

07 June 2013

Mr Tim Bryant  
Secretary  
Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Mr Bryant,

**Re: submission to the Senate Standing Committee on Economics Inquiry:  
*Tax Laws Amendment (2013 Measures No. 2) Bill 2013***

**1. Introduction**

On 30 May 2013, the Senate referred the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* to the Senate Standing Committee on Economics for inquiry and report. Schedule 2 of the Bill – Incentives for designated infrastructure projects – creates a new tax loss incentive aimed at encouraging private sector investment in nationally significant infrastructure.

The introduction of the new incentive will preserve the economic value of early-stage tax losses throughout an infrastructure project, and will provide much needed certainty to investors with respect to the recoupment of such losses.

Specifically, the new incentive will uplift the value of carry forward losses by the 10-year Government bond rate, and exempt the losses from the continuity of ownership test (COT) and the same business test (SBT).

Infrastructure Partnerships Australia (IPA) notes the progress of this measure so far, including the improvements to the Bill following consultation on the Exposure Draft.

However, further improvements to the Bill would help to ensure the incentive better reflects industry practice. Specific areas for attention are:

1. the exclusion of certain consolidated groups from the application of the incentive; and
2. ensuring that finance and stapled entities are not excluded from the incentive.

**2. About Infrastructure Partnerships Australia**

Infrastructure Partnerships Australia is the nation's peak infrastructure body. Our mission is to advocate the best solutions to Australia's infrastructure challenges, equipping the nation with the assets and services we need to secure enduring and strong economic growth and importantly, to meet national social objectives.

Infrastructure is about more than balance sheets and building sites. Infrastructure is the key to how we do business, how we meet the needs of a prosperous economy and growing population and how we sustain a cohesive and inclusive society.

Infrastructure Partnerships Australia seeks to ensure governments have the maximum choice of options to procure key infrastructure. We believe that the use of public or private finance should be assessed on a case-by-case basis. Infrastructure Partnerships Australia also recognises the enhanced innovation and cost discipline that private sector project management and finance can deliver, especially with large and complex projects.

Our Membership is comprised of the most senior industry leaders across the spectrum of the infrastructure sector, including financiers, constructors, operators and advisors. Importantly, a significant portion of our Membership is comprised of government agencies.

Infrastructure Partnerships Australia draws together the public and private sectors in a genuine partnership to debate the policies and priority projects that will build Australia for the challenges ahead.

### **3. Consolidated Groups**

Under the Bill, the head company of a consolidated group may be a designated infrastructure project (DIP) entity and eligible for the incentive, *“only if none of the members of the consolidated group carries on, or has ever carried on, activities that do not relate to the same DIP.”* Further *“the head company will stop being a DIP entity from the joining time if the joining entity carried on activities that did not relate to the head company’s DIP.”*

This drafting excludes certain consolidated groups from the incentive. IPA recommends that this be addressed to better reflect industry practice.

In practice, there could be circumstances where a member of a consolidated group suffers losses at a time when there is no income derived elsewhere in the consolidated group, against which to offset those losses. For example, an infrastructure fund that holds multiple infrastructure projects, all in the construction phase, could experience losses across all projects for several years before projects commence operations and generate revenue.

The current drafting would result in a superannuation fund or infrastructure focussed managed fund that invests in a number of DIPs being excluded from the incentive.

It would provide certainty for investors as to the recoupment of their losses, and therefore be in line with the objectives of the incentive, for entities in such circumstances to be able to quarantine losses within the project, to be offset against future income from that same project.

### **4. Stapled groups and special purpose finance entities**

It is important that stapled entities and special purpose finance entities aren’t excluded from the DIP entity eligibility criteria.

Example 2.11 in the Explanatory Memorandum (attached at Annexure A) provides for the inclusion of special purpose finance entities that are *“set up to manage finance for the project”* as eligible DIP entities, specifically referring to *“a special purpose vehicle established to source project finance for the group and to manage ongoing finance obligations.”* This is a welcome amendment to the Exposure Draft Legislation.

It would be preferable, however, if the reference to *“special purpose finance vehicles”* was included in footnotes in the legislation, rather than in the Explanatory Memorandum. There have been instances in the past when the Australian Tax Office (ATO) has not considered the Explanatory Memorandum in its rulings, and if this were the case with respect to the incentive, special purpose finance entities could still be excluded.

It would also provide further certainty to the industry if there was an explicit reference to the stapled structures that are regularly used in infrastructure investment.

## **5. Ancillary activities**

There are a number of activities that entities undertake in the normal course of an infrastructure project that, if the incentive was introduced in its Exposure Draft Legislation form, may have caused a project entity to fall outside of the eligibility criteria.

This has been corrected in the Bill, through the inclusion of Example 2.11 in the Explanatory Memorandum. IPA welcomes this change.

The drafting of the Exposure Draft Legislation for this incentive made it clear that to be deemed a *designated infrastructure project entity* (DIPE), *“the only activities in which the entity engages at the relevant time, or engaged before the relevant time, are or were for the purposes of the entity carrying on the infrastructure project.”* Furthermore, it was not clear that that drafting would have covered activities which are ancillary but nonetheless integral to *“carrying on the infrastructure project.”*

In order to remedy this and provide certainty for the industry, IPA recommended the inclusion of examples of allowable ancillary activities in the Explanatory Memorandum, and welcomes the inclusion of Example 2.11.

Again, it would be preferable if examples of allowable ancillary activities were included as footnotes in the legislation, to give project participants further certainty with respect to their losses.

## **6. Fixed trusts**

The incentive applies to a *“designated infrastructure project entity”* which can be *“a fixed trust or a company”* and we welcome the application of the incentive to fixed trusts.

However, the fixed trust regime is currently being reviewed, and the outcome of how this regime will apply and which types of entities will be considered fixed trusts is, at this stage, unclear. Currently, to be deemed a fixed trust and obtain certainty on this matter, an entity must seek a private ruling from the ATO, adding substantial regulatory burden and uncertainty.

While noting it is a separate area for reform, the changes to the fixed trust regime should be expedited and completed as soon as possible.

## **7. Further contact**

Should you require further information, I invite you to contact our Manager, Policy, Zoe Peters, on (02) 9240 2064.

Yours sincerely,

**BRENDAN LYON**  
CHIEF EXECUTIVE OFFICER

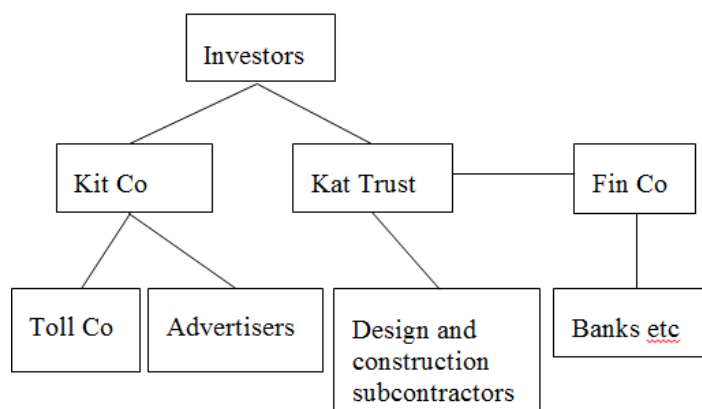
## **1. ANNEXURE A – EXAMPLE 2.11**

### **Example 1.1: Designated infrastructure project entities**

The Victorian State Government has applied for a major upgrade to an Interstate Highway to be designated as a DIP. The Coordinator provisionally designates the Interstate Highway Project. Kit Co successfully tenders for the project and applies to the Coordinator to finally designate the project. The Coordinator designates the project as set out in Kit Co's application for designation, including the design, construction, project management, holding assets for use in the design and construction of the upgrade to the Interstate Highway, financing through a related special purpose finance entity that will borrow money from a syndicate of third party banks, generating revenue through advertising along the road and operation and maintenance of the upgrade to the Interstate Highway as a designated infrastructure project.

Kit Co is responsible for the project management. Kit Co has secured finance from a number of lenders, including the Victorian Government and Farmer's Bank. Kit Co arranges for the loans to be made to a special purposes vehicle, Fin Co, which is set up to manage finance for the project, including applying for loans and on-lending to entities in the group and managing ongoing compliance with the requirements of the lenders under relevant facility documents (which Fin Co may arrange to be undertaken through the appointment of powers of attorney to other group entities). From time to time, Fin Co receives interest on the monies it holds prior to on lending the funds. Earning interest, while not a specifically listed activity in the project description, is incidental to the project's finance activities. Fin Co lends money to Kat Trust, which is stapled to Kit Co, to construct or purchase assets for the project and to lease them to Kit Co for the purpose of carrying on the project. During the course of the project, Kat Trust also engages a number of subcontractors to design and construct the project.

Kit Co earns revenue from the collection of tolls and engages Toll Co to collect tolls as agent on Kit Co's behalf. Kit Co also enters into a subcontract with Toll Co to operate and maintain the road. Kit Co earns income to partially fund its operating activities by placing advertising billboards on the side of the road.



Kit Co and Kat Trust will both be DIP entities (as long as they do not carry on any other activities) because they are each carrying on the project as designated by the Coordinator, that is (1) the project management, operation and maintenance, and (2) the design and construction, and holding and leasing of assets respectively. The fact that Kit Co earns income from advertising along the road does not prevent it from being a DIP entity because that activity has been designated by the Coordinator as being a relevant activity in carrying on the project (as set out in the business case put forward in Kit Co's application for designation). The entities that pay Kit Co to advertise their products, however, will not be DIP entities because they are not carrying on the project or a part of it as designated by the Coordinator.

Fin Co will also be a DIP entity as Fin Co's activities amount to carrying on the project as designated by the Coordinator. In particular, it is a special purpose vehicle established to source project finance for the group and to manage ongoing finance obligations. The fact that Fin Co may do so through the appointment of powers of attorney to other group entities does not affect this position.

The shareholders of Kit Co and unitholders of Kat Trust, who are also effectively providing finance for the project, do not qualify as DIP entities because they are not carrying on the DIP as designated by the Coordinator. The mere holding of shares/units is not carrying on an activity for the purposes of the project.

The banks that lend to Fin Co are also not DIP entities because they are not carrying on the DIP as designated by the Coordinator.

Whether the design and construction subcontractor qualifies as a DIP entity will depend on whether the subcontractor carries on the project or part of the project or is merely acting as agent for Kit Co (in addition, it could only be a DIP entity provided it is not carrying on, and has not carried on, other activities).

Toll Co will be a DIP entity, as it delivers project operation and maintenance services as subcontractor to Kit Co, provided it does not carry on, and has not carried on, other activities. The mere collection of tolls as agent on behalf of Kit Co would not itself qualify Toll Co as a DIP entity because those are legally the activities of Kit Co.

The Victorian State Government will not qualify as a DIP entity even if it is operating through a government enterprise that is a company or

fixed trust because it carries on other activities and would not benefit from the concessions in any case.