have addressed this further in Question 13.

## What is eligible production?

7. *Please provide any feedback on the proposed emissions intensity threshold of 0.6kg of carbon dioxide equivalent up to the production gate.*
8. *Other than electrolysis, what production processes would meet this emissions intensity threshold now or before 2030?*
9. *Please provide feedback on the proposed minimum capacity requirement (equivalent to 10 MW electrolyser)?*
10. *For renewable production processes other than electrolysis, is using the minimum capacity requirement of “equivalent to a 10MW electrolyser” appropriate? Is another definition of capacity required to deal with other production pathways?*
11. *Should grid connected electrolyser projects be required to match their hydrogen production with electricity generated by the same electricity grid? Please provide feedback on this proposal.*
12. *Please provide feedback on the proposal to not include additional requirements on renewable energy generation for access to the incentive, such as additionality and hourly time-matching with hydrogen production.*

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

## Administrative arrangements

13. *Please provide any feedback on the proposed administrative approach.*
14. *The proposed GO scheme will be used to support the registration and verification of hydrogen production. Are there any additional factors that would need to be accounted for in the proposed design of that scheme?*
15. *The Government may legislate the administrative arrangements in subordinate legislation. Please provide any feedback on this proposed approach.*

### Q13. Administrative Approach

BDO considers a dual agency model consisting of DCCEEW 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 DCCEEW must be enshrined in the tax law, ideally supported by a supplementary program charter.

The proposed approach of leveraging the Guarantee of Origin (GO) Scheme operated by the Clean Energy Regulator (CER) would ideally minimise the duplication of administrative tasks. However, CER is still in the process of defining the approach for issuing these certificates.

The GO Certificates are not intended for applicants seeking the HPTI. Therefore we recommend that during the process of obtaining a GO Certificate, that it is possible to effectively “check a box” to request a corresponding HPTI certificate. We believe this process should be managed by DCCEEW or CER.

#### Program Compliance

The HPTI 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 HPTI 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 DCCEEW requesting the relevant GO and HPTI certificates. To the extent that DCCEEW determines that the HPTI eligibility requirements are met, the activities and expenditure qualify for the purposes of the HPTI, it may issue a certificate with a registration number, total mass of hydrogen produced and allowed HPTI to be entered into the Company Tax Return.

Certificates may be subject to revocation in the event that DCCEEW 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 DCCEEW to review a certificate in the event it has concerns the eligibility requirements are not satisfied, or the reported hydrogen volume is inaccurate. This request may be issued to DCCEEW 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.

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.

#### **Q14. Additions to GO Scheme verification**

BDO believes the proposed GO scheme is appropriate to establish eligibility. However, as detailed above we recommend the established a review and audit process, with the potential to lead to the revocation of the GO and HPTI certificates.

#### **Q15. Legislating Administrative Arrangements**

The entitlement to, and value of the HPTI is determined directly based on the volume of hydrogen produced. The establishment of the GO Scheme should allow for a relatively simplified legislation that delegates the review and audit responsibility to DCCEEW.

A separate provision can be introduced that allows the Commissioner to request DCCEEW to review a GO/HPTI certificate if there are concerns with respect to the authenticity of the claim.

BDO recommends that following the finalisation of legislation that in the first instance the Commissioner and the Minister for DCCEEW establish a program charter detailing the basis for review activities.

We recommend that any provisions are not overly prescriptive, and allow for flexibility in managing the issuance, review and audit of the certificates based on the program charter. After the program has been in operation for a substantive period, Treasury may consider whether to legislate some of the issues covered by the program charter if it has deemed the charter to be insufficient.

## Community benefit principles

16. What obligations should be imposed on potential recipients of the HPTI to ensure the community benefit principles are met?
17. What obligations are potential recipients of the HPTI currently subject to that might support the community benefit objectives (noting these will be finalised under the Future Made in Australia Act)?
18. Are there any additional objectives that you consider important? What obligations might support these?
19. Recipients of the HPTI 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?
20. How should entities proposing to claim the HPTI be required to demonstrate compliance with tax obligations?
21. What information do you consider important for the community that should be reported publicly on the recipients of the HPTI such as the amount of credit received?
22. Who should the reporting requirements be imposed on? For example, on the recipient entity, or central reporting through a regulator?

### Q16. Community Obligations

Potential HPTI applicants have preexisting obligations including:

- Obligations to prioritise a local workforce
- 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 HPTI to taxpayers that currently meet these obligations.

**Q17. Current Obligations**

Please refer to the answer to Question 16.

**Q18. Additional Objectives**

BDO has not identified any other additional objectives.

**Transparency and disclosure**

We agree that transparency measures are critical for trust in the program. However, they must be practical. Accordingly, we therefore recommend that DCCEEW and the Clean Energy Regulator jointly publish a list of HPTI 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.

The published data should contain the following information:

1. Entity Name and ABN
2. Volume of Hydrogen Produced
3. Emission intensity
4. HPTI Received

We believe it is important that the public disclosure includes the production pathway to provide the public with a level of confidence in the integrity of the program.

**Q19. Compliance with tax obligations**

To establish eligibility, we believe the taxpayer must maintain records substantiating the eligibility requirements and volume of hydrogen produced, this may include:

Documentation satisfying the obligations of the GO Scheme

- Batching data from equipment programmable logic controllers (PLC) and human machine interface (HMI)
- Weighbridge and pipeline metering records
- Engineering drawing and models e.g. PFD, P&ID, etc.
- Purchase orders and agreements establishing the supply of the hydrogen.

**Q20. Community information**

Refer to the response in Question 19.

**Q21. Reporting entity**

Refer to the response in Question 19.

## Interaction with other government incentives

23. Please provide feedback on the proposed treatment of the interactions between the HPTI and other forms of Commonwealth, State or foreign government support.
24. How can the HPTI best leverage other types of support? Please provide examples relevant to your project if possible.
25. What are the key practical considerations with receiving support through the HPTI and the Hydrogen Headstart program simultaneously?
26. Are there specific interactions with other support programs that should be considered?

### Q22. Interaction with Government Support

We acknowledge that the intention of the incentive is to provide support to Australian hydrogen processing facilities in an environment with various other government incentives. Accordingly, we recommend the inclusion of additional clarification of the interaction with the HPTI and other government grants and incentive. We note the following interactions with respect to each program:

- Grants & Investment

Receipt of Australian Renewable Energy Agency (ARENA), Hydrogen Headstart and/or similar government grants should not preclude the taxpayer from accessing the HPTI.

- Research & Development Tax Incentive (RDTI)

Similarly, we do not believe the HPTI should preclude the taxpayer from accessing the RDTI or vice versa. Due to the anticipated rapid growth of the hydrogen sector we anticipate overlap between HPTI production activities and RDTI R&D activities.<sup>1</sup> A taxpayer should be able to access both programs simultaneously to ensure the facilities are operating at the maximum efficiency and capacity, thereby maximising the Treasury's return on investment.

### Q23. Other Support

As discussed in Question 23, given these facilities will require such significant levels of investment, consider the potential to allow for expenditure to be claimed under both the RDTI and HPTI.

### Q24. Hydrogen Headstart

We recommend that for practicality, entities that successfully participated in the Hydrogen Headstart program should have the ability to 'fast track' through the HPTI administration process. Being recipient of the Hydrogen Headstart program would imply that the entity has already provided rigorous detailed FID and facility production.

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<sup>1</sup> See Section 355-20 of ITAA 1997.



**Q25. Specific Program Interactions**

Please refer to the response to Question 23.