
Infrastructure Project Designation Rules – Tax Loss Incentive for Designated Infrastructure Projects

Outline

The Infrastructure Project Designation Rules (“the Rules”) are legislative instruments Treasury ministers can make that provide subsidiary detail affecting the scope and operation of the Bill to amend the *Income Tax Assessment Act 1997* (ITAA 1997) to provide a tax incentive for designated infrastructure projects.

All legislative references are to the *Income Tax Assessment Act 1997*, unless otherwise stated.

The Rules stipulate the processes and conditions for application and designation of infrastructure projects. The Rules specify matters to be considered in estimating the capital expenditure of designated infrastructure projects. The Rules also provide for reporting and monitoring requirements for designated infrastructure projects; and the publication of information by the Infrastructure Coordinator.

Because the Rules are legislative instruments, they are subject to the *Legislative Instruments Act 2003*. In particular, they only become enforceable once they are registered on the *Federal Register of Legislative Instruments* and they cease to apply if they are disallowed by either House of Parliament under a notice of motion made within 15 sitting days after the instrument is tabled in that House (which must occur within 6 sitting days after it is registered).

The *Legislative Instruments Act 2003* provides a default position that disallows the incorporation of certain documents unless the contrary intention appears. The operation of the *Legislative Instruments Act 2003* is modified in one respect for the Rules to provide a contrary intention that permits the incorporation of other documents as they exist from time to time. This capacity could be used, for example, to allow the Rules to incorporate Infrastructure Australia’s published *Infrastructure Priority List*, Infrastructure Australia’s *Reform and Investment Framework*; or to require publication of its list of designated infrastructure projects.

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Applications for designation

- 1.1 Section 415-10 of the Bill refers to applications for designation.
- 1.2 Applications must be submitted in accordance with conditions specified in these Rules.
- 1.3 An application for designation must be in writing and:
 - a) accompany a submission to Infrastructure Australia for an infrastructure project's inclusion on the *Infrastructure Priority List* submitted in accordance with Infrastructure Australia's *Reform and Investment Framework* as amended from time to time, or relate to a submission to Infrastructure Australia already made;
 - b) [be accompanied by an application fee of \$XX]; and
 - c) include an estimate of the capital expenditure that would be incurred financial year by financial year in the course of carrying out the project, verified by an individual or firm of appropriate expertise.

Note: the amount of the fee is in the process of being determined and will be prescribed in the final Rules. A definition of acceptable expertise will be provided in the final Rules.

Estimates of capital expenditure

- 1.4 Sections 415-10 and 415-35 of the Bill refer to estimates of capital expenditure.
- 1.5 Capital expenditure of a proposed project is an estimate of the debt outstanding by the private sector and equity contributed to the project by the private sector as at the end of construction that is reasonably attributable to financing the design and construction of the project.
 - a) For example, this amount will exclude capital expenditure paid for through upfront grants from an Australian government agency.

- 1.6 Amounts that are not reasonably attributable to the design and construction of the project include:

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- b) capitalised returns on debt and equity;
- c) debt and equity raising costs; and
- d) professional advisory costs that are unrelated to project design or construction.

1.7 The Infrastructure Coordinator will require applicants to provide an updated estimate of capital expenditure if there is reason to believe that the estimate has changed between provisional designation and designation.

Dealing with applications

1.8 Section 415-12 of the Bill refers to dealing with applications.

1.9 The assessment of applications for designation will coincide with the timing and assessments of submissions to Infrastructure Australia's *Infrastructure Priority List* process.

1.10 The *Infrastructure Priority List* will be reviewed four times a year, in January, April, July and October.

1.11 In dealing with applications the Infrastructure Coordinator may require further information in relation to an application including, but not limited to, information about the estimate of the capital expenditure of a project.

- For example, the Infrastructure Coordinator may request the submission of a revised estimate of a project's capital expenditure as the financing arrangements for the project are finalised.

Provisional designation

1.12 Section 415-15 of the Bill refers to provisional designation.

1.13 Each of the following is a condition prescribed under subparagraph 415-15(1)(d)(i) for the provisional designation of a project:

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- a) The project is included on Infrastructure Australia's *Infrastructure Priority List* and assessed as 'Threshold' or 'Ready to Proceed'.
- b) The infrastructure to be provided or enhanced by the project will be public common-user infrastructure or infrastructure with open access arrangements likely to be accessed by multiple users.
- c) At least some part of the project is to be privately owned or financed.
- d) Construction of the project has not commenced.

1.14 For the purposes of a provisional designation of a project, the Infrastructure Coordinator may accept capital expenditure being determined using a draft base case financial model prepared by the private sector in relation to the project or, if applicable, the government capital expenditure business case or Public Sector Comparator financial model.

Ranking of provisional designations

1.15 If one or more projects the subject of an application under section 415-10 have not been provisionally designated, and each meets the conditions set out in paragraph 1.13, the Infrastructure Coordinator shall designate so many of them provisionally, and in their order on the *Infrastructure Priority List*, as does not breach section 415-25. The Infrastructure Coordinator shall not provisionally designate any project under this paragraph until after applying paragraph 1.22.

1.16 At the time of provisional designation under section 415-15 the Infrastructure Coordinator will consider setting performance conditions (such as a timetable, or concluding an agreement for access) in relation to a project as conditions precedent to designation.

1.17 The matters to which the Infrastructure Coordinator must have regard in setting performance conditions are:

- a) any conditions imposed by Infrastructure Australia at the time the project was assessed as either 'Threshold' or 'Ready to Proceed' that remain outstanding;
- b) matters relevant to the integration of the project into other existing or proposed infrastructure; and

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- c) any conditions arising from the terms of the application or the submission referred to in paragraph 1.3.

Revocation of provisional designation

1.18 The Infrastructure Coordinator must not designate a provisionally designated project, and must revoke the provisional designation, if in the reasonable opinion of the Infrastructure Coordinator any of the conditions referred to in paragraph 1.20 will not be met, or are no longer met, and in the case of the conditions referred to in paragraph 1.20(e) and (f) will not be waived.

Designation

1.19 Section 415-20 of the Bill refers to designation.

1.20 Each of the following is a condition prescribed under subparagraph 415-20(1)(d)(i) for the designation of a project:

- a) The project has received provisional designation.
- b) The project is included on Infrastructure Australia's *Infrastructure Priority List* and assessed as 'Ready to Proceed'.
- c) The infrastructure to be provided or enhanced by the project will be public common-user infrastructure or infrastructure with open access arrangements likely to be accessed by multiple users.
- d) At least some part of the project is to be privately owned or financed.
- e) Construction of the project has not commenced.
- f) Every condition imposed by Infrastructure Australia at the time the project was assessed as either 'Threshold' or 'Ready to Proceed' has been met or has been waived by Infrastructure Australia.
- g) Every performance condition, if any, set by the Infrastructure Coordinator at the time of provisional

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designation of the project has been met or has been waived by the Infrastructure Coordinator.

h) Financial close has occurred or is imminent.

1.21 For the purposes of a designation of a project, capital expenditure may be determined using the final base case financial model prepared by the private sector in relation to the project.

1.22 No designations will be made after 30 June 2017.

Ranking of Designations

1.23 If one or more projects the subject of an application under section 415-10 have not been designated and each meets the conditions set out in paragraph 1.20 the Infrastructure Coordinator shall designate so many of them, and in their order on the *Infrastructure Priority List*, as does not breach section 415-25.

Revocation of Designation

1.24 The Infrastructure Coordinator may only revoke a project's designation if in the reasonable opinion of the Infrastructure Coordinator, either:

- a) financial close did not occur promptly after designation and without material variation from submitted documentation;
- b) the designated infrastructure project entity failed to provide to the Infrastructure Coordinator the information required under paragraph 1.25; or
- c) the infrastructure project will not be completed or operated as described in the submission referred to in paragraph 1.3.

Reporting Requirements

1.25 At the time of designation under section 415-20 the Infrastructure Coordinator may set ongoing requirements for reporting to the Infrastructure Coordinator in relation to items such as, but not limited to, the periodic reporting of capital expenditure or updates on the progress of construction.

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The capital expenditure cap

- 1.26 Section 415-25 of the Bill refers to the capital expenditure cap.
- 1.27 The cap is set at \$25 billion.

Information to be made public

- 1.28 Section 415-45 of the Bill refers to information to be made public.
- 1.29 Each [quarter] the Infrastructure Coordinator must publish information on each provisionally designated project and each designated project [including estimates of capital expenditure and reports on the progress of construction].