

BCA

Business Council of Australia

Critical Minerals Production Tax Incentive

BCA submission

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Contents

1.	Overview.....	2
2.	Key recommendations	3
3.	Eligibility.....	3
3.1	Eligible entities	3
3.2	Start date/duration	4
3.3	Eligible processing expenditure.....	4
3.4	Eligible outputs	5
4.	Administrative arrangements	5
5.	Community Benefit Principles	6
6.	Other issues	7

1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide a submission to the consultation paper for the proposed Critical Minerals Production Tax Incentive (CMPTI). A well-designed CMPTI can provide the foundation for Australia to be a competitive destination for critical minerals processing and refining.

A successful transition is being able to achieve a net zero economy while maintaining energy security, reliability affordability, and our international competitiveness – each vital to maintaining living standards and economic prosperity. Australia’s abundance of critical minerals present an exceptional opportunity to diversify supply chains and support low emissions technologies. Demand for these minerals will increase over time, and Australia is uniquely positioned to play a continued and growing role as a trusted and reliable trade partner in this sector.

The eligibility criteria and design of the CMPTI must not be so restrictive as to limit support for projects that otherwise meet the policy objectives, or that may otherwise result in investment going overseas. Many of these projects will deliver benefits across local communities and supply chains, but at the same time, the Community Benefit Principles must not be so narrowly or rigidly defined as to undermine the success of the CMPTI. It is important to be aware that these principles, while positive in the broad sense, risk increasing costs and offsetting competitive gains achieved through the CMPTI. There is evidence emerging in other countries that providing subsidies has increased project costs, particularly when labour and product markets are tight.

The Future Made in Australia agenda reflects the balanced intent of the Government to craft an Australian response to the US Inflation Reduction Act (IRA), as called for by the BCA. Australia should respond if other nations are taking significant action to attract investment. Ideally, this is achieved by learning from the errors made in other programs and getting the investment fundamentals right. As with any policy though, there is a need for firm and clear guardrails to ensure the policy is a success, there is judicious use of taxpayer dollars, and to deliver a sustainable and enduring policy agenda that allows businesses to plan confidently. The BCA has previously proposed a set of guardrails to help select priority industries and develop any policy response:

- All investments must be expert-led, with expert advice provided to government as the origination point.
- The process must be open, transparent, evidence-based and unimpeachably independent.
- It should be carefully targeted and avoid parameters which can be broadly interpreted.
- There must be the scope to withdraw, or limit, funds based on outcomes being missed or achieved.
- We must not invest in projects that can stand alone with private investment, or those which will never stand alone without government support.
- All our investments must be in areas in which we have a comparative advantage and where the investment helps those projects get to market faster, or there is clear national interest in making that investment.¹

Just as Australia should not sit still while other countries are increase incentives, nor can we sit still while they are growing their competitiveness at a foundational level. To reinvent our economy we must, as a point of national urgency, become a more competitive place to do business. This requires a focus on getting the fundamentals right to make Australia an attractive investment destination through reform of our tax system, easing the burden of regulation, a streamlined project approvals process, a high-quality skills and education system, a well-managed migration program, a streamlined foreign investment screening regime, and improvements to the workplace relations system. Getting these fundamentals right will spur innovation and lift productivity.

Simply put, the benefits of the CMPTI cannot be realised if a project is unable to proceed in Australia – be it through complexity in the project approvals process or a fundamentally uncompetitive business environment. Similarly, the CMPTI cannot succeed if upstream mining activities continue to face increasing costs and regulation, and are mired in the project approvals process.

¹ https://www.bca.com.au/keynote_address_to_the_business_hunter_annual_summit_2024

2. Key recommendations

- **Recommendation 1:** Clarify that companies that would otherwise qualify for the CMPTI should not be restricted based on the structure of a project, such as a joint venture.
- **Recommendation 2:** Remove the requirement for FID by 2030, recognising the additional compliance costs and time-limited nature of the CMPTI.
- **Recommendation 3:** If an FID requirement is included, ensure that it takes a substance over form approach.
- **Recommendation 4:** Clarify that companies can claim for the CMPTI for 10 years from when they first apply.
- **Recommendation 5:** Clarify the scope of eligible processing expenditure and do not exclude depreciation, which would otherwise disadvantage capital-intensive critical minerals processing projects.
- **Recommendation 6:** Clarify the list of specific eligible outputs from refinement and processing through an extensive consultation process with industry.
- **Recommendation 7:** Ensure the dual agency administration model clearly outlines the roles and responsibilities of administrator and information sharing arrangements, publishes timely and clear guidance material, and includes a timely and efficient dispute resolution process.
- **Recommendation 8:** Community Benefit Principles should recognise the significant broader economic benefits of current projects that already occur and not be narrowly or rigidly defined so as to undermine the success of the CMPTI.
- **Recommendation 9:** The compliance and administration costs related to Community Benefit Principles should be minimised and leverage existing reporting measures and arrangements as much as possible.
- **Recommendation 10:** Any ATO CMPTI transparency and disclosure reporting requirements should report the value of the tax benefit and publish the data post a minimum two-year delay given the potentially commercially sensitive nature of this data.
- **Recommendation 11:** Ensure the next round of consultation provides sufficient time to consult on the design and application of the CMPTI.
- **Recommendation 12:** Clarify how the CMPTI will interact with other policies, such as the global and domestic minimum tax.

3. Eligibility

3.1 Eligible entities

The CMPTI will be available for companies subject to Australia's corporate tax system. There may be projects that involve companies operating together on a joint venture basis. Eligibility for entities should be agnostic on the structure of projects. For example, the corporate participants of trusts, partnerships or unincorporated joint ventures should be able to directly claim the tax offset in respect of their share of eligible production where they would otherwise qualify as companies. Similarly, corporate limited partnerships and corporate unit trusts that are taxed as companies should be eligible.

It should also be clarified that for tax consolidated groups, the head company would be the eligible entity so that a subsidiary member (whether a company or not) owning the eligible facility and that is not itself subject to tax while part of that tax consolidated group, will not lead to an ineligibility outcome and the tax offset will accrue to the head company of the tax consolidated group which includes that subsidiary member.

Recommendation 1

Clarify that companies that would otherwise qualify for the CMPTI should not be restricted based on the structure of a project, such as a joint venture.

3.2 Start date/duration

The merits of the 2030 deadline for final investment decision (FID) are unclear, given the time it may take projects to proceed through regulatory approvals processes and begin production. At the same time, this introduces additional costs and complexity around compliance with the CMPTI that may not be necessary to achieve its objectives. For example, the benefits from the CMPTI will ultimately be capped by the 2040 end date.

Another issue for consideration is the treatment of expansion or additional phases of the same project initially approved by 2030. For example, where additional facilities or sites are added over time, but are part of the original project that was part of the initial investment decision. In other contexts, criteria such as common infrastructure (such as power supply), commonality of ownership, or physical proximity have been used.

When these factors are considered alongside the time-limited nature of the benefit and it being linked to production, the need for these limitations should be reconsidered.

Were the FID requirement to remain, it should take a substance over form approach. For example, the Australian Taxation Office (ATO) nominated substantive FID indicators as part of PCG 2016/17. This focuses more on the indicia of the decision or definitive commitment to proceed, which may not always be a formal FID. To illustrate, FID can take different forms across companies, projects, and scenarios, while different FID activities can occur progressively or in parallel. For example, this could be a commitment to purchase long lead items, a signed lease/option to buy/lease a proposed site, or entering into contracts for power and water supply.

Recommendation 2

Remove the requirement for FID by 2030, recognising the additional compliance costs and time-limited nature of the CMPTI.

Recommendation 3

If an FID requirement is included, ensure that it takes a substance over form approach.

Recommendation 4

Clarify that companies can claim for the CMPTI for 10 years from when they first apply.

3.3 Eligible processing expenditure

Clarity around eligible processing expenditure is critical to understand how the scheme will work and the potential benefits. Treasury has identified high capital requirements as one of the barriers to critical minerals processing projects, but depreciation is not classified as eligible processing expenditure.² The exclusion of depreciation will put more capital-intensive processing at a disadvantage as the incentive will be a smaller proportion of costs. It also puts Australia at a competitive disadvantage to the US as depreciation qualifies under the IRA's comparable 45X Advanced Manufacturing Production Credit. The proposed exclusion risks undermining the success of the CMPTI and will emphasise the competitiveness gap of Australian projects.

This will be inherently complex and challenging to administer given the diversity of operations across the 31 critical minerals and the extent to which they integrate with upstream activities around resource extraction of the resource.

² Australian Government, The Treasury, 2024, *Future Made in Australia National Interest Framework, Supporting paper*, May.

Recommendation 5

Clarify the scope of eligible processing expenditure and do not exclude depreciation, which would otherwise disadvantage capital-intensive critical minerals processing projects.

3.4 Eligible outputs

The Department of Industry, Science, and Resources (DISR) list of specific outputs from refinement and processing of the 31 critical minerals will similarly be a critical element of the CMPTI. This will be a significant and complex undertaking and should be developed through extensive consultation with industry.

Recommendation 6

Clarify the list of specific eligible outputs from refinement and processing through an extensive consultation process with industry.

4. Administrative arrangements

The proposed dual agency model for administration of the CMPTI is appropriate given the technical nature of the scheme, with DISR managing eligibility requirements and the ATO managing compliance of the expenditure claims against those eligible activities. The dual agency model will however be inherently more complex and costly to administer and comply with, as demonstrated by the experience around administration of the Research and Development Tax Incentive (RDTI).

It will therefore be critical to have settings in place to ensure the CMPTI is administered effectively, consistently, predictably and efficiently, while delivering a streamlined and timely process for companies to comply with. This will help deliver on the policy intent at least cost, and support confidence in the scheme. It may be best achieved through a legislative instrument. Key elements of an effective and efficient dual agency model include:

- **Clearly outlining the roles and responsibilities** of DISR and ATO in administering the CMPTI. This could be achieved through a public charter that clearly outlines roles and expectations, including how the administrators will work together, how they will engage with companies (including expected timeframes) and appropriate accountability mechanisms for administrators.
- **Information sharing** between administrators to reduce duplication and compliance costs.
- **Guidance material** should be prepared in a timely manner to provide claimants with certainty around the operation and administration of the CMPTI. There is also merit in an ability to seek an advanced finding/determination (similar to the RDTI) based on the proposed project parameters prior to FID so that it reduces any uncertainty or risk of not being eligible
- **Dispute resolution** processes to resolve reviews undertaken by the administrators in an efficient and timely manner before further escalation (e.g. to the Administrative Appeals Tribunal).

Recommendation 7

Ensure the dual agency administration model clearly outlines the roles and responsibilities of administrator and information sharing arrangements, publishes timely and clear guidance material, and includes a timely and efficient dispute resolution process.

5. Community Benefit Principles

Investment is more than just the capital needed to fund projects to allow businesses to grow, compete and expand. It delivers many other broader economic benefits, such as:

- Creating jobs and stimulating further investment across the supply chain and in local communities.
- Driving productivity growth, which in turn drives real wages growth.
- Promoting competition and the efficient allocation of resources across the economy, while also stimulating research, development and innovation.
- Increasing global linkages and opportunities by linking to international supply chains.

Governments play a crucial role in providing the right incentive framework for ensuring that the benefits of investment are maximised and the risks minimised. Primarily, this requires ensuring open and competitive markets across the economy and transparent regulatory and governance systems.

While investment can bring many broader economic benefits, it should not be a rigid requirement for investment to proceed. It is important to not lose sight of the overall benefits higher investment provides through higher productivity and, in turn, higher real wages for workers and lower prices for consumers. It can also improve the allocation of resources by freeing up local resources for more efficient uses.

In that context, there is significant uncertainty around what the Community Benefit Principles will entail in practice and a risk that the costs of compliance, and any additional cost arising from increased demand for labour and materials, could undermine the competitiveness of projects. There is evidence emerging in other countries that this has increased project costs, particularly when labour and product markets are tight. Simply put, the costs could exceed the benefits such that they could undermine the success of the CMPTI if they restrict project eligibility – including ongoing eligibility – due to a set of narrowly defined benefits. At the same time, these requirements should not be so onerous as to create barriers for small- and medium-sized businesses from participating in Future Made in Australia programs.

There should also be an acknowledgement that significant work is already underway through a range of other initiatives to deliver community benefits as part of the net zero transition, including through the Net Zero Economy Authority. Investment is occurring to develop a skilled workforce in the renewable energy sector. It should also be noted that Australia's workforce is well paid in comparison to other countries with which Australia is competing. Suggestions that these jobs are not well paid ignores the significant workplace protections currently in place.

The Community Benefit Principles must be fit for purpose, while also objective and clear to provide certainty for taxpayers to at least initially self-assess eligibility for FID deliberations. If the conditions are too onerous, it will become a disincentive. Key considerations for how the Community Benefit Principles should be designed in practice include:

- Not undermining the eligibility and competitiveness of projects that otherwise deliver net benefits to the community, particularly if these arise from onerous labour market conditions.
- Future Made in Australia Plans should leverage other similar reporting requirements – where appropriate – to minimise compliance costs for companies, administration costs for regulators and leverage already developed and understood initiatives.
 - This could include Australian Industry Participation Plans and the Statement of Tax Record.
- There should not be ongoing reporting requirements except where there is a material change in circumstances or to ensure ongoing compliance with any conditions. This should be conducted in a 'light touch' manner that minimises compliance costs.

The consultation paper notes transparency and disclosure reporting requirements will form part of the CMPTI. Many companies will reflect the impact of production tax credits as part of existing financial reporting requirements (including proposed Australian public country-by-country reporting) or as part of the Voluntary Tax Transparency Code. It will be critical that any reporting requirements improve public accountability without duplicating existing transparency obligations and do not unnecessarily confuse or undermine the operation of the CMPTI. For example, to the extent production tax credits data are reported by the ATO, only the value of the tax benefit should be reported. A minimum two-year delay in publication should also be considered given the potentially commercially sensitive nature of this data. For example, RDTI transparency data are published with a two-year delay for this reason.

Recommendation 8

Community Benefit Principles should recognise the significant broader economic benefits of current projects that already occur and not be narrowly or rigidly defined so as to undermine the success of the CMPTI.

Recommendation 9

The compliance and administration costs related to Community Benefit Principles should be minimised and leverage existing reporting measures and arrangements as much as possible.

Recommendation 10

Any ATO CMPTI transparency and disclosure reporting requirements should report the value of the tax benefit and publish the data post a minimum two-year delay given the potentially commercially sensitive nature of this data.

6. Other issues

The feedback in this submission is not exhaustive, recognising the limited time available to consult with member companies, and the added complexity and challenges of industries in their nascency. The next round of consultation should include further clarification of the issues raised in this submission as well as other issues flagged in the consultation paper. There should also be sufficient time for further consultation, recognising the current two-week consultation period falls well short of best practice principles. At the same time, many issues will be further realised as projects progress further through the development process. This may include clarifying how the CMPTI will interact with the 15 per cent global and domestic minimum tax. In particular, it should be treated as a qualifying refundable tax credit as part of the Pillar Two rules.

Recommendation 11

Ensure the next round of consultation provides sufficient time to consult on the design and application of the CMPTI.

Recommendation 12

Clarify how the CMPTI will interact with other policies, such as the global and domestic minimum tax.

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