

Director
Production Tax Incentives Unit
Corporate and International Tax Division
The Treasury
Langton Cres
Parkes ACT 2600

12 July 2024

Dear Treasury

Treasury consultation regarding Hydrogen Production Tax Incentive

1. Introduction

Alvarez & Marsal Australia ("A&M") is pleased to provide our submission on the Hydrogen Production Tax Incentive ("HPTI") consultation paper dated June 2024 ("Consultation Paper").

A&M is an advisor to many current and prospective investors and developers of green hydrogen projects in Australia, and we welcome the Government's support for this environmentally and economically critical industry. The views expressed below are solely our own and are not presented on behalf of any particular client.

We have focused our observations on the intended tax-related processes and implementation of the HPTI, rather than necessarily providing responses to each question raised within the Consultation Paper.

2. Please provide any feedback on the proposed eligibility criteria.

2.1. Choice of entity

Under the current proposal, the HPTI scheme will only be available to corporations that are subject to Australian income tax throughout the relevant income year (except entities that are fully exempt from paying corporate income tax). This is intended to facilitate the payment of HPTI through the tax system as a refundable tax offset.

It appears that Treasury is basing this approach on the research and development ("R&D") tax offset.

Based on our industry experience in energy generation and storage projects, entities other than corporations (specifically, Australian resident unit trusts and partnerships) are extensively used in similar capital-intensive projects. The use of these entities provides increased flexibility to investors, permits favourable financing terms and has a material impact on the commerciality and feasibility of a project.

Failing to permit unit trusts or partnerships to access the HPTI will:

- (a) reduce the commercial viability of certain green hydrogen projects; and
- (b) require restructuring of existing projects in development or otherwise deny access to the HPTI for certain high quality green hydrogen projects.

Unlike the R&D tax offset, the HPTI is intended to be cash settleable in all circumstances. Therefore, it is not necessary that the entity claiming the HPTI be a tax-paying entity. In contrast, the R&D tax offset is often non-refundable, hence it requires a tax-paying entity to be the claimant.

Recommendation: the HPTI should be available to the following entities:

- (a) company;

- (b) unit trust;
- (c) partnership; and
- (d) GST joint venture.

2.2. Taxation of credits

The Consultation Paper does not address the expected tax treatment of the HPTI once received.

Any additional taxes imposed on the HPTI when received will reduce its efficiency and effectiveness in encouraging investment into Australia's hydrogen industry.

Recommendation: confirm that the HPTI should be treated as a refundable tax offset with no further tax payable on the amount received, and will not be subject to goods and services tax ("GST").

3. What key factors would need to be accounted for in a definition of an eligible facility for the purposes of the HPTI.

3.1. Eligible brownfield transactions

It is unclear from the Consultation Paper whether the HPTI will continue to be available following transfer of either the eligible facility or the eligible entity holding the facility.

Due to the capital-intensive nature of similar projects and differing investment profiles of infrastructure investors, direct or indirect transfers of eligible facilities may occur during the HPTI concession period.

Any incoming investor would require assurance that a project which is commercially feasible as a result of the HPTI would continue to receive the HPTI payments following a transaction.

Recommendation: entitlement to the HPTI credit should transfer with an eligible facility, irrespective of changes in ownership or upstream investment structure.

4. What key factors would need to be accounted for in a definition of Final Investment Decision (FID) for the purposes of the HPTI

4.1. Project upgrades

Under the current proposal, FID for each eligible facility must be made on or before 30 June 2030.

It is unclear from the Consultation Paper whether an upgrade to an eligible facility, where the decision to upgrade is made after 30 June 2030, will:

- (a) be able to benefit from the HPTI (i.e. in respect of increased production); or
- (b) cause the facility to no longer be eligible for the HPTI.

Large-scale infrastructure assets, including those required for efficient hydrogen production, require long term and significant ongoing capital expenditure. For new technology, such as hydrogen, this may result in significant modifications to existing facilities that cannot be reasonably forecast at the time of initial FID.

Where a facility is eligible for HPTI, any subsequent improvements and upgrades to that facility should continue to qualify for HPTI, regardless of when the FID is made for those subsequent upgrades. This provides certainty to investors and eases the administrative burden of tracing the source of production within a facility.

Recommendation: the HPTI should be available where an eligible facility is upgraded even if the FID for the upgrade occurs after 30 June 2030.

5. Please provide any feedback on the proposed administrative approach.

5.1. Timing of credits

Under the current proposal, it appears that eligible entities will receive the HPTI upon production of hydrogen, as measured at the production gate. This is consistent with the intent of the incentive.

To claim the HPTI, it is suggested that entities adjust their pay-as-you-go ("PAYG") instalment rate, based on the expected HPTI credit to be received, where they are in a tax payable position.

It is unclear from the Consultation Paper how or when the HPTI will be paid if:

- (a) the entity has a PAYG instalment rate of nil; or
- (b) forecast instalments are less than the HPTI credit to be received.

Further, requesting a reduction in the pay-as-you-go instalment rate (based on expected business and investment income for a period) is an imprecise and impractical method for entities to determine the amount of the HPTI credit available.

Relying on a PAYG instalment variation to receive the HPTI, therefore, reduces investor certainty over the timing of receipt of the HPTI. This, in turn, may increase the cost of equity and debt finance.

Instead, entities should be able to self-disclose hydrogen production (to the production gate) in a period within the Business Activity Statement ("BAS"), under a new separate section with bespoke reporting labels. Cash settleable refunds of the HPTI credit should then be included within the calculation of net 'amounts the ATO owes you'.

This facilitates the receipt of the HPTI alongside the payment or receipt of other net amounts for that reporting period (i.e. 21 days after lodgement of the BAS for monthly lodgements, or 28 days after lodgement for quarterly lodgements), providing greater certainty on cash flows for investors.

Recommendation: the HPTI should be delivered through the Business Activity Statement, rather than by taxpayers adjusting their Pay-As-You-Go Instalment Rate.

5.2. Eligibility and implementation certainty

We expect the benefits provided under the HPTI will materially affect the commercial viability of a project.

Accordingly, certain investors and financiers will require certainty, prior to investment, over the eligibility of a project to access the HPTI scheme. An advance ruling process, administered by either the ATO and DCCEE, should be made available to confirm the application of the HPTI to a particular facility.

Further, there is currently a long lead time required to obtain a private ruling from the ATO. Any such delays may result in delays on financing, constructing and operating projects, negatively impact the gross value of the HPTI receivable and the overall viability of a project.

Therefore, an efficient advance ruling process (rather than the ordinary ATO private ruling process) should be made available.

Recommendation: an advanced and expedited ruling process should be made available to confirm the eligibility of a project and the timing of HPTI receipts.

5.3. Review period

Investors will require certainty over the possibility for HPTI credits to be subject to a future tax audit, or the possibility of clawback provisions applying to require previously paid HPTI credits to be repaid by the entity.

The Consultation Paper is unclear in respect of the statutory review period which will apply to claims made by entities for HPTI credits.

Recommendation: receipt of HPTI credits should be subject to a statutory review period of two years from the due date for lodging the relevant tax return in which the claim for HPTI credit is made.

5.4. Interaction with BEPS Pillar 2

Following the introduction of legislation before Parliament on 4 July 2024 to implement key components of the OECD's Pillar Two framework, including the domestic top-up tax, for income years commencing on or after 1 January 2024, consideration should be given to the interaction of the HPTI credit with the Pillar Two framework.

In particular, the Consultation Paper is unclear as to how the HPTI credit will be viewed in conjunction with the application of the domestic minimum tax rate of 15%.

Recommendation: HPTI should be disregarded for the purposes of calculating the domestic top-up tax amount.

6. Further consultation

We would welcome the opportunity to discuss these issues further with Treasury.

Should you have any comments or queries in respect of our submission, please contact Edward Consett, Managing Director, on +61(0) 437 609 251.

Yours faithfully



Authorised delegate of Alvarez & Marsal Australia