Commonwealth Coat of Arms

Income Tax Assessment (Infrastructure Project Designation) Rule 2013

as amended

made under section 415-100 of the

Income Tax Assessment Act 1997

**Compilation start date:** 30 August 2016

**Compilation number:** 1

**Includes amendments up to:** *Income Tax Assessment (Infrastructure Project Designation) Amendment Rule 2016*

**About this compilation**

**This compilation**

This is a compilation of the *Income Tax Assessment (Infrastructure Project Designation) Rule 2013* as in force on the date of registration. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 30 August 2016.

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of each amended provision.

**Uncommenced amendments**

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

**Application, saving and transitional provisions for provisions and amendments**

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

**Modifications**

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

**Provisions ceasing to have effect**

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

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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*.

***Assessment Framework*** means the framework of that name maintained by Infrastructure Australia as existing from time to time.

***Board*** means the Board of Infrastructure Australia established by section 6D of the *Infrastructure Australia Act 2008.*

***Infrastructure Priority List*** means a list of that name developed by Infrastructure Australia under 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.

Note 1: ***Commissioner*** is defined in the Act as the Commissioner of Taxation.

Note 2: ***Infrastructure CEO*** is defined in the Act as the CEO of Infrastructure Australia appointed under section 29 of the *Infrastructure Australia Act 2008*.

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:

(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 CEO 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 CEO 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 CEO 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 CEO 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 CEO.

As a legislative instrument, this rule is subject to Chapter 3 of the *Legislation Act 2003*. In particular, it only becomes enforceable once:

(a) it is registered on the Federal Register of Legislation; 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 *Legislation Act 2003*). This could be used, for example, to allow the rule to incorporate Infrastructure Australia’s published Infrastructure Priority List, its Assessment 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 Assessment 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 CEO requests an applicant to give further information about an application because, in the opinion of the Infrastructure CEO, the application is incomplete or does not contain sufficient information for the Infrastructure CEO to deal with the application, the applicant must comply with the request as soon as practicable.

Example: The Infrastructure CEO 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, has been assessed under the Assessment Framework to be a nationally significant infrastructure priority and is included on the Infrastructure Priority List as a “Project”;

(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 CEO for the purpose of considering provisional designation has been given; or

(ii) the Infrastructure CEO has decided that the information is no longer required.

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

(3) If the Infrastructure CEO proposes to provisionally designate an infrastructure project, the Infrastructure CEO 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 CEO 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 a “Project” 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 CEO must not provisionally designate an infrastructure project, if in the opinion of the Infrastructure CEO:

(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 CEO 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 CEO 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 CEO 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 CEO for this subsection; and

(c) the entity provides the Infrastructure CEO with an amended estimate of infrastructure project capital expenditure if the Infrastructure CEO requests the entity to do so; and

(d) the entity provides the Infrastructure CEO with any additional information relating to the application if the Infrastructure CEO requests the entity to do so;

the Infrastructure CEO 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 CEO 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 CEO 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 CEO must revoke an instrument of provisional designation if:

(a) in the opinion of the Infrastructure CEO, a condition set under paragraph (3)(b) has been significantly breached; or

(b) in the opinion of the Infrastructure CEO:

(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 415-70 of the Act.

Conditions for designation

(2) Each of the following is a condition for the designation of the infrastructure project:

(a) the Infrastructure CEO has provisionally designated the infrastructure project;

(b) the infrastructure, part or all of which is to be provided or enhanced by the infrastructure project, has been assessed under the Assessment Framework to be a nationally significant infrastructure priority and is included on the Infrastructure Priority List as a “Project”;

(c) at least part 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 as a preliminary to designation has been met or has been waived by Infrastructure Australia;

(g) each condition set by the Infrastructure CEO as a preliminary to designation has been met or has been waived by the Infrastructure CEO;

(h) financial close has occurred or is imminent.

(3) If the Infrastructure CEO proposes to designate an infrastructure project, the Infrastructure CEO must:

(a) consider whether to set any conditions for the designated infrastructure project to remain designated; and

(b) set any conditions the Infrastructure CEO 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 CEO 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 CEO 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.

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 CEO 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 CEO 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 CEO for this subsection; and

(c) the entity provides the Infrastructure CEO with an amended estimate of infrastructure project capital if the Infrastructure CEO requests the entity to do so; and

(d) the entity provides the Infrastructure CEO with any additional information relating to the application if the Infrastructure CEO requests the entity to do so;

the Infrastructure CEO 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 CEO 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 CEO 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 CEO may revoke an instrument of designation only if, in the opinion of the Infrastructure CEO:

(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 CEO 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 CEO considers this is applicable to the infrastructure project); or

(iii) the Public Sector Comparator financial model (if the Infrastructure CEO considers this is applicable to the infrastructure project); or

(iv) another method acceptable to the Infrastructure CEO; 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 CEO; 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:

(a) the Infrastructure CEO 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 CEO has received in relation to designated infrastructure projects; and

(c) the Infrastructure CEO must publish the information as soon as practicable after the provisional designation, or the designation, has occurred.

Endnotes

Endnote 1—About the endnotes

The endnotes provide details of the history of this legislation and its provisions. The following endnotes are included in each compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

Endnote 5—Uncommenced amendments

Endnote 6—Modifications

Endnote 7—Misdescribed amendments

Endnote 8—Miscellaneous

If there is no information under a particular endnote, the word “none” will appear in square brackets after the endnote heading.

**Abbreviation key—Endnote 2**

The abbreviation key in this endnote sets out abbreviations that may be used in the endnotes.

**Legislation history and amendment history—Endnotes 3 and 4**

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended the compiled law. The information includes commencement information for amending laws and details of application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision level. It also includes information about any provisions that have expired or otherwise ceased to have effect in accordance with a provision of the compiled law.

**Uncommenced amendments—Endnote 5**

The effect of uncommenced amendments is not reflected in the text of the compiled law, but the text of the amendments is included in endnote 5.

**Modifications—Endnote 6**

If the compiled law is affected by a modification that is in force, details of the modification are included in endnote 6.

**Misdescribed amendments—Endnote 7**

An amendment is a misdescribed amendment if the effect of the amendment cannot be incorporated into the text of the compilation. Any misdescribed amendment is included in endnote 7.

**Miscellaneous—Endnote 8**

Endnote 8 includes any additional information that may be helpful for a reader of the compilation.

Endnote 2—Abbreviation key

|  |  |
| --- | --- |
| ad = added or inserted | pres = present |
| am = amended | prev = previous |
| c = clause(s) | (prev) = previously |
| Ch = Chapter(s) | Pt = Part(s) |
| def = definition(s) | r = regulation(s)/rule(s) |
| Dict = Dictionary | Reg = Regulation/Regulations |
| disallowed = disallowed by Parliament | reloc = relocated |
| Div = Division(s) | renum = renumbered |
| exp = expired or ceased to have effect | rep = repealed |
| hdg = heading(s) | rs = repealed and substituted |
| LI = legislative instrument | s = section(s) |
| LIA = *Legislative Instruments Act 2003* | Sch = Schedule(s) |
| mod = modified/modification | Sdiv = Subdivision(s) |
| No = Number(s) | SLI = Select Legislative Instrument |
| o = order(s) | SR = Statutory Rules |
| Ord = Ordinance | Sub-Ch = Sub-Chapter(s) |
| orig = original | SubPt = Subpart(s) |
| par = paragraph(s)/subparagraph(s) |  |
| /sub-subparagraph(s) |  |

Endnote 3—Legislation history

| Name | FRLI registration or gazettal | Commencement | Application, saving and transitional provisions |
| --- | --- | --- | --- |
| Income Tax Assessment (Infrastructure Project Designation) Rule 2013 | F2013L01335  (10 July 2013) | 1 September 2014 |  |
| Income Tax Assessment (Infrastructure Project Designation) Amendment Rule 2016 | F2016L01359  (29 August 2016) | 30 August 2016 | Sch 1 (item 19) |

Endnote 4—Amendment history

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

| Provision affected | How affected |
| --- | --- |
| s. 4 | am. No. F2016L01359, 2016 |
| s. 5 | am. No. F2016L01359, 2016 |
| s. 6 (note) | am. No. F2016L01359, 2016 |
| s. 7 | am. No. F2016L01359, 2016 |
| s. 8 | am. No. F2016L01359, 2016 |
| s. 9 | am. No. F2016L01359, 2016 |
| s. 10 | am. No. F2016L01359, 2016 |
| s. 11 | am. No. F2016L01359, 2016 |
| s. 12 | am. No. F2016L01359, 2016 |

Endnote 5—Uncommenced amendments

Endnote 6—Modifications

Endnote 7—Misdescribed amendments

Endnote 8—Miscellaneous