



Income Tax Assessment (Infrastructure Project Designation) Rule 2013

I, David Bradbury, Assistant Treasurer, make the following instrument under the *Income Tax Assessment Act 1997*.

Dated: 7 July 2013

David Bradbury
Assistant Treasurer

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Part 1—Preliminary

1 Name of rule

- (1) This rule is the *Income Tax Assessment (Infrastructure Project Designation) Rule 2013*.
- (2) This rule may also be cited as the “Infrastructure Project Designation Rules”.

2 Commencement

This rule commences on the commencement of section 415-55 of the *Income Tax Assessment Act 1997*.

3 Authority

This rule is made under the *Income Tax Assessment Act 1997*.

4 Definitions

In this rule:

Act means the *Income Tax Assessment Act 1997*.

Infrastructure Priority List means a list of that name developed by Infrastructure Australia under paragraph 5(2)(b) of the *Infrastructure Australia Act 2008*.

infrastructure project means an enterprise that is a proposed investment in, or enhancement to, infrastructure.

infrastructure project capital expenditure has the meaning given by section 5.

Reform and Investment Framework means the framework of that name maintained by Infrastructure Australia.

Note: *Commissioner* is defined in the Act as the Commissioner of Taxation.

5 Infrastructure project capital expenditure

- (1) In this rule, *infrastructure project capital expenditure* is the total expenditure in respect of the design and construction of the infrastructure project, other than any expenditure:
 - (a) incurred by an Australian government agency; or
 - (b) funded by a grant from an Australian government agency.

Note: Infrastructure project capital expenditure is not limited to outgoings of capital, or of a capital nature, within the meaning of section 8-1 of the Act.

- (2) In addition to subsection (1), *infrastructure project capital expenditure* is taken not to include expenditure in relation to:

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- (a) the cost of financing the design and construction of the infrastructure project; or
 - (b) repair or maintenance of the infrastructure project; or
 - (c) professional advisory services that are unrelated to the design or construction of the infrastructure project.
- (3) For subsection 415-80(5) of the Act:
- (a) the Infrastructure Coordinator may request an applicant to amend an estimate of infrastructure project capital expenditure given by the applicant; and
 - (b) the matters to which the Infrastructure Coordinator must have regard in requesting an applicant to amend an estimate are whether the expenditure in the estimate:
 - (i) complies with the descriptions in subsection (1) and subsection (2) (if appropriate); and
 - (ii) is reasonable; and
 - (iii) will, or is likely to, change substantially.
- (4) If the Infrastructure Coordinator requests the applicant to give an amended estimate of infrastructure project capital expenditure, the applicant must comply with the request as soon as practicable.

Example: The Infrastructure Coordinator may request an amended estimate of infrastructure project capital expenditure as the financing arrangements for the infrastructure project are finalised.

6 Purpose of rule

This rule prescribes matters:

- (a) required or permitted by Subdivision 415-C of Division 415 of Part 3-45 of the Act to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to that Subdivision.

Note: This rule is a legislative instrument that provides subsidiary detail affecting the scope and operation of the tax incentive for designated infrastructure projects specified in Subdivision 415-C of Division 415 of Part 3-45 of the Act.

It sets out processes and conditions for applications and designations relating to infrastructure projects, and includes:

- (a) matters to be considered in estimating the capital expenditure of designated infrastructure projects; and
- (b) reporting and monitoring requirements for designated infrastructure projects; and
- (c) requirements for the publication of information by the Infrastructure Coordinator.

As a legislative instrument, this rule is subject to the *Legislative Instruments Act 2003*. In particular, it only becomes enforceable once:

- (a) it is registered on the Federal Register of Legislative Instruments; and
- (b) its commencement date occurs;

and it ceases to apply if disallowed by either House of Parliament under a notice of motion made within 15 sitting days after the instrument is tabled in that House (tabling must occur within 6 sitting days after registration).

The Act permits this rule to incorporate another document as it exists from time to time (this modifies the default prohibition in the *Legislative Instruments Act 2003*). This

could be used, for example, to allow the rule to incorporate Infrastructure Australia's published Infrastructure Priority List, its Reform and Investment Framework, or its list of designated infrastructure projects.

7 Applications for designation

- (1) This section prescribes requirements for an application under section 415-55 of the Act for the designation of an infrastructure project.

General content

- (2) The application must:
 - (a) be in writing; and
 - (b) be accompanied by an application fee of \$20 000.
- (3) The application must:
 - (a) be accompanied by a submission to Infrastructure Australia, made in accordance with the Reform and Investment Framework, for the inclusion on the Infrastructure Priority List of:
 - (i) the infrastructure that is to be provided or enhanced by the infrastructure project; or
 - (ii) infrastructure that includes the infrastructure that is to be provided or enhanced by the infrastructure project; or
 - (b) relate to a submission of that kind that has already been made to Infrastructure Australia.

Note: An application mentioned in paragraph (b) might be for the designation of a further part of the infrastructure that is sought to be included in the Infrastructure Priority List.

Estimate of infrastructure project capital expenditure

- (4) The application must include:
 - (a) an estimate of the infrastructure project capital expenditure that would be incurred for the purpose of the infrastructure project, identified by each financial year in which the infrastructure is expected to be provided or enhanced; and
 - (b) a statement by an independent professional advisory firm with appropriate expertise in infrastructure that, in the firm's opinion, the estimate is reasonable.

Note: See subsection 415-55(2) of the Act.

8 Dealing with applications

- (1) This section prescribes requirements for dealing with an application under section 415-60 of the Act for the designation of an infrastructure project.
- (2) If the Infrastructure Coordinator requests an applicant to give further information about an application because, in the opinion of the Infrastructure Coordinator, the application is incomplete or does not contain sufficient information for the Infrastructure Coordinator to deal with the application, the applicant must comply with the request as soon as practicable.

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Example: The Infrastructure Coordinator may request information on the infrastructure which is included, or sought to be included, on the Infrastructure Priority List.

9 Provisional designation

- (1) This section prescribes requirements for provisionally designating an infrastructure project under section 415-65 of the Act.

Conditions for provisional designation

- (2) Each of the following is a condition for the provisional designation of the infrastructure project:
- (a) the infrastructure, part or all of which is to be provided or enhanced by the infrastructure project, is included on the Infrastructure Priority List and assessed as “Threshold” or “Ready to Proceed”;
 - (b) at least part of the infrastructure to be provided or enhanced by the infrastructure project is privately owned or financed;
 - (c) the infrastructure to be provided or enhanced by the infrastructure project:
 - (i) is infrastructure known as “common use infrastructure”; or
 - (ii) is not common use infrastructure but is operated using the principles of operating common use infrastructure; or
 - (iii) in any other case—will not be operated in a way that is exclusively for the benefit of one or more specific users and does not permit access by other intending users;
 - (d) construction of the infrastructure to be provided or enhanced by the infrastructure project has not commenced;
 - (e) either:
 - (i) any information requested by the Infrastructure Coordinator for the purpose of considering provisional designation has been given; or
 - (ii) the Infrastructure Coordinator has decided that the information is no longer required.

Note: See subparagraph 415-65(1)(d)(i) of the Act.

- (3) If the Infrastructure Coordinator proposes to provisionally designate an infrastructure project, the Infrastructure Coordinator must:
- (a) consider whether to set any conditions for the provisionally designated infrastructure project to remain provisionally designated; and
 - (b) set any conditions the Infrastructure Coordinator considers appropriate, having regard to the following:
 - (i) whether Infrastructure Australia set any conditions when the infrastructure, part or all of which is to be provided or enhanced by the infrastructure project, was assessed as “Threshold” or “Ready to Proceed” and, if so, whether any of the conditions is still in force;
 - (ii) any matter relevant to the integration of the infrastructure to be provided or enhanced by the infrastructure project into other existing or proposed infrastructure;

- (iii) whether it is appropriate to set a condition because of the content of the application for designation or the related submission to Infrastructure Australia.

Example: A condition could relate to a timetable or a requirement to have an agreement for access. See subsection 415-65(6) and subparagraph 415-70(1)(d)(i) of the Act.

- (4) The Infrastructure Coordinator must not provisionally designate an infrastructure project, if in the opinion of the Infrastructure Coordinator:
- (a) it is not possible for the infrastructure project to satisfy one or more of the conditions mentioned in subsection 10(2); and
 - (b) it is unlikely that the condition or conditions would be waived.

Note: See paragraphs 10(2)(f), (g) and (h).

Ranking provisional designations

- (5) If:
- (a) one or more infrastructure projects covered by an application under section 415-55 of the Act has not been provisionally designated; and
 - (b) each of those infrastructure projects meets the conditions set out in subsection (2);

the Infrastructure Coordinator must designate provisionally as many of the applications as can be designated, following the order (if any) set out in the Infrastructure Priority List, until reaching the infrastructure project capital expenditure cap in section 415-75 of the Act.

Note: Infrastructure Australia will review the Infrastructure Priority List in March, July and November in each year.

Instruments of provisional designation

- (6) An instrument of provisional designation must state or refer to:
- (a) details of the infrastructure project, with sufficient information to allow the details to be amended if a variation to the infrastructure project is not material; and
 - (b) an indication of the kind of variation the Infrastructure Coordinator would regard as material; and
 - (c) the estimate of infrastructure project capital expenditure accepted under section 415-80 of the Act.

Amendment of instruments of provisional designation

- (7) If:
- (a) an entity to which an application for designation under section 7 relates applies to the Infrastructure Coordinator to amend the instrument of provisional designation by amending details referred to in paragraph (6)(a); and
 - (b) the application is in the form (if any) approved by the Infrastructure Coordinator for this subsection; and

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- (c) the entity provides the Infrastructure Coordinator with an amended estimate of infrastructure project capital expenditure if the Infrastructure Coordinator requests the entity to do so; and
- (d) the entity provides the Infrastructure Coordinator with any additional information relating to the application if the Infrastructure Coordinator requests the entity to do so;

the Infrastructure Coordinator may amend the instrument of provisional designation.

Note: This entity may not be the entity that originally made the application for designation. For example, this entity may have bought the original entity.

- (8) However, the Infrastructure Coordinator must amend the instrument of provisional designation if, having regard to the information provided in the application, the amended estimate of infrastructure project capital expenditure provided under paragraph (7)(c) (if any), or the information provided under paragraph (7)(d) (if any), the Infrastructure Coordinator is of the opinion that:
 - (a) the variation to the infrastructure project is not material; and
 - (b) the amended estimate of infrastructure project capital expenditure provided under paragraph (7)(c) (if any) would not breach the infrastructure project capital expenditure cap under section 415-75 of the Act.

Note: See subsection 415-80(6) of the Act.

- (9) An amended instrument of provisional designation must specify the date it takes effect, which may be a time before the amendment is made.

Revocation of instruments of provisional designation

- (10) The Infrastructure Coordinator must revoke an instrument of provisional designation if:
 - (a) in the opinion of the Infrastructure Coordinator, a condition set under paragraph (3)(b) has been significantly breached; or
 - (b) in the opinion of the Infrastructure Coordinator:
 - (i) it is no longer possible for the infrastructure project to satisfy one or more of the conditions mentioned in subsection 10(2); and
 - (ii) the condition or conditions will not be waived.

Note: See paragraphs 10(2)(f) and (g).

10 Designation

- (1) This section prescribes requirements for designating an infrastructure project under section 415-75 of the Act.

Conditions for designation

- (2) Each of the following is a condition for the designation of the infrastructure project:
 - (a) the Infrastructure Coordinator has provisionally designated the infrastructure project;

- (b) the infrastructure, part or all of which is to be provided or enhanced by the infrastructure project, is included on the Infrastructure Priority List and assessed as “Ready to Proceed”;
 - (c) part or all of the infrastructure to be provided or enhanced by the infrastructure project is privately owned or financed;
 - (d) the infrastructure to be provided or enhanced by the infrastructure project:
 - (i) is infrastructure known as “common use infrastructure”; or
 - (ii) is not common use infrastructure but is operated using the principles of operating common use infrastructure; or
 - (iii) in any other case—will not be operated in a way that is exclusively for the benefit of one or more specific users and does not permit access by other intending users;
 - (e) construction of the infrastructure to be provided or enhanced by the infrastructure project has not commenced;
 - (f) each condition set by Infrastructure Australia when the infrastructure project was assessed as “Ready to Proceed” has been met or has been waived by Infrastructure Australia;
 - (g) each condition set by the Infrastructure Coordinator when the infrastructure project was provisionally designated has been met or has been waived by the Infrastructure Coordinator;
 - (h) financial close has occurred or is imminent.
- (3) If the Infrastructure Coordinator proposes to designate an infrastructure project, the Infrastructure Coordinator must:
- (a) consider whether to set any conditions for the designated infrastructure project to remain designated; and
 - (b) set any conditions the Infrastructure Coordinator considers appropriate, having regard to any matter relevant to the integration of the infrastructure to be provided or enhanced by the infrastructure project into other existing or proposed infrastructure.

Example: Periodic reporting to the Infrastructure Coordinator in relation to infrastructure project capital expenditure, or updates on the progress of construction.

Ranking designations

- (4) If:
- (a) one or more infrastructure projects covered by an application under section 415-55 of the Act has not been designated; and
 - (b) each of those infrastructure projects meets the conditions set out in subsection (2);

the Infrastructure Coordinator must designate as many of the applications as can be designated, following the order (if any) set out in the Infrastructure Priority List, until reaching the infrastructure project capital expenditure cap in section 415-75 of the Act.

Note: Infrastructure Australia will review the Infrastructure Priority List in March, July and November in each year.

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Instruments of designation

- (5) An instrument of designation must state or refer to:
- (a) details of the infrastructure project, with sufficient information to allow the details to be amended if a variation to the infrastructure project is not material; and
 - (b) an indication of the kind of variation the Infrastructure Coordinator would regard as material; and
 - (c) the estimate of infrastructure project capital expenditure accepted under section 415-80 of the Act.

Amendment of instruments of designation

- (6) If:
- (a) an entity to which an application for designation under section 7 relates applies to the Infrastructure Coordinator to amend the instrument of designation by amending details referred to in paragraph (5)(a); and
 - (b) the application is in the form (if any) approved by the Infrastructure Coordinator for this subsection; and
 - (c) the entity provides the Infrastructure Coordinator with an amended estimate of infrastructure project capital if the Infrastructure Coordinator requests the entity to do so; and
 - (d) the entity provides the Infrastructure Coordinator with any additional information relating to the application if the Infrastructure Coordinator requests the entity to do so;

the Infrastructure Coordinator may amend the instrument of designation.

Note: This entity may not be the entity that originally made the application for designation. For example, this entity may have bought the original entity.

- (7) However, the Infrastructure Coordinator must amend the instrument of designation if, having regard to the information provided in the application, the amended estimate of infrastructure project capital expenditure provided under paragraph (6)(c) (if any), or the information provided under paragraph (6)(d) (if any), the Infrastructure Coordinator is of the opinion that:
- (a) the variation to the infrastructure project is not material; and
 - (b) the amended estimate of infrastructure project capital expenditure provided under paragraph (6)(c) (if any) would not breach the infrastructure project capital expenditure cap under section 415-75 of the Act.

Note: See subsection 415-80(6) of the Act.

- (8) An amended instrument of designation must specify the date it takes effect, which may be a time before the amendment is made.

Revocation of instruments of designation

- (9) The Infrastructure Coordinator may revoke an instrument of designation only if, in the opinion of the Infrastructure Coordinator:
- (a) financial close did not occur promptly after the designation; or

- (b) financial close occurred with a material variation from the documentation submitted with the application for designation; or
- (c) a condition set under paragraph (3)(b) has been significantly breached; or
- (d) the infrastructure project will not be completed or operated without a material variation from the information in the application for designation.

Notice to Commissioner

- (10) The Infrastructure Coordinator must:
 - (a) notify the Commissioner of a decision to designate an infrastructure project or to amend or revoke an instrument of designation; and
 - (b) give the Commissioner a copy of the instrument of designation or amended instrument of designation.

11 Acceptance of estimates of infrastructure project capital expenditure

For paragraph 415-80(1)(a) of the Act, the conditions for the acceptance of an estimate of infrastructure project capital expenditure under section 415-80 of the Act are:

- (a) if the estimate relates to an application for provisional designation, or the variation of an instrument of provisional designation, the estimate has been determined using:
 - (i) a draft base case financial model prepared by the private sector in relation to the infrastructure project; or
 - (ii) the government capital expenditure business case (if the Infrastructure Coordinator considers this is applicable to the infrastructure project); or
 - (iii) the Public Sector Comparator financial model (if the Infrastructure Coordinator considers this is applicable to the infrastructure project); or
 - (iv) another method acceptable to the Infrastructure Coordinator; and
- (b) if the estimate relates to an application for designation, or the variation of an instrument of designation, the estimate has been determined using:
 - (i) the final base case financial model prepared by the private sector in relation to the infrastructure project; or
 - (ii) another method acceptable to the Infrastructure Coordinator; and
- (c) if the applicant has been requested under subsection 5(3) to give an amended estimate of infrastructure project capital expenditure, the applicant has given the amended estimate; and
- (d) the estimate includes a statement by an independent professional advisory firm with appropriate expertise in infrastructure that, in the firm's opinion, the estimate is reasonable.

12 Information to be made public

For section 415-90 of the Act, requirements in relation to the publication of information are that:

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- (a) the Infrastructure Coordinator must publish information on each provisionally designated infrastructure project and each designated infrastructure project; and
- (b) the information must:
 - (i) include or summarise each estimate of infrastructure project capital expenditure accepted under subsection 415-80(1) of the Act; and
 - (ii) include or summarise each report on the progress of construction that the Infrastructure Coordinator has received in relation to designated infrastructure projects; and
- (c) the Infrastructure Coordinator must publish the information as soon as practicable after the provisional designation, or the designation, has occurred.