



Australian Government
The Treasury

TSY/AU

Economic infrastructure staples tax concession

Draft Guidance Note

November 2019



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Consultation Process

Request for feedback and comments

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

Closing date for submissions: 17 January 2020

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Mail	Manager Corporate and International Tax Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to Deepti Paton
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Providing a confidential response

It is our intention to publish non-confidential submissions on the Australian Treasury website after the closing date for submissions has passed.

If you would like all or part of your submission to remain confidential, you should indicate this at the time of lodging your submission together with reasons as to why you are requesting that the information be accepted on a confidential basis. Automatically generated confidentiality statements in emails do not suffice for this purpose.

Respondents who would like part of their submission to remain confidential should provide a version that 'blacks out' or specifically identifies the confidential information as well as a separate complete version.

A request made under the *Freedom of Information Act 1982* (Cth) to have access to submissions marked 'confidential' will be determined in accordance with that Act.

Overview

1. The purpose of this note is to provide guidance to potential applicants regarding the processes for applications to the Treasurer for the economic infrastructure staples tax concession (the concession).
2. The Treasurer's approval of an application for this concession cannot be relied on as an indication that an approval from a local, state, territory, or Commonwealth Government, or government agency, will be forthcoming, for example, in relation to planning approvals, foreign investment approvals, private rulings from the Australian Taxation Office (ATO) or any other approval.

What is the concession?

3. The concession ensures continued support for the development of nationally significant infrastructure facilities.
4. The concession:
 - is an exception to the 30 per cent managed investment trust (MIT) withholding tax rate on non-resident investors that applies to distributions of income that are, broadly, attributable to a cross staple arrangement;
 - applies a withholding tax rate of 15 per cent to distributions of income to non-residents to the extent that the income is rent from an investment in land attributable to an approved new economic infrastructure facility (or approved improvement to an economic infrastructure facility); and
 - applies for 15 years from the date that an asset that is part of the facility (or improvement to the facility) is first put to use.
5. Legislation for the concession is at section 12-439 of Schedule 1 to the *Taxation Administration Act 1953*.

The application process

Who can apply?

6. An Australian government agency (other than the Commonwealth) may make an application to the Treasurer in respect of the facility or an improvement to the facility.
7. Australian government agency is defined in section 995-1 of the *Income Tax Assessment Act 1997* as meaning:
 - a) the Commonwealth, a State or a Territory; or
 - b) an authority of the Commonwealth or of a State or a Territory.
8. Applications can only be made by an Australian government agency (for example, a State Government authority). These applications can be in respect of:
 - a facility which the agency intends to develop or improve and then dispose of an interest in; or
 - a non-government owned, operated and/or proposed facility or improvement to a facility.

How to apply?

9. A completed application should be submitted to the Treasurer via [email address].
10. The application must include the information specified in this document and may include any other information that the applicant considers would assist the Treasurer in making a determination.
11. Applicants should consider the applicability of the ATO's Law Companion Ruling LCR 2019/D2 (Non-concessional MIT income)¹ in making their application.
12. The applicant must provide a supplement to the application if any of the information contained in the application changes or becomes incorrect after the application date.
13. Applications for the concession will be treated as being provided in-confidence to the Government for the purposes of seeking approval from the Treasurer for the concession.
14. Treasury will assess the application, and provide advice to the Treasurer. As part of this assessment process, Treasury may seek input from any federal, state and territory or local government department or agency as relevant, including:
 - the Department of Infrastructure, Transport, Cities and Regional Development;
 - Infrastructure Australia;
 - the ATO;
 - the Infrastructure and Project Financing Agency;
 - the Department of Communications and the Arts;
 - the Department of the Environment and Energy; and/or
 - the Department of Agriculture.
15. An approval of the Treasurer:
 - will be in writing;
 - will specify the facility, or the improvement, that is approved;
 - will specify the date on which the approval comes into force; and
 - may contain any other information that the Treasurer considers appropriate.
16. The Treasurer will publicly announce an approval and it will be reported as a measure in the Budget process. The cost to revenue of approving the concession for the facility or improvement will not specifically be identified in the Budget process if doing so would cause commercial-in-confidence information to be revealed.
17. If the Treasurer decides not to approve the facility or the improvement to a facility specified in the application, the Treasurer is required to notify the applicant of the decision in writing as soon as practicable after making the decision.
18. In addition to providing their application to the Treasurer, applicants must also submit a final business case to Infrastructure Australia for evaluation.² Infrastructure Australia is required to publish an evaluation summary following its evaluation of a project business

1 This reference will be updated once the Law Companion Ruling has been finalised. The Law Companion Ruling is currently in draft and the content may be subject to change.

2 Further information on this requirement is below.

case considered for inclusion on the Infrastructure Priority List.³ This evaluation summary includes the estimated capital expenditure of the project, as well as the contribution sought from the Australian Government where applicable.

When can you apply?

19. The application must be made before construction has commenced in relation to the facility or the improvement.

The criteria

20. The Treasurer may approve the facility, or the improvement to the facility, specified in the application for the concession if the Treasurer is satisfied that the following criteria are met:
- the facility is an economic infrastructure facility;
 - the estimated capital expenditure of the facility (or the improvement) is \$500 million or more;
 - the facility (or the improvement) is yet to be constructed;
 - the facility (or the improvement) will significantly enhance the long-term productive capacity of the economy; and
 - approving the concession for the facility (or the improvement) is in the national interest.

The facility is an ‘economic infrastructure facility’

21. The Treasurer may approve the facility (or an improvement to a facility) if the Treasurer is satisfied that the facility is an economic infrastructure facility.
22. An economic infrastructure facility is a facility that is any of the following:
- a. transport infrastructure;
 - b. energy infrastructure;
 - c. communications infrastructure;
 - d. water infrastructure.
23. Generally, economic infrastructure will be enduring facilities that support or enable economic activity and improve national productivity in Australia.⁴
24. For the purposes of the concession, examples of economic infrastructure facilities may include:
- electricity distribution networks;
 - toll road networks; and

3 In accordance with subsection 5A(4) of the *Infrastructure Australia Act 2008*, the decision of the Infrastructure Australia Board will be published on the Infrastructure Australia website in the form of an evaluation summary. Examples of past evaluation summaries can be found on the Infrastructure Australia website at <https://infrastructureaustralia.gov.au/projects/project-assessments.aspx>

4 Revised Explanatory Memorandum, Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 [1.80].

- ports.⁵
25. Examples of facilities that would not typically be economic infrastructure, for the purposes of the concession, include:
- a mining operation; and
 - a water facility built for use by a single commercial business.⁶
26. In considering whether a number of assets together comprise a facility, the applicant should have regard to the commentary in paragraphs 1.117 to 1.120 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019.
27. The applicant is required to provide information to establish that the application relates to an ‘economic infrastructure facility’.
28. Any determination of the Treasurer will cover the ‘facility’ or ‘improvement to the facility’ that is specified in the application. As such, applicants are required to specify the scope and boundary of the ‘facility’ or ‘improvement to the facility’ in detail. Further information may be sought from the applicant on this point, if required.

The estimated capital expenditure on the facility or improvement is \$500 million or more

29. The application must include information to establish or provide evidence that the estimated capital expenditure on the facility or improvement is \$500 million or more.

The facility or improvement is yet to be constructed

30. The application must be made before construction has commenced in relation to the facility or the improvement. The application must include information as to the proposed (or estimated) commencement dates for construction and operation.

The facility or improvement will significantly enhance the long-term productive capacity of the economy

31. In determining whether a facility (or an improvement to a facility) will significantly enhance the long-term productive capacity of the economy, the Treasurer may consider whether:
- the economic benefits resulting from the facility (or the improvement) outweigh, or will outweigh, the economic costs; and
 - in the opinion of Infrastructure Australia, the facility is nationally significant infrastructure within the meaning of the *Infrastructure Australia Act 2008*.⁷

5 Revised Explanatory Memorandum, Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 [1.81].

6 Revised Explanatory Memorandum, Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 [1.82].

7 Revised Explanatory Memorandum, Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 [1.84].

32. When an application is made to the Treasurer, a final completed business case is required to also be submitted to and assessed by Infrastructure Australia⁸ in respect of the same facility or improvement.
- The business case to Infrastructure Australia need not have been made by the same applicant that makes the application to the Treasurer. However, the project's business case submission to Infrastructure Australia must be made by the project proponent, as set out in the Infrastructure Australia Assessment Framework.
 - Applicants should consider Infrastructure Australia's usual timeframes to assess business cases, which are subject to the quality of the business case and the timing of the proponent's responses to any clarification questions from Infrastructure Australia.
33. The application to the Treasurer must include:
- details of whether the project's business case has been positively assessed by the Infrastructure Australia Board and placed on Infrastructure Australia's Infrastructure Priority List as a 'High Priority' or 'Priority' project;
 - a copy of the business case provided to Infrastructure Australia; and
 - any further information related to the economic costs and benefits resulting from the facility (or improvement) that the applicant considers would assist the Treasurer in determining whether this criterion is met.
34. If the business case and Infrastructure Australia's assessment are not yet available at the time the application is made to the Treasurer, the application must indicate this. These documents and/or information must be provided to the Treasurer when they become available.

Approving the concession for the facility or the improvement is in the national interest

35. In determining whether approving the concession for the facility or the improvement is in the national interest, the Treasurer may have regard to a range of factors, including:
- the anticipated revenue cost of approving the concession for the facility (or improvement);
 - the likely uplift in economic growth as a result of the facility (or improvement);
 - whether approving the concession for the facility (or improvement) is likely to have a material impact on whether the project goes ahead;
 - whether an approval of the concession for the facility (or improvement) is consistent with the Government's objectives;
 - whether the entities to the cross staple arrangement and any known ultimate investors in those entities are compliant with Australian laws;
 - the impact of the facility (or improvement) on the relevant community (this might include social impacts, issues of social exclusion and/or quality of life, such as access to services, employment and safety);

8 This will be a full business case assessment in accordance with section 5A of the *Infrastructure Australia Act 2008*, using the methodology set out in the Infrastructure Australia Assessment Framework. The outcome of the assessment would be a decision by the Infrastructure Australia Board to include or not include the project to the Infrastructure Priority List.

- whether the facility (or improvement) will impact on any particular geographical area/s; and
 - the type and magnitude of any other government assistance that has been sought or provided in relation to the same or similar infrastructure facility (or improvement).
36. To assist the Treasurer in determining whether approving the facility or improvement is in the national interest, the application must include:
- Specific details of the facility or improvement.
 - Details and a diagram of the actual or proposed corporate structure including ultimate beneficiaries and ownership holdings.
 - If one or more beneficiaries are (or are proposed to be) foreign, information should be included relating to the (likely) country where the beneficiaries are (or will be) tax residents.
 - If one or more beneficiaries are (or are proposed to be) a sovereign wealth fund or a foreign pension fund, the percentage of interests in the MIT that are (or are expected to be) held by those beneficiaries.
 - Details of the funding proposal including whether the proposed new facility or improvement is expected to be funded by investor debt.
 - Expected fund payment amounts (attributable to MIT cross staple arrangement income) to each beneficiary for the 15 years after the asset that is part of the facility is first put to use.
 - In the case of an improvement to a facility, include amounts that are (if the approval is granted) estimated to be excepted MIT cross staple arrangement income (i.e. subject to a 15 per cent MIT withholding rate).
 - The expected rate of return to each beneficiary for the 15 years after the asset that is part of the facility is first put to use.
 - An estimated date on which the facility or improvement is expected to become operational.
 - The financial accounting year and any substituted accounting period.
 - Information as to whether the entities to the cross staple arrangement and any known ultimate investors in those entities are or have ever been non-compliant with Australian laws.
 - Details of any other government assistance (from any government or government body) that has been sought or provided in relation to the same or similar infrastructure facility or improvement.
 - Any other information that the applicant considers would assist the Treasurer in determining whether approving the concession for the facility or improvement is in the national interest.

Legislative considerations

37. A choice may be made under section 25-115 of *the Income Tax Assessment Act 1997* by parties to the cross staple arrangement. This choice has the effect of shielding the deduction for the payment of cross staple rent from the application of the General Anti-Avoidance Rules in Part IVA of the *Income Tax Assessment Act 1936*.

38. The facility remains subject to all other applicable tax laws, including Subdivision 275-L of the *Income Tax Assessment Act 1936* (that is, the non-arm's length income rule) and sections 12-441 to 12-445 of Schedule 1 to the *Taxation Administration Act 1953* (that is, the concessional cross staple rent cap).
39. For an approved economic infrastructure facility (or approved improvement) to benefit from the concession, the facility would need to involve an investment in land (including an interest in land) for the purpose, or primarily for the purpose, of deriving rent. The ATO's interpretation of the definitions of a facility and an economic infrastructure facility is relevant for determining whether a facility meets these requirements.
40. A decision by the Treasurer to approve the concession for the facility or improvement as being in the national interest should not be taken as an assurance or indication that a decision by other government bodies and agencies under other legislation, such as the *Foreign Acquisitions and Takeovers Act 1975*, will be favourable as well.

Application process - Examples

Example #1

Action	Process	Timing
A State Government resolves to construct then privatise a specific infrastructure facility (a toll road).		
<i>[State Government planning, funding and approvals processes.]</i>		
The State Government makes an application to Infrastructure Australia in support of a Commonwealth funding application.	Infrastructure Australia assesses proposal as being a 'high priority project'.	Typically 3 – 6 months
State Government makes an application to the Treasurer, via Treasury, for the Treasurer's approval for the concession. <ul style="list-style-type: none"> Application includes outcomes of Infrastructure Australia's assessment, details of the Commonwealth funding being sought and further information as required/appropriate. 	Treasury processes and assesses the application, seeks input from the ATO, Infrastructure Australia, Department of Infrastructure, Transport, Cities and Regional Development, Infrastructure and Project Financing Agency and other departments and agencies where relevant. Treasury provides advice to the Treasurer.	Note: These processes may take place simultaneously so that assessment periods may overlap in part.
The Treasurer makes a decision as to whether to grant the approval.	The Treasurer publishes their decision via a public announcement (if application successful) or informs the applicant directly (if application unsuccessful).	1 – 3 months
Treasury provides details of the outcome of the application to the Department of Infrastructure, Transport, Cities and Regional Development.	The outcome of the application for the concession is a consideration as part of the assessment process for any Commonwealth funding application.	

Example #2

Action	Process	Timing
A non-government lessee-operator of an economic infrastructure facility (a port) that is held in a stapled structure resolves to make an improvement to the facility (i.e. add a wharf), pending approvals and financing.		
<i>[Planning and approvals processes.]</i>		
The non-government lessee-operator makes an application for State Government funding.		
The non-government lessee-operator approaches Treasury to inquire about the concession. Treasury advises the non-government lessee-operator that 1) applications need to be made by an Australian government agency to the Treasurer, and 2) a final business case for the improvement needs to be submitted to Infrastructure Australia.		
The non-government lessee-operator makes an application to Infrastructure Australia in respect of the improvement to the facility.	Infrastructure Australia assesses proposal as being a 'priority project'.	Typically 3 – 6 months Note: These processes may take place simultaneously so that assessment periods may overlap in part.
The non-government lessee-operator collaborates with the State Government to make an application to the Treasurer, via Treasury, for the Treasurer's approval for the concession. <ul style="list-style-type: none"> Application includes outcomes of Infrastructure Australia's assessment, details of the State Government funding being sought and further information as required/appropriate. 	Treasury processes and assesses the application, seeks input from the ATO, Infrastructure Australia, Department of Infrastructure, Transport, Cities and Regional Development, Infrastructure and Project Financing Agency and other departments and agencies where relevant. Treasury provides advice to the Treasurer.	
The Treasurer makes a decision as to whether to grant the approval.	The Treasurer publishes their decision via a public announcement (if application successful) or informs the applicant directly (if application unsuccessful).	1 – 3 months

<p>Treasury provides details of the outcome of the application to the State Government.</p>	<p>The outcome of the application for the concession is a consideration as part of the assessment process for the State Government funding application.</p>	
<p>If the Treasurer’s approval is granted, the non-government lessee-operator liaises with the ATO to manage tax risks associated with implementation.</p>	<p>The ATO liaises with the non-government lessee-operator directly to manage tax risks associated with implementation, including in relation to the proportion of rent attributable to the approved improvement.</p>	

Application checklist

This checklist contains information that is required to be included in all applications. Significant delays in processing can be expected for applications that do not include information outlined in the checklist.

Please note: additional information requirements may be relevant to your application.

Information required:

- Specific details of the proposed new facility or improvement (any approval will attach to the proposal as outlined in the application).
- Information to establish or provide evidence that the application relates to an 'economic infrastructure facility'.
- A copy of the business case provided to Infrastructure Australia (including details as to the proposed capital expenditure on the new facility or improvement) (when available).
- Details of whether the project's business case has been positively assessed by the Infrastructure Australia Board and placed on Infrastructure Australia's Infrastructure Priority List as a 'High Priority' or 'Priority' project (when available).
- Details and a diagram of the actual or proposed corporate structure including ultimate beneficiaries and ownership holdings.
 - If one or more beneficiaries are (or are proposed to be) foreign, information should be included relating to the (likely) country where the beneficiaries are (or will be) tax residents.
 - If one or more beneficiaries are (or are proposed to be) a sovereign wealth fund or a foreign pension fund, the percentage of interests in the MIT that are (or are expected to be) held by those beneficiaries.
- Details of the funding proposal including whether the proposed new facility or improvement is expected to be funded by investor debt.
- Expected fund payment amounts (attributable to MIT cross staple arrangement income) to each beneficiary for the 15 years after the asset that is part of the facility is first put to use.
- In the case of an improvement to a facility, include amounts that are (if the approval is granted) estimated to be excepted MIT cross staple arrangement income (i.e. subject to a 15 per cent MIT withholding rate).
- The expected rate of return to each beneficiary for the 15 years after the asset that is part of the facility is first put to use.
- An estimated date on which the facility or improvement is expected to become operational.
- The financial accounting year and any substituted accounting period.
- Information as to whether the entities to the cross staple arrangement and any known ultimate investors in those entities are or have ever been non-compliant with Australian laws.
- Details of any other government assistance (from any government or government body) that has been sought or provided in relation to the same or similar infrastructure facility or improvement.

Information that may be included:

- Any further information related to the economic costs and benefits resulting from the facility (or improvement) or more broadly in relation to the projected impact of the proposal on the long-term productive capacity of the economy.
- Any other information that the applicant considers would assist the Treasurer in determining whether approving the concession for the facility or improvement is in the national interest.