Chapter 1
Tax Loss Incentive for Designated Infrastructure Projects

Outline of chapter

1.1 Schedule X to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to provide a tax incentive for entities that only carry on nationally significant infrastructure projects that have been designated as designated infrastructure projects by the Infrastructure Coordinator.

1.2 The tax incentives:

- uplift the value of such entities' carry forward tax losses by the long term bond rate; and
- exempt such entities that are companies from the continuity of ownership and same business tests
- exempt such entities that are fixed trusts from the trust loss and bad debt deduction tests.

1.3 All references to legislative provisions in this chapter are references to the ITAA 1997, unless otherwise stated.

Context of amendments

1.4 Companies and trusts are generally allowed a deduction for tax losses generated in past years provided that certain conditions are satisfied. In particular, companies and trusts must either demonstrate that the majority of the beneficial owners of the entity have not changed since the loss was incurred (the continuity of ownership test) or the entity is carrying on the same business (the same business test). Fixed trusts will generally be requires to satisfy the requirement of continuity of ownership (the 50 per cent stake test) at certain times, including where abnormal trading takes place or the same business test in relevant circumstances.

1.5 The rules governing the utilisation of tax losses are in Divisions 165 and 166 for companies and Schedule 2F to the *Income Tax*

Assessment Act 1936 (ITAA 1936) for trusts. The tests are modified for entities joining a consolidated group in Division 707.

1.6 Infrastructure projects may move through a number of distinct phases as they move from the construction phase to the operational phase. These phases may be considered different businesses and may even be carried on by different entities or entity types depending on the different needs of the project as it moves through its different phases. As such, it is not always possible to offset the losses from an infrastructure project against income earned in later phases of the project.

1.7 Infrastructure projects often experience long lead times between incurring deductible expenditure in the construction phase and earning assessable income in the operational phase. Tax losses are therefore accumulated and carried forward to later income years awaiting the receipt of income. As such, the real value of losses may be eroded over time, disadvantaging infrastructure investment compared to other types of investment.

1.8 Investment in high quality infrastructure projects is critical to improving national productivity and underpinning economic growth. This measure will encourage private investment in nationally significant infrastructure projects by:

- ensuring that the real value of losses will be maintained through time; and
- increasing the likelihood that the losses can be used to offset future earnings.

1.9 Announced in the 2011-12 Budget, the 'Infrastructure Investment Incentive Package' is consistent with the reform directions identified in the Australia's Future Tax System Review. It continues the process of tax reform started with the release of the Government's Stronger, Fairer, Simpler package of reforms in the 2010-11 Budget.

Summary of new law

1.10 This Schedule provides for an entity that is carried on for the purpose of a designated infrastructure project to:

- uplift losses by the government bond rate; and
- carry forward losses even though it does not satisfy the continuity of ownership or same business test.

1.11 This Schedule provides for the Infrastructure Coordinator to designate an at least partly privately-financed infrastructure project of national significance to be a ‘designated infrastructure project’ (DIP) before 30 June 2017 where:

- the project satisfies any requirements prescribed by the Minister or, if there are no prescribed requirements:
  - the project is nationally significant; and
  - the financing arrangements for the project have been made or are imminent; and
- granting the project DIP status will not cause the estimated capital expenditure of all projects granted DIP status to exceed $25 billion or a higher prescribed amount.

Comparison of key features of new law and current law

New law	*Current law*
An entity can utilise past losses without satisfying the continuity of ownership or same business test provided that its sole purpose is to carry on a single project designated by the Infrastructure Coordinator as a DIP. The Infrastructure Coordinator may designate a project as a DIP in prescribed circumstances or, if none are prescribed, where it is nationally significant and financial close has happened or is imminent and granting the project DIP status will not cause the estimated global expenditure cap to be exceeded.	An entity must satisfy a continuity of ownership test (including the 50 per cent stake test for trusts) or the same business test (if available) before it can utilise losses from past years.
The value of losses carried forward by an entity is uplifted by the long term Government bond rate if the entity’s sole purpose is to carry on a DIP.	The value of carried forward losses is based on their nominal value.

Detailed explanation of new law

1.12 This measure provides for certain entities ('designated infrastructure project entities') to uplift their losses by the long term government bond rate and modifies the continuity of ownership tests (including the 50 per cent stake test for trusts) and same business test for these entities.

1.13 In order to access the tax concessions set out in the Bill, that is, the uplift and the exemption from the continuity of ownership (including the 50 per cent stake test for trusts) and same business tests (if available), an entity must solely carry on a DIP.

Tax benefits for designated infrastructure project entities

1.14 This measure allows companies and fixed trusts that carry on a designated infrastructure project to uplift their tax losses from earlier years. The companies can also deduct those tax losses and their bad debts even if they do not satisfy the 'continuity of ownership' and 'same business' tests. The trusts can also deduct their tax losses and bad debts even if they do not satisfy the trust equivalent of those tests.

Uplifting losses

1.15 A company or a fixed trust that is, a designated infrastructure project entity in an income year uplifts its unutilised tax losses from the 2012-13 and later income years before making any deductions. ***[Schedule #, items 4 and 43, subsection 415-10(1) of the ITAA 1997 and section 415-5 of the Income Tax (Transitional Provisions) Act 1997]***

1.16 An entity may qualify as a designated infrastructure project entity when the project has not yet been designated, or the entity has not yet begun carrying on the project, as long as the project becomes designated or the entity begins carrying it on. That means that an entity is able to uplift losses in past years. These entities would not need to amend their past assessments (unless they have already utilised some of the losses), but should notify the Australian Taxation Office of the revised carry forward amounts. ***[Schedule #, item 4, section 415-15]***

1.17 Those losses will continue being uplifted in future years until the entity either fully deducts them or stops being a designated infrastructure project entity. Even after it stops being a designated infrastructure project entity, the previous uplifts are retained; they are just not uplifted further.

1.18 The losses are uplifted by the income year's long term bond rate, which is the year's average yield for 10-year non-rebate Australian Treasury bonds. This rate is chosen, rather than, say, the CPI rate, to compensate the infrastructure entity for the cost of not being able to use the tax saved from its loss in the most profitable investment available, adjusted for risk. In other words, the entity is considered to be lending the money represented by the tax loss to the government for a long term. The return is used is therefore the long term interest rate for lending money to the government. ***[Schedule #, item 4, subsection 415-10(1)]***

Example 1.1 Uplifting tax losses

Wolf Transport Projects carries on a project that is designated as designated infrastructure project on 1 January 2016. The entity has no other business activities and qualifies as a designated infrastructure project entity. The entity first incurred a loss of $6 million in the 2013-14 income year.

In the 2014-15 income year it made a small profit that utilised $1.5 million of its 2013-14 tax loss. The long term bond rate for 2014-15 is 5.5 per cent.

In the 2015-16 income year, the entity makes a loss of $76 million and the long term bond rate is 5.8 per cent.

Wolf Transport Projects calculates its carry forward loss from the 2013-14 income year by uplifting it for the 2014-15 income year and then reducing it by the utilised amount (that is $6 million x 1.055 – $1.5 million = $4,830,000). The unutilised portion is then uplifted again for the 2015-16 income year ($4,830,000 x 1.058 = $5,110,140).

The 2015-16 loss was only incurred that year and so is not uplifted. The unutilised losses of $5,110,140 and $76 million will be uplifted before being applied against any taxable income in the next income year if there is any.

1.19 If an entity is only a designated infrastructure project entity for only a part of an income year, the bond rate used in its uplift factor for that year is apportioned in accordance with the number of days in the year for which it was such an entity. ***[Schedule #, item 4, subsection 415-10(1)]***

Example 1.2 Apportioning the uplift

In the previous example, if Wolf Transport Projects was only a designated infrastructure project entity for 100 days during 2015-16, the bond rate used in its uplift factor for that year would have been apportioned using the fraction 100/365. So, its uplift factor for that year would have been 1.59 per cent [5.8 per cent x 100/365].

Notifying the Commissioner

1.20 In order to access the uplift, the entity must have notified the Commissioner, in the approved form, that it is a designated infrastructure project entity by the due date or a later date allowed by the Commissioner. The entity only needs to provide notice once. ***[Schedule #, item 4, subsection 415-10(2) and paragraph 415-10(3)(d)]***

1.21 Notice will generally be due when the entity first lodges a tax return seeking to uplift a loss. However, if the entity does not receive notification that a project has been designated as a DIP until after it has reported losses to the Commissioner, notice may be provided 28 days after the project has been designated as a DIP. ***[Schedule #, item 4, subsection 415-10(2) and paragraphs 415-10(3)(a) and (c)]***

1.22 In addition, an entity cannot be sure that it is eligible for the uplift until it commences carrying on activities for the purposes of the DIP. As such, if there is a gap between the entity incurring costs, in relation to applying for designation for example, and commencing carrying on activities in relation to the DIP, notice does not need to be provided until 28 days after the activities have commenced. ***[Schedule #, item 4, paragraph 415-10(3)(b)]***

Utilising past losses

Continuity of ownership test

1.23 Companies are normally prevented from deducting a tax loss for an income year if they have not maintained a sufficient continuity of ownership from the start of the year the loss arose until the end of the year they want to deduct it. There will be a sufficient continuity of ownership if the same persons hold more than 50 per cent of the voting power in the company, and rights to more than 50 per cent of its dividends and capital distributions, throughout that period.

1.24 The amendments provide that a designated infrastructure project entity does not have to satisfy this test in order to deduct its tax losses from the 2012-13 and later income years. ***[Schedule #, item 4, subsection 415-30(1) and paragraph 415-90(a)]***

1.25 The amendments do this by adjusting the test period used to work out whether the company has failed the continuity of ownership test. Instead of the period running from the start of the loss year until the end of the deduction income year, the period runs from:

- the first time in or after the loss year that the company stopped being a designated infrastructure project entity; or

- the end of the deduction year if it has not stopped being such an entity.

In either case, the period ends at the end of the deduction year.

[Schedule #, items 4 and 43, subsections 415-30(2) of the ITAA 1997 and section 415-5 of the Income Tax (Transitional Provisions) Act 1997]

1.26 In the first case, the entity would only fail the continuity of ownership test if there was the necessary 50 per cent change in rights *after* the entity stopped being a designated infrastructure project entity. Changes before that time would be ignored.

1.27 In the second case, the test period would start and stop at the same moment, so the continuity of ownership test would always be passed. ***[Schedule #, item 4, subsections 415-30(2) and (3)]***

Example 1.3 Adjusted continuity of ownership test period

Brine Enterprises Pty Ltd, a designated infrastructure project entity has carry forward losses from the 2013-14 income year. During the 2014-15 income year, the shareholders of Brine Enterprises Pty Ltd sell all their shares. Brine Enterprises seeks to utilise some of the losses (after applying the uplift) at the end of the 2014-15 income year.

Brine would normally have failed the continuity of ownership test in 2014-15 because there was not a 50 per cent continuity of interest from the start of the loss years until the end of 2014-15. However, because it was a designated infrastructure project entity, the test period collapses into a single point at the end of 2014-15 and so Brine would pass the continuity of ownership test.

On 30 May 2016, Brine stops being a designated infrastructure project entity. On 15 June 2016, the shareholders sell a 60 per cent stake in Brine.

In 2015-16, Brine Enterprises again seeks to utilise some of the unutilised losses. Brine Enterprises stopped being a designated infrastructure project entity on 30 May, so the ownership test period runs from that day until the end of 2015-16 (30 June). Since there was a 60 per cent change in ownership during that reduced test period, Brine Enterprises fails the continuity of ownership test in 2015-16 and can only utilise the losses if the same business test is satisfied.

1.28 Widely held companies and eligible Division 166 companies (companies in which more than a 50 per cent interest is held, directly or indirectly, by widely held companies, non-profit companies, charities, or complying superannuation funds and similar entities) apply the continuity of ownership test in a modified way. Division 166 makes it easier for them to pass the test by only testing for continuity of ownership at the start of the loss year, at the end of each year up to the end of the deduction income year, and at each intervening time there is a substantial corporate change. Unlike other companies, these companies do not have to test for all intervening points.

1.29 The measure adjusts the start of the test period for these companies if they are designated infrastructure project entities in the same way it adjusts it for other companies that are designated infrastructure project entities. ***[Schedule #, item 4, subsection 415-30(2)]***

Same business test

1.30 If a company does not satisfy the continuity of ownership test, it may still be able to deduct the tax loss if it passes the same business test by carrying on the same business throughout the deduction income year that it carried on at the moment it failed the continuity of ownership test.

1.31 The measure also adjusts the period used to test whether the company passes the same business test. Instead of testing for the whole of the deduction income year, a company only has to test for the part of the year that occurs immediately after it stopped being a designated infrastructure project entity until the end of the income year in which it seeks to utilise the loss. ***[Schedule #, item 4, subsections 415-30(4) and (5)]***

Special control test

1.32 Even if a company passes the continuity of ownership test or the same business test, it still might not be able to deduct a tax loss if someone who did not, and could not, control the company directly or indirectly during the loss year began to so control it, or became able to so control it, after the loss year for the purpose of getting an income tax benefit (see subsection 165-15(1)). To do so, it has to satisfy a modified same business test (see subsections 165-15(2) and (3)). This special control test does not apply to a company that is a designated infrastructure project entity both at some time in the loss year and at some time after the loss year. ***[Schedule #, item 4, subsection 415-30(6)]***

Application of tests during year of ownership change

1.33 The income tax law provides special rules for working out the taxable income or loss of a company for an income year in which it fails the continuity of ownership test. That year is divided into periods, each of which ends when there is a sufficient change of ownership. Broadly, the loss or gain for each period is worked out as if the period were a separate income year (but periods are treated as a single period if the same business is carried on throughout those periods). The company’s taxable income for the year does not include deductions for the tax losses of any of those periods (see Subdivision 165-B).

1.34 However, if the company is a designated infrastructure project entity from the start of that year, the first period cannot end before the company stops being a designated infrastructure project entity. If it does not stop being such an entity during the year, the year would be treated as a single period and the normal rules would apply to work out its taxable income. ***[Schedule #, items 2, 3 and 4, paragraphs 165-35(b) and (c), and subsections 415-30(6) and (7)]***

Tax losses, bad debts and trusts

1.35 Trusts that are not 'excepted trusts' for the whole income year also need to pass certain tests relating to ownership and control or abnormal trading in its units set out in Schedule 2F of the ITAA 1936 before deducting current and prior year losses and debt deductions. The measure ensures that a designated infrastructure project entity that is a trust does not need to satisfy these tests by making it an 'excepted trust'. ***[Schedule #, item 1, section 272-100 in Schedule 2F of the ITAA 1936]***

1.36 However, a trust may stop being a designated infrastructure project entity because, for example, it has stopped being a fixed trust, has stopped carrying on a designated infrastructure project or has commenced other activities. If a trust stops being a designated infrastructure project entity during the income year then it will need to satisfy the tests relating to continuity of ownership (the '50 per cent stake test') or abnormal trading in its units because it is not an excepted trust for the whole income year.

1.37 The test time for these tests are modified in a way that is similar to how the continuity of ownership test is modified for companies. That is, generally, the test period starts just after the entity stops being a designated infrastructure project entity. The test period is not changed if it would usually start after the entity stopped being a designated infrastructure project entity. For example, if the test period was in the year after the entity stopped being a designated infrastructure project entity. ***[Schedule #, item 4, sections 415-20 and 415-25]***

Capital losses and companies

1.38 Rules similar to the rules for tax losses apply to the use of net capital losses by a company when there is a sufficient change in its ownership (see Subdivisions 165-CA and 165-CB). This measure does not adjust those rules for designated infrastructure project entities. ***[Schedule #, item 4, subsection 415-30(8)]***

1.39 Special rules apply to a company that fails both the continuity of ownership test and the same business test if fixed interests in the company's income and capital were held through certain trust structures throughout the test period (see Subdivision 165-F). This measure also does not adjust those rules for designated infrastructure project entities. ***[Schedule #, item 4, subsection 415-30(8)]***

Deducting bad debts

1.40 A taxpayer that derives an amount of assessable income can later claim a deduction if it is unable to collect the amount it is owed. This deduction for a 'bad debt' reverses the original assessment of the amount. However, a company can only get the deduction if it satisfies continuity of ownership and same business tests similar to those that apply for deducting its tax losses.

1.41 If the debt goes bad in the same year the amount was derived, the company must satisfy the continuity of ownership test for the whole year. If the amount was derived in an earlier year, it must satisfy the test from the time the amount was derived until the end of the deduction year. If it fails that continuity of ownership test, it can still deduct the bad debt if it satisfies the same business test. (See Subdivision 165-C.)

1.42 The measure provides that a designated infrastructure project entity that was a designated infrastructure project entity in the income year it derived the original amount does not normally have to satisfy this test in order to deduct its bad debts for so long as it remains a designated infrastructure project entity. It does that by adjusting the rules that limit a company's capacity to deduct a bad debt in a similar way to the way it adjusts its capacity to deduct tax losses. ***[Schedule #, item 4, subsection 415-35(1)]***

1.43 For the purposes of the continuity of ownership test, the start of the test period is brought forward to the point when the company stopped being a designated infrastructure project entity. If it has not stopped being such an entity, the start of the test period merges with the end of the deduction income year, so that the test would always be passed. ***[Schedule #, item 4, subsections 415-35(2) and (3)]***

1.44 For the purposes of the same business test, the company must carry on the same business during the period after it stopped being a designated infrastructure project entity that it carried on at the start of that period (if that is later than it otherwise would be). ***[Schedule #, item 4, subsections 415-35(4) and (5)]***

1.45 If a company deducts a bad debt but only because it passes the same business test, and that deduction creates or increases a tax loss, then the tax loss (or the increase) can only be deducted in a later year if the company passes the same business test again for that later year (see section 165-132). The measure adjusts the test period used for that purpose in the same way. ***[Schedule #, item 4, subsection 415-35(4)]***

1.46 The special control test that can prevent a company deducting a tax loss even if it passes the continuity of ownership test or the same business test also applies for a company deducting bad debts (see section 165-129). This special control test does not apply to a company that is still a designated infrastructure project entity at some time after the original amount was derived (or after the year it was derived if the debt became bad in a later year). ***[Schedule #, item 4, subsection 415-35(6)]***

1.47 The operation of the continuity of ownership test and the same business test for widely held companies and eligible Division 166 companies, which is modified for designated infrastructure project entities that are deducting a tax loss is modified in the same way if they are deducting a bad debt. ***[Schedule #, item 4, subsections 415-35(2), (4) and (5)]***

Consolidated groups

1.48 A designated infrastructure project entity cannot be a member of a consolidated group. However, an entity may join a consolidated group if all of its membership interests are acquired by a consolidated group. ***[Schedule #, item 4, subparagraph 415-15(1)(a)(ii)]***

1.49 When an entity joins a consolidated group, it transfers its tax losses, film losses and net capital losses to the group's head company but only to the extent that the joining entity could have used the loss itself if its income year had ended just after the joining time (and assuming it had enough income or gains against which to offset the loss).

1.50 If the joining entity was a designated infrastructure project entity, the measure allows the entity's tax losses (including any uplifted amount) to be transferred without having to consider whether the joining entity could otherwise have used the losses itself. ***[Schedule #, items 26 and 43, subsections 707-120(1) and 707-120(5) of the ITAA 1997]***

What is a designated infrastructure project entity?

1.51 A company or a fixed trust can be a ***designated infrastructure project entity*** if it is not a member of a consolidated group. It must carry on an infrastructure project that is a designated infrastructure project or that later becomes a designated infrastructure project. ***[Schedule #, item 4, paragraphs 415-15(a), (b) and (d)]***

1.52 The only activities the entity can engage in while it carries on the infrastructure project are activities for the purposes of the DIP (the entity cannot even engage in activities on other DIPs). If it does begin to carry on other activities, the entity would lose its status as a designated infrastructure project entity. ***[Schedule #, item 4, paragraph 415-15(c)]***

1.53 This restriction reflects the fact that the concessional treatment of the entity's losses is intended to encourage investments in infrastructure projects. If the entity were able to carry on other activities, it would be necessary to partition the entity's tax affairs into an infrastructure component and a residual component. That would create a great deal of complexity, which is avoided by the 'single activity' approach. It would also be risky for the DIP entity because if one project stopped being a DIP then the entity would lose its access to the tax concessions. The chosen approach is also consistent with usual industry practice in which infrastructure projects are typically conducted by special purpose vehicles.

Designated infrastructure projects

1.54 A ***designated infrastructure project*** is an investment in, or enhancement to, infrastructure that is designated by the Infrastructure Coordinator. ***[Schedule #, item 4, subsection 415-60(1)]***

1.55 The Infrastructure Coordinator is a statutory office created by section 27 of the *Infrastructure Australia Act 2008*.

The designation process

Applications

1.56 An entity must apply to the Infrastructure Coordinator to have its infrastructure project designated. The application must:

- be in the form the Coordinator requires;
- be accompanied by any fee that has been prescribed; and
- include an estimate of the project's capital expenditure.

[Schedule #, item 4, subsections 415-45(1), (2) and (4)]

1.57 The Infrastructure Coordinator may designate projects as provisional or final DIPs before 1 July 2017 unless a later date is prescribed. This reflects the fact that the measure is only intended to be a short term encouragement for infrastructure investments. ***[Schedule #, item 4, paragraph 415-12(5)]***

1.58 The Infrastructure Coordinator will consider applications in the order prescribed or, if no rules are made for provisional designation, the order in which the applications are made. The rules may prescribe other requirements for dealing with applications, such as how quickly applications must be dealt with and how incomplete or otherwise inadequate applications should be dealt with. ***[Schedule #, item 4, subsections 415-50(1), (2) and (4)]***

1.59 The designation process would normally involve two stages: provisional designation if the project satisfies the necessary conditions; and final designation if the project continues to satisfy the conditions and financial close on it has occurred or is imminent. If financial close has occurred when the Coordinator considers the application, it could go straight to final designation. ***[Schedule #, item 4, subsections 415-50(3), 415-55(1) and 415-60(1) and (2)]***

Provisional designation

1.60 Provisional designation is a process by which a project can secure its entitlement to the tax benefits provided by the measure even though it has not yet satisfied the financial condition. It also allows the entity to advise its potential financial backers that the project will obtain the tax benefits if they provide the necessary finance. An entity cannot, however, access the concessions unless the project receives final designation.

1.61 A project will be provisionally designated if the Infrastructure Coordinator accepts the estimate of capital expenditure in the application and that estimate would not breach the $25 billion capital expenditure cap. ***[Schedule #, item 4, paragraphs 415-55(1)(a), (b) and (c)]***

1.62 Any conditions prescribed by the infrastructure project designation rules must also be satisfied. If no conditions are prescribed, the Coordinator must be satisfied that the project is of 'national significance'. That is an expression from the *Infrastructure Australia Act 2008* that means that the project is a transport, energy, communications or water project that will improve national productivity. ***[Schedule #, item 4, paragraph 415-55(1)(d) and subsections 415-55(3) and (4)]***

1.63 If the project does not satisfy the required conditions, the Infrastructure Coordinator will refuse to designate it. The applicant can ask the Administrative Appeals Tribunal to review that refusal. ***[Schedule #, item 4, subsections 415-50(2) and (3) and paragraph and 415-75(a)]***

1.64 The Infrastructure Coordinator will always revoke a project's provisional designation when the project gets a final designation. If the Coordinator decides not to finally designate a project, its provisional designation will also be revoked. ***[Schedule #, item 4, subsection 415-55(2)]***

1.65 A provisional designation can otherwise only be revoked in circumstances prescribed in the infrastructure project designation rules. Those circumstances could include, for example, the entity failing to provide the Coordinator with the information it requires to make its decision about designating the project or failing to observe any conditions that attach to it continuing to be provisionally designated. ***[Schedule #, item 4, subsections 415-55(2), (3) and (4)]***

1.66 An entity can ask the Administrative Appeals Tribunal to review a decision to revoke its project's provisional designation. ***[Schedule #, item 4, paragraph 415-75(b)]***

Final designation

1.67 A project will get a final designation if it continues to satisfy the conditions necessary for provisional designation plus any additional conditions that are prescribed in the infrastructure project designation rules. ***[Schedule #, item 4, subsections 415-60(1), and (2)]***

1.68 If no additional conditions have been prescribed, final designation will depend on the Infrastructure Coordinator being satisfied that the applicant is legally able to access the money required for the project (called 'financial close' on the project) or that its ability to do so is imminent (for example, because its bankers or investors have committed to providing the money and only the formal execution of documents remains to be done). ***[Schedule #, item 4, paragraph 415-60(2)(b)]***

1.69 If the project does not satisfy the required conditions, the Infrastructure Coordinator will refuse to designate it. The applicant can ask the Administrative Appeals Tribunal to review that refusal. ***[Schedule #, item 4, subsections 415-50(2) and (3) and paragraph 415-75(c)]***

1.70 A final designation can only be revoked in circumstances prescribed in the infrastructure project designation rules. Those circumstances could include, for example, the entity failing to provide the Coordinator with any information required under the rules or breaching conditions set for the project to remain designated. ***[Schedule #, item 4, subsections 415-60(3) and (4)]***

1.71 When it finally designates a project, or revokes a project's designation, the Infrastructure Coordinator must advise the Commissioner of Taxation within 28 days. ***[Schedule #, item 4, subsection 415-60(6)]***

1.72 An entity can ask the Administrative Appeals Tribunal to review a decision to revoke its project's final designation. ***[Schedule #, item 4, paragraph 415-75(d)]***

The infrastructure project designation rules

1.73 The ***infrastructure project designation rules*** are legislative instruments Treasury ministers can make that provide subsidiary detail affecting the scope and operation of the designated infrastructure project regime. ***[Schedule #, item 4, subsection 415-405(1)]***

1.74 In particular, the rules can:

- provide for, and set the amount of, application fees;
- provide for the order in which applications for designation are to be determined;
- set the conditions that must be satisfied for provisional or final designation of a project or for it to remain so designated;
- set the conditions for revocation of a provisional or final designation;
- set the conditions for the Infrastructure Coordinator accepting an application's estimate of a project's capital expenditure;
- set the requirements for an applicant amending its capital expenditure estimate;
- increase the size of the capital expenditure cap; and
- set the requirements for publishing information about infrastructure projects and the capital expenditure cap.

[Schedule #, item 4, subsections 415-45(3), 415-50(1), 415-55(2) and 415-70(1), (3), (4) and (5) and sections 415-55, 415-60 and 415-80]

1.75 Because the infrastructure project designation 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).

1.76 The operation of the *Legislative Instruments Act 2003* is modified in one respect for the infrastructure project designation rules. The rules are permitted to incorporate other documents issued by

Infrastructure Australia as they exist from time to time. The *Legislative Instruments Act 2003* provides a default position that disallows the incorporation of certain documents unless the contrary intention appears. Expressly permitting that to be done provides that contrary intention. This capacity could be used, for example, to allow the rules to incorporate Infrastructure Australia's published list of nationally significant projects, which is available on the internet. ***[Schedule #, item 4, subsection 415-405(2)]***

The capital expenditure cap

1.77 The tax benefits available for designated infrastructure projects are deliberately limited in order to limit the overall cost to the Commonwealth revenue. The Minister may prescribe rules about how projects that will qualify for the tax concessions will be selected. Otherwise, projects will be selected on a first come-first served basis. While capping total estimated capital expenditure does not directly limit the cost to Commonwealth revenue, it does so indirectly because it effectively limits the total magnitude of project that are able to access the concessions. ***[Schedule #, item 4, subsections 415-50(1), (2) and (3)]***

1.78 A project cannot be designated, or provisionally designated, if the designation would mean that the total estimated capital expenditure on all designated and provisionally designated projects would exceed the cap. ***[Schedule #, item 4, paragraphs 415-55(1)(c) and 415-60(1)(c) and subsection 415-65(1)]***

1.79 The cap is set at $25 billion but this can be increased by the infrastructure project designation rules. ***[Schedule #, item 4, subsection 415-65(2)]***

1.80 If a designation, or provisional designation is revoked, the expenditure estimate for that project would no longer count against the cap, freeing up an amount that could be used to designate another project.

Capital expenditure estimates

1.81 An application to have a project designated must be accompanied by an estimate of the project's capital expenditure. The capital expenditure estimate does not include an amount that is paid for by an Australian government agency because the cap is intended to be limited to private investment. So, for example, a capital expenditure estimate should be reduced by an amount of a government grant or an amount that is directly paid for by a government agency (such as where the government agency pays a subcontractor to conduct part of the project). ***[Schedule #, item 4, subsection 415-45(3)]***

1.82 The Infrastructure Coordinator must accept that estimate if it complies with any conditions in the infrastructure project designation rules. If the rules contain no such conditions, the Coordinator has to be satisfied that the estimate is acceptable. ***[Schedule #, item 4, subsections 415-45(2) and 415-70(1)]***

1.83 Applicants can amend their estimates at any time before the project is finally designated at the request of the Infrastructure Coordinator having regard to the prescribed circumstances. An amended estimate is treated as though it was the original estimate. ***[Schedule #, item 4, subsections 415-70(5) and (6)]***

1.84 The Infrastructure Coordinator can only revoke an acceptance of an estimate before the project is finally designated and only in accordance with the prescribed rules. In particular, the Coordinator can prescribe circumstances in which it can request the applicant to amend their estimate. ***[Schedule #, item 4, subsections 415-70(2) and (3)]***

Publishing information

1.85 The Infrastructure Coordinator can, and must, publish information about provisionally and finally designated infrastructure projects and about the capital expenditure cap if required to do so by the infrastructure project designation rules. ***[Schedule #, item 4, section 415-80]***

Delegating the Infrastructure Coordinator's powers

1.86 The Infrastructure Coordinator is empowered to execute a written delegation of his or her powers to an officer who is, or is acting as, an SES employee in the staff provided by the Department of Infrastructure and Transport to assist the Infrastructure Coordinator. ***[Schedule #, item 4, section 415-85]***

Application and transitional provisions

1.87 The measure applies to tax losses for the 2012-13 and later income years and to debts that were originally incurred in those years and later became bad debts of the entity. ***[Schedule #, items 4 and 44, section 415-5 of the Income Tax (Transitional Provisions) Act 1997]***

Consequential amendments

Definitions

1.88 A number of defined terms are created for the purposes of this measure. The Dictionary to the ITAA 1997 is amended to include references to each of those definitions. ***[Schedule #, items 31 and 33, subsection 995-1(1) (definitions of 'designated infrastructure project', 'designated infrastructure project entity', 'infrastructure project designation rules' and 'provisionally designated infrastructure project')]***

1.89 The use of one of those terms in the ITAA 1936 is defined to have the same meaning as it does in the ITAA 1997. ***[Schedule #, item 16, subsection 272-140(1) in Schedule 2F to the ITAA 1936 (definition of 'designated infrastructure project entity')]***

1.90 Some other definitions are amended to reflect changes made by the designated infrastructure project regime. ***[Schedule #, items 17, 32, 34, 37, 35, 36 and 38, subsection 272-140(1) definition of 'tax loss', subsection 995-1(1) definitions of 'ownership test period', 'same business test period', 'test period', 'tax loss' and 'test time']***

Guide material

1.91 Guide material is inserted to give readers an overview of what the provisions do. ***[Schedule #, item 4, sections 415-1, 415-5 and 415-40]***

1.92 A number of non-operative tables, which are designed to point readers to relevant provisions, are updated to reflect the addition of this measure. ***[Schedule #, items 19, 21, 22 and 23, tables in sections 12-5 and 36-25]***

1.93 Notes are added to the guide material at the front of the Subdivisions about deducting tax losses, bad debts and trust losses to alert readers to the fact that the conditions for those deductions do not apply to a designated infrastructure entity. ***[Schedule #, items 7, 8, 9, 10, 11, 12, 13, 14, 24 and 25, sections 266-15, 266-30, 266-65, 266-80, 266-100, 266-115, 266-140, 266-155 in Schedule 2F to the ITAA 1936, and sections 165-5 and 165-117 (notes)]***

The role of the Infrastructure Coordinator

1.94 The provisions of the *Infrastructure Australia Act 2008* that establish the role of the Infrastructure Coordinator are amended to reflect that its role includes functions conferred on it by other laws. This reflects the fact that this measure relies on the Infrastructure Coordinator designating infrastructure projects as eligible for the special taxation treatment the measure provides for. The amendments provide that the Infrastructure Coordinator's role includes all legislative extensions (rather than just this particular extension) so that any future legislative extension does not require further consequential amendment of the *Infrastructure Australia Act 2008*. ***[Schedule #, items 39, 40 and 41, subsections 28(2), (3) and (4) and 40(1) of the Infrastructure Australia Act 2008]***

1.95 The existing power of the Minister for Infrastructure and Transport to extend the Infrastructure Coordinator's role by written direction is retained but is located in a differently numbered provision. The validity of those existing directions, which may refer to the provision's previous numbering, are preserved as if they had been made under the new provision. ***[Schedule #, item 42]***

Other

1.96 Subsection 268-20(4) in Schedule 2F to the ITAA 1936 has been re-worded to clarify, for the purposes of applying the trust loss provisions, a period that might otherwise constitute multiple periods may be treated as one period if the same business test is satisfied. This may be relevant to an entity that stops being a designated infrastructure project entity during the test period. ***[Schedule #, item 15, Subsection 268-20(4) in Schedule 2F to the ITAA 1936]***

1.97 The terms 'start', 'starts' and 'starting' have been replaced with the words 'begin', 'begins' and 'beginning' respectively in parts of the trust loss provisions to provide more consistent terminology across the provisions. ***[Schedule #, items 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, subsections 266-185(1), 267-90(1), 268-10(2), 268-15(2), 268-20(2), 268-25(2), 268-75(1), 268-85(5), 269-65(1), 269-25(1) and paragraphs 269-25(1)(a), 269-100(4)(a), 271-80(a), 272-80(6B)(a) and (b) and 272-85(5C)(a) and (b) and subparagraph 272-80(6A)(i) of Schedule 2F to the ITAA 1936]***