



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: economics.sen@aph.gov.au

Committee Members
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

9 January 2025

Dear Sir/Madam

**FUTURE MADE IN AUSTRALIA (PRODUCTION TAX CREDITS AND OTHER MEASURES) BILL 2024
[PROVISIONS]**

BDO refers to the invitation by the Senate to provide feedback following the recent introduction of Future Made in Australia (Production Tax Credit and Other Measures) Bill 2024 (“the Bill”). Our feedback in response to the invitations is set out in the following document.

Yours sincerely

BDO Services Pty Ltd

Lance Cunningham
BDO National Tax Technical Leader

Executive Summary

BDO appreciates the opportunity to provide feedback on the Future Made in Australia (Production Tax Credits and Other Measures) Bill 2024. The Bill proposes significant measures aimed at enhancing Australia's production capabilities through targeted tax incentives. Our submission outlines key recommendations and considerations to ensure the Bill effectively achieves its objectives while fostering community benefits and promoting sustainable growth.

BDO has provided feedback on the Bill, focusing on key areas to enhance its effectiveness with key recommendations including:

1. **Timing and Application of Community Benefit Rules:** Establish clear guidelines on when and how community benefit rules should be applied to ensure consistency and transparency.
2. **Other Tax Offset Interactions:** Address interactions with existing tax offsets to prevent mischief while ensuring complementary benefits.
3. **HPTI Final Investment Decision (FID) Alternatives:** Provide a clear definition of FID and consider alternatives to support diverse investment scenarios.
4. **HPTI Protections for Commissioning and Operational Faults:** Implement provisions to safeguard against commissioning and operational faults, ensuring smooth scaling up of production activities.
5. **CMPTI Allowance for Unincorporated Joint Ventures (UJVs):** Introduce provisions to protect the access of UJV participants in the CMPTI.
6. **CMPTI Substantially All Safe Harbour:** Incorporate provisions that simplify that administration of evaluating eligible CMPTI expenditure.

These recommendations aim to refine the Bill, support Australia's strategic production goals, and foster sustainable community benefits.

Our primary focus in this feedback is to simplify the administration of this program for all stakeholders, while still meeting the objectives of the broader Future Made in Australia Bill.



Contents

Executive Summary	2
Introduction	4
General Recommendations	4
Recommendation 1: Timing and Application of Community Benefit Rules	4
Recommendation 2: Other Tax Offset Interactions	4
Hydrogen Production Tax Incentive	5
Recommendation 3: Final Investment Decision Alternatives	5
Recommendation 4: Protections for Commissioning and Operational Faults	5
Critical Minerals Production Tax Incentive	6
Recommendation 5: Mechanism for Unincorporated Joint Ventures	6
Recommendation 6: Expenditure Safe Harbour - “Substantially All” Rule	6

Introduction

The Future Made in Australia (Production Tax Credits and Other Measures) Bill 2024 represents a pivotal legislative initiative aimed at enhancing Australia's competitive edge in the renewable energy and critical minerals sectors. This Bill encompasses significant measures, including the Hydrogen Production Tax Incentive (HPTI) and the Critical Minerals Production Tax Incentive (CMPTI).

BDO contributed its responses to the Treasury consultation papers for both incentives in July of last year. We note with satisfaction that many of the issues raised during the consultation have been resolved in the final version of the Bill. However, it is important to note that the provisions introduced in the Bill could still present administrative challenges that may be burdensome on both the regulators and the taxpayers.

To address these concerns, we offer the following recommendations as set out below.

General Recommendations

Recommendation 1: Timing and Application of Community Benefit Rules

We acknowledge the importance of the community benefit rules for both the HPTI and CMPTI. However, the proposed provisions 419-145 and 421-45 of the Bill that allows for the Minister to introduce a new rule could potentially apply to a taxpayer in the same income year that the rule is introduced.

Investment incentives require certainty to promote the investment by businesses. The introduction of the rules to permit changes to criteria after investment decisions are made will increase investment risk, potentially decrease investment, and may reduce the effectiveness of the policy. This can be perceived as potentially unfair to the taxpayer, as it may fail to provide sufficient time to comply with the new rule. Particularly if the new rule requires a significant investment by the taxpayer to comply with the new rule.

We therefore recommend adjusting the provision to ensure a taxpayer complies with a community benefit rule by the end of the next income year beginning after the introduction of a new rule by a legislative instrument.

Recommendation 2: Other Tax Offset Interactions

We recommend that the Bill specifically address how the HPTI and CMPTI interact with other existing tax offset provisions, particularly given their reliance on emerging technologies. It is crucial that these tax incentives do not preclude taxpayers from accessing the R&D Tax Incentive. The taxpayers engaged in these sectors are often at the forefront of technological innovation, aiming to develop solutions that offer broad-reaching benefits for Australia's economy and its people. Ensuring that the Bill facilitates and does not hinder access to the R&D Tax Incentive will support these high-tech developments and contribute to the nation's strategic goals in renewable energy and critical minerals production.

Hydrogen Production Tax Incentive

Recommendation 3: Final Investment Decision Alternatives

The term “Final Investment Decision” (FID) is not legislatively defined. Further, the Bill in its current form does not establish a definition of a FID in the proposed provisions for Division 421 or Division 995 of ITAA 1997 therefore, it must be interpreted in accordance with the Acts Interpretation Act 1901.

While we broadly agree with the guidance issued by Treasury in paragraphs 1.94 to 1.101 of the Explanatory Memorandum, it is still open to interpretation and relies on a culmination of multiple events.

Rather than placing a reliance on the term FID, we recommend that provision 421-55(5) introduce alternative safe harbors where a taxpayer may instead either:

1. Place an order on major equipment with the required nameplate capacity before 1 July 2030;
or
2. Sign an Engineering, Procurement, and Construction (EPC) contract for the facility with the required nameplate capacity before 1 July 2030.

These actions demonstrate the same commitment to the project as an FID, while being significantly easier to substantiate by providing the Clean Energy Regulator (CER) with a copy of the relevant contracts.

Recommendation 4: Protections for Commissioning and Operational Faults

It is recommended that the Bill include provisions to protect taxpayers who fail to meet their certified production profile due to the commissioning of a facility or unexpected operational faults. Hydrogen production, which relies heavily on emerging technologies, often requires extended equipment maintenance, process upgrades and/or commissioning periods to ensure operational safety and efficiency. During these periods, or in instances where unit operations unexpectedly fail, taxpayers may be unable to meet their certified production targets.

Therefore, the following protections should be included:

1. Where a taxpayer is commissioning the facility and can demonstrate that the necessary steps are being taken to meet the production profile post-commissioning.
2. Where a taxpayer experiences an unexpected operational fault and can demonstrate that the fault is being rectified, and the production profile will be met once operations resume.

These provisions will prevent the certification from being unduly challenged, provided the taxpayer can substantiate their intentions to meet the production profile either after the commissioning period or once the operational fault has been rectified. This approach ensures fairness and acknowledges the complexities involved in the deployment and operation of advanced hydrogen production technologies.

Critical Minerals Production Tax Incentive

Recommendation 5: Mechanism for Unincorporated Joint Ventures

During the consultation process, participants raised concerns about the lack of a mechanism for participants in unincorporated joint ventures (UJVs) to access the CMPTI. UJVs are a common structure used throughout the Australian resources sector.

The Explanatory Memorandum at paragraph 2.29 acknowledges each participant may claim its own share of the expenditure incurred as part of the UJV. However, this does not appear to specifically be addressed in the provisions of the bill. This ambiguity leaves this open to interpretation by the regulators and taxpayers.

We therefore recommend the introduction of provisions similar to those in Subdivision 355-J of the ITAA 1997 to claim the R&D Tax Incentive where each partner in an “R&D partnership” is an eligible entity.

Recommendation 6: Expenditure Safe Harbour - “Substantially All” Rule

BDO recommends including a safe harbour provision where, if a taxpayer can demonstrate that at least 80% of an expense has been incurred in qualified production activities, the entire expense should be considered eligible for these activities. This safe harbour aims to reduce the administrative burden associated with verifying whether the remaining 20% of the expense was incurred in production activities.

The rationale is to prevent the ATO and taxpayers from engaging in debates over expenses, which would generally result in a financial benefit that is less than the time-cost for all personnel involved from both the ATO and the taxpayer.

For example, it may be possible to easily substantiate that more than 80% of a FIFO employee's active hours were involved in qualified production activities based on site entry and exit documentation. However, the balance of their time spent traveling to the site was not directly recorded, yet the sole purpose of that travel was to attend the site to conduct the qualified production activities.