
Industry Research and Development Decision-making Principles 2011

Outline

1.1 Section 32A of the *Industry Research and Development Act 1986* (the Act) allows the relevant Minister to make, by legislative instrument, decision-making principles that Innovation Australia (which is 'the Board' and is established by section 6 of the Act) must comply with when deciding whether:

- to allow a thing to be given under Part III of the Act with a further period than that specified in Part III of the Act (extensions of time);
- refusing to make a finding sought under Part III of the Act is justified (findings);
- making a variation sought under Section 27M of the Act is justified (variation of registration).

1.2 The decision-making principles set out publicly the processes and relevant considerations for the Board to take account of when it makes any of the decisions listed above. The decision-making principles are intended to ensure transparency and consistency of decision making by the Board in relation to the matters listed above.

1.3 For clarity, references to the Board in the decision-making principles include a reference to a delegate of the Board (noting that the Board has the power to delegate powers to another person or committee under the Act). Further, words in the singular in the regulations should be read to include the plural (for example, 'activity' can also be read as 'activities'), and words in the plural should be read to include the singular (for example, 'activities' can also be read as 'activity').

1.4 The decision-making principles are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Consultation

1.5 The decision-making principles have been the subject of internal and public consultation processes. AusIndustry and the Australian Taxation Office (ATO), the administrators of the R&D Tax Incentive, contributed to the development of the decision-making principles through internal consultation processes in late 2010 and during 2011.

1.6 Public consultation was held between 11 July 2011 and 5 August 2011. Nineteen submissions were received, as well as feedback from the Tax Concession Committee of the Board. Interested parties were also given the opportunity to discuss the draft decision-making principles with officers from the Department of Innovation, Industry, Science and Research.

1.7 The main issues raised in public consultation were that:

- a number of proposed reasons listed for the Board to refuse to make various findings were unreasonable;
- the operation and application of the ‘injustice’ provisions needed to be clarified;

1.8 To address these issues, a number of proposed reasons for the Board to refuse to make findings have been deleted and others have been amended to ensure that all reasons for the Board to refuse to make findings are reasonable. The ‘injustice’ provisions have been removed and replaced with more practical and specific provisions relating to circumstances where the Board may allow extra time for a thing to be given under Part 3 of the decision-making principles, and where the Board should not refuse to make a finding under Part 4 of the decision-making principles.

Commencement

1.9 The decision-making principles commence on the first moment of the day after the day when the principles are registered on the Federal Register of Legislative Instruments [*Part 1, 1.2*].

Principles applying to decision-making under Parts 3, 4 and 5

1.10 The decision-making principles only apply to decisions by the Board in relation to extensions of time, refusing to make findings, and making variations to registrations. They do not apply to all decisions made by the Board in its administration of the R&D Tax Incentive *[Part 2, 2.1]*.

1.11 When making decisions in relation to any of the three matters described above, the Board is obliged to give an interested person an opportunity to present their case in the manner approved by the Board. In practice, this typically involves an interested person making a written submission to the Board *[Part 2, 2.2(1)]*.

1.12 An interested person is defined in the decision-making principles as any of the following:

- an applicant in relation to a matter under Part III of the Act;
- an R&D entity;
- an entity acting on behalf of an R&D entity in accordance with section 28B of the Act;
- a research service provider (RSP).

[Part 1, 1.3]

1.13 A person or entity may qualify as an interested person in more than one capacity. It is theoretically possible for an entity to fall within each of these categories at once.

1.14 The Board must consider all evidence and explanation given by or for the interested person in relation to the case. This includes considering any evidence and explanation provided by any third party acting in support of the interested person.

1.15 The Board must take into account all relevant considerations and disregard all irrelevant considerations in making its decision. Past and present behaviour by the interested person is deemed to be a relevant consideration. For example, if the interested person has previously refused to cooperate with the Board or unreasonably refused to provide information relevant to an application, the Board may take this into account. Relevant considerations may arise from various sources, including third parties. Previous cases may also be

considered relevant and the Board must take into account relevant decisions from those cases. *[Part 2, 2.2(2)]*

1.16 The Board must act in good faith and without bias (although these requirements do not prevent the Board from taking into account the past and present behaviour of the interested person) *[Part 2, 2.2(3)]*.

1.17 The Board must also base its decisions on the merits of the arguments and tested evidence put to it in the course of the decision-making process. Evidence will be considered ‘tested’ evidence where the Board is satisfied as to the veracity of the evidence. If two or more pieces of evidence are in conflict, the Board may need to investigate further to be satisfied as to the true state of things in relation to the particular issue. The Board may seek independent advice in relation to a case made by an interested person. *[Part 2, 2.3]*

Principles applying to decisions about extensions of time

1.18 Part III of the Act includes a number of deadlines for interested persons to comply with as part of the R&D Tax Incentive. The deadlines relate to:

- applications for registration;
- responding to a Board request for additional information;
- completion of forms for registration or continued registration as a Research Service Provider; and
- applications for a review of a reviewable decision.

[Part 3, 3.1]

1.19 An interested person may request that the Board consider their particular circumstances and decide whether those circumstances warrant the allowing of a further period to comply with the particular deadline. The Board will consider whether the interested person is entitled to a further period. If the Board considers that a further period is justified, it will then determine the duration of the further period to which the interested person is entitled.

1.20 While it is expected that the majority of interested persons will comply with the standard deadlines under the

program, the Board is aware that an extension of time may be justified in the case of exceptional circumstances, or in the case of very minor delays, in order to ensure that interested persons are not unduly or unjustifiably prevented from accessing the program.

When a further period must be given

1.21 The Board must allow a further period of time for an interested person to comply with a deadline if:

- prior to the relevant deadline, the interested person has provided the Board with an explanation of why a further period is required; and
- the further period requested is 14 days or less.

1.22 The intention of allowing this short further period is to avoid the need for the Board to make decisions about relatively trivial further periods, and to avoid the need for interested persons to submit to a process in order to secure a relatively trivial further period [*Part 3, 3.2(1)*].

1.23 It is not intended that this provision be regularly used to effectively extend all deadlines by 14 day. Habitual use of this provision by an interested person may be of concern to the Board, and may be taken into account by the Board under the ‘past behaviour’ rule in 2.2(2)(b) of the decision-making principles or as a risk factor under the R&D Tax Incentive compliance regime.

When a further period may be given

1.24 The remainder of the discussion of the decision-making principles that relates to extensions of time ignores the mandatory extension of time allowed when the conditions of 3.2(1) are met, and deals instead with the discretionary powers of the Board in relation to extensions of time.

1.25 The Board may allow a further period of time for an interested person to comply with a deadline if the act, omission or event that led to the interested person being unable to meet the relevant deadline was not:

- the fault of the interested person; and

- within the interested person's control.

Both conditions must exist for the Board to allow a further period. *[Part 3, 3.2(2)]*

1.26 An interested person whose own actions prevent them from meeting a deadline is generally not entitled to a further period. An interested person who is aware that circumstances within their control – that is, the interested person has the power to intervene in and correct the situation – will prevent them from meeting a deadline, but does not act, or act sufficiently, to meet the deadline is also generally not entitled to a further period.

Reason for further period

1.27 A wider variety of acts, omissions or events may cause an interested person to be unable to meet a deadline. The decision-making principles categorise these acts, omissions and events as:

- acts or omissions of the Board;
- acts or omissions of the interested person;
- acts or omissions of another person; or
- events for which no-one is responsible.

[Part 3, 3.3]

1.28 In making an application to the Board for a further period to allow a thing to be given, the interested person should inform the Board of the act, omission or event which has created the need for a further period and specify which of the four categories listed above the interested person believes is appropriate for their circumstances.

1.29 In considering the application, the Board will evaluate the act, omission or event nominated by the interested person and reach its own conclusion about why the need for the extension has arisen. Any evidence that the interested person can provide to support their case about why the need for the extension has arisen will be useful to the Board.

Act or omission by the Board

1.30 An interested person may request that they be allowed a further period because of an act or omission by the Board. An

act by the Board in this context may include, for example, the provision of incorrect information that an interested person relied upon to their detriment, or an incorrectly addressed letter that was never received by the interested person. *[Part 3, 3.3(a)]*

Act or omission by the interested person

1.31 An interested person may request that they be allowed a further period to comply with a deadline because of their own act or omission, or because of an act or omission of an individual acting on behalf of the interested person (with the interested person's express or implied authority). An interested person may, for example, make an act or omission as a result of an act or omission by a third party, or as a result of particular events. For example, an interested person's key personnel may fail to perform necessary functions, accidentally destroy key property or records, or cause a breakdown of the person's record keeping system. *[Part 3, 3.3(b)(i)]*

1.32 In considering an application in which an act or omission of the interested person is nominated as the cause of the need for a further period, the Board will consider whether the act or omission was the fault of, and within the control of, the interested person. If the Board decides to grant a further period, the Board is not obliged to agree to the amount of time requested by the interested person – the Board will grant a further period that it considers is reasonable in the circumstances.

Other reasons

1.33 Interested persons may request that they be allowed a further period for other reasons other than an act or omission by themselves or by the Board. Other reasons may involve the actions of third parties who do not act as agents of the interested person (including those who act directly against the interests of the interested person), or other events such as fire, floods, or cyclones which destroy documents, the death or illness of key personnel, or a problem that results in a failure of delivery of information (such as a computer system failure). *[Part 3, 3.3(b)(ii) and (iii)]*

Duration of further period

Act or omission by the Board

1.34 Where the Board has, by act or omission, caused the interested person to require a further period, the Board is obliged

to allow a further period that enables the interested person to be in the same position that they would have been had the act or omission not occurred. *[Part 3, 3.4(1)]*

1.35 In granting this further period, the Board is not obliged to agree to the amount of time requested by the interested person – the Board must grant a further period that it considers is reasonable in the circumstances. (That is, sufficient additional time that the Board considers is reasonable to allow the interested person to place themselves in the same position they would have been in if the act or omission had not occurred).

1.36 While the Board may allow less extra time than requested by an interested person, the Board may also allow more time than was requested if it is of the view that the interested person will require more time than has been requested and that this additional time is justified. *[Part 3, 3.4(2)]*

Other reasons

1.37 If an extension of time is being sought for reasons other than an act or omission of the Board and the Board is satisfied that a further period is warranted, the Board must take into account (in addition to any other relevant considerations):

- the amount of time, if any, that has passed between the original deadline and the application by the interested person requesting the further period; and
- the amount of time that has or will pass between the original deadline and the deadline proposed by the interested person.

[Part 3, 3.5(1)]

1.38 The Board will generally look more favourably on requests which are made before the relevant deadline has passed, unless the interested person can justify, in the circumstances, a request being made after the relevant deadline.

1.39 Where the Board considers that a further period is justified, it must be satisfied that the amount of extra time allowed is in proportion to the level of inability of the interested person to meet the original deadline. For example, the unexpected absence of the interested person's key staff for a month at a critical time of year will normally justify a longer extension of time compared to the unexpected absence of key

staff for a week at a critical time of year. In other circumstances, the unexpected absence of key staff for a week at a critical time may have a greater impact on an interested person's ability to meet a deadline than an unexpected absence of key staff for a month during a non-critical time. [Part 3, 3.5(2)]

1.40 Where an interested person applies for an extension of time, other than for the reason of an act or omission of the Board, the interested person must be able to justify the amount of additional time that has been requested. The longer the additional period of time requested is, the stronger the explanation and evidence must be to justify the Board granting the requested further period. For example, a request for a significant amount of additional time may need to be supported by evidence from a third party (such as an insurance assessment in relation to fire damage). [Part 3, 3.5(3)]

Effect of extensions of time on findings

1.41 When considering whether to allow a further period to an interested person, the Board must balance the case for allowing the further period with the impact that further period may have on the ability of the Board to make a finding mentioned in subsections 355-705(1) and 355-710(1) of the *Income Tax Assessment Act (ITAA) 1997* within the time specified in those sections.

1.42 This rule may cause the Board to allow an extension of time of a lesser duration, or to not permit any extension of time, than would have otherwise been the case [Part 3, 3.6].

Principles applying to decisions about findings

1.43 Part III of the Act allows interested persons and the Commissioner of Taxation (the Commissioner) to request that the Board make findings. Findings are the Board's formal decision as to whether or not:

- activities are R&D activities, or will be R&D activities when they are conducted;
- activities satisfy the conditions to be activities conducted outside Australia; and/or
- technology constitutes core technology.

Findings by the Board are binding on the Commissioner when determining whether expenditure incurred in relation to the activities or technology is R&D expenditure or core technology expenditure for the purposes of Division 355 of the *ITAA 1997*.

1.44 Part III of the Act allows the Board to refuse to make a finding in relation to:

- a request by an R&D entity for one or more findings about a registration;
- a request by an R&D entity, or an entity acting on behalf of an R&D entity under section 28B of the Act, for one or more advance findings about the nature of activities;
- a request by an R&D entity for one or more findings about activities to be conducted outside Australia; and/or
- a request by an R&D entity for one or more findings about whether technology constitutes core technology.

[Part 4, 4.1]

1.45 The Board may decide, if justified, to refuse to make a finding on all or part of the activities or technology contained in a finding request by an interested person. That is, a refusal to make a finding may apply to any part of a request by an interested person, as well as to the request in its entirety. However, the Board must make a finding in relation to these matters if requested to do so by the Commissioner.

1.46 The Board may determine for itself what constitutes an activity or technology. That is, the Board need not agree with the R&D entity as to what constitutes a particular activity or technology.

When refusal to make a finding is justified

1.47 There are a number of circumstances in which the Board is justified in refusing to make a finding. The reasons discussed below constitute an exhaustive list – if the Board cannot refer to one or more of these reasons, it is obliged to make a finding. If more than one reason exists that justifies a refusal to make a finding, the Board should make each of these reasons clear to the applicant to ensure that the applicant has a full understanding of the Board’s decision. This will ensure review processes to operate appropriately and efficiently.

1.48 The Board is justified in refusing to make a finding if:

- the entity that is applying for the finding or who is the subject of the finding is not an R&D entity; or
- the entity that is applying for the finding is not an entity that is authorised to act on behalf of an R&D entity under section 28B of the Act.

This will prevent the Board being subject to requests for findings, and making findings, for entities in relation to which findings cannot be made. *[Part 4, 4.2(1)(a)]*

1.49 The Board is justified in refusing to make a finding if the Board determines that it has already made a finding, or is in the process of making a finding, about the same or substantially similar activities or technology for the R&D entity. This is intended to prevent an applicant repeatedly requesting findings about the same or similar activities or technology in the hope of receiving a favourable outcome. *[Part 4, 4.2(1)(b)]*

1.50 The Board is justified in refusing to make a finding if the Board has previously refused to make a finding about particular activities or technology for the applicant and the applicant is unable to show that the Board's reason for refusing no longer applies. If the reason for the original refusal no longer applies, the Board may nevertheless refuse to make a finding about the particular activities or technology if another relevant ground for refusal applies. *[Part 4, 4.2(1)(c)]*

1.51 The Board is justified in refusing to make a finding if the finding would cover a period where the applicant is a subsidiary member of a consolidated group or multiple entry consolidated group (MEC group) of which the head company is an R&D entity. This is to ensure that the applicant in this circumstance is the head company as the head company, not the subsidiary member, will be the appropriate applicant. *[Part 4, 4.2(1)(d)]*

1.52 The Board is justified in refusing to make a finding if the applicant has:

- submitted an incomplete application form; or
- incorrectly filled out the application form; or

- provided information that is insufficient to meet the requirements of the application form.

This is to ensure that the Board's is not required to seek further information where that information should have been provided by the applicant in the first instance, and to ensure that the applicant gives proper consideration to their application.

[Part 4, 4.2(1)(e)]

1.53 The Board is justified in refusing to make a finding if the applicant does not provide further information as requested by the Board within the period permitted. This rule is intended to ensure that applicants are genuine and that applicants cooperate with the Board in the making of a finding.

[Part 4, 4.2(1)(f)]

1.54 The Board is justified in refusing to make a finding if the applicant does not pay the relevant fees (if any) associated with lodging an application *[Part 4, 4.2(1)(g)]*.

1.55 The Board may refuse to make any finding, other than a finding about activities conducted or to be conducted outside Australia under section 28C of the Act, if:

- the Board has released public advisory material or a general public finding about activities which are the same or substantially similar to the activities on which the Board has been asked to make a finding;
- the R&D entity can reasonably rely on the relevant material or finding in relation to their own activities; and
- the Board has referred the applicant to the relevant material or finding on the Board's website or otherwise provide a copy of that material or finding to the applicant.

1.56 It will be reasonable for an R&D entity to rely on public advisory material or a general public finding where the material or finding relates to a situation that is substantially similar to the R&D entity's own position.

1.57 This rule is intended to prevent public advice from the Board leading to an influx of requests for findings seeking formal confirmation that the public advice applies to particular circumstances. The rule does not allow the Board to avoid responding to all such requests, and the Board should respond to

requests for findings where there is genuine doubt as to whether the public advice applies or does not apply. *[Part 4, 4.2(2) and (3)]*

Refusal to make an advance finding

1.58 The Board may also refuse to make an advance finding about the nature of activities in certain circumstances.

1.59 Where a request for an advance finding is made about specified supporting activities, the Board may refuse to make an advance finding if it is not satisfied that:

- the activities claimed to be core R&D activities to which the specified supporting R&D activities relate would meet the definition of core activity in section 355-25 of the *ITAA 1997*; or
- the R&D entity has conducted the specified core R&D activity, or intends to conduct the specified core R&D activity.

[Part 4, 4.3(2)]

1.60 The Board may scrutinise specified core R&D activities which are outside the scope of the advance finding in order to be satisfied as to nature of the specified supporting R&D activities about which the finding will be made. The Board does not need to make a finding about the nature of the specified core R&D activities to be satisfied.

1.61 In considering whether the R&D entity intends to conduct specified core R&D activities, the Board may wish to examine the R&D entity's R&D plans, including plans for the R&D project of which the specified core R&D activities are a part.

1.62 The Board may refuse to make an advance finding if the Board is not satisfied that the activities for which the advance finding is sought will be conducted within the time in which the advance finding would be in force. That is, the activities will not be conducted within the current or subsequent two income years. *[Part 4, 4.3(3)]*

1.63 The Board may refuse to make an advance finding if the Board is not satisfied that the R&D entity on whose behalf the application is made has investigated the state of the art in relation to the field relevant to the activity about which the

finding is requested to be made. To prevent the Board refusing to make an advance finding on this basis, the applicant should include in the application some evidence of its investigations.

[Part 4, 4.3(4)]

Refusal to make a finding about activities to be conducted outside Australia

1.64 The Board, when deciding whether to make a finding about activities to be conducted outside Australia, may also refuse to make such a finding in certain circumstances.

1.65 Specifically, the Board may refuse to make a finding about overseas activities if the R&D entity does not provide evidence or an independent opinion that the activities cannot be conducted solely in Australia or the external Territories. In a situation where the reason why activities cannot be conducted solely in Australia or the external Territories is relatively straightforward and can be demonstrated by supporting evidence, an independent opinion will generally not be required. However, an independent opinion may be required in circumstances where it is not clear why activities cannot be conducted solely in Australia or the external Territories and there is no supporting evidence that objectively establishes that this is the case. *[Part 4, 4.4(a)]*

1.66 The Board may also refuse to make a finding about overseas activities if the estimates provided by the R&D entity about the actual or reasonably anticipated expenditure are not, in the opinion of the Board, reasonable estimates. Reasonably anticipated expenditure for this purpose is expenditure that the R&D entity has a rational and objective basis to expect that it will incur (even though, given the unpredictable nature of R&D activities, it is possible that actual expenditure incurred will be more or less than what was originally estimated). The Board must have confidence in the estimates in order to determine whether the Australian core activities and supporting activities will entail a greater financial commitment than the overseas activities. *[Part 4, 4.4(b)]*

When refusing to make a finding is not justified

1.67 To help ensure the smooth operation of the findings process, in certain circumstances the Board should, despite being justified in refusing to make a finding under Part 4 of the decision-making principles, refrain from exercising its right to do so.

1.68 The Board may not refuse to make a finding whenever an interested person has confirmed they are immediately able to address the reason for the Board to refuse to make the finding. For example, an interested person has provided additional information to the Board slightly later than requested. While the Board has the right to refuse to make a finding requested by the interested person, the finding should be made as requested. *[Part 4, 4.5]*

1.69 The intention of this limitation on the Board is to prevent a formal process being begun – a refusal, followed by a request for review, or a formal resubmission of the finding request – when a minor administrative effort can quickly address the problem and allow the finding process to proceed.

Principles applying to decisions about variation of registration

1.70 An R&D entity has up to ten months from the end of an income year to submit an application to register R&D activities it conducted in that income year in order to claim the R&D tax offset.

1.71 The Act allows an R&D entity to apply for a variation to their registration under section 27M of the Act. The Board must, under paragraph 27M(1)(c) of the Act, apply the decision-making principles in deciding whether a variation to an R&D entity's registration is justified *[Part 5, 5.1]*.

1.72 In order to vary a registration, the Board must be satisfied that the requested variation is consistent with any valid findings it has made under Part III of the Act, and the variation is justified in accordance with the decision-making principles.

1.73 The Board may request additional information from the R&D entity to assist with its decision, if necessary. Such a request may be made in the same way as a request under section 27E of the Act (that is, the Board may request specified information, or kinds of information, and may ask that the information be given in an approved form and within a prescribed timeframe).

1.74 It is not possible to add activities to a registration as part of the variation process. Additional activities can only be added through the normal application process. If the applicant

seeks to add additional activities outside of the normal registration period, they will need to request a further period to register the activities under subparagraph 27D(c)(ii) of the Act.

1.75 A registration that has been varied, either because of a Board finding or on request of the entity, is deemed always to have existed as varied. This rule reflects the fact that although activities may have been miscategorised by the R&D entity in its registration application, the Board's decision does not itself change the nature of the activities. While an entity is able to rely upon self assessment to register activities, if those activities are later found by the Board to have been ineligible, the entity cannot purport to claim expenditure in relation to those activities in the registration year. This rule also prevents the administrative complexity that would result from maintaining two or more different variations of the same registration during one income year.

When a variation may be made

1.76 There is a distinction made between variation requests made before the ten month deadline and after the ten month deadline.

- Before the ten month deadline an R&D entity can submit only one R&D application but can choose to submit multiple variations to the application without limitations placed on what may be varied. Unless a contrary finding is made, the Board is obliged to process the applications for variation and amend the R&D entity's registration application according to the R&D entity's wishes.
[Part 5, 5.2(1)]
- After ten months from the end of the income year an R&D entity can still apply for variations, but the Board will accept variations only in particular circumstances
[Part 5, 5.2(2)].

1.77 There are no limitations on variations made before the ten month deadline to avoid penalising any R&D entities who submit an application for registration ahead of the ten month deadline.

1.78 Except for minor corrections, the Board must not vary a registration where the activities specified in the application are:

- within the review period allowed under subsection 30C(3) of the Act;
- the subject of an internal review under section 30D of the Act; or
- the subject of review by the Administrative Appeals Tribunal (AAT) under section 30E of the Act.

[Part 5, 5.2(3)]

When a variation is justified

1.79 The Board may allow a variation of an R&D entity's registration after the 10 month deadline only if the application:

- seeks removal of all or part of an activity from the R&D entity's registration;
- seeks to change the times during which all or part of an activity occurred (without increasing the length of time during which an activity occurred) or reducing the length of time during which an activity occurred;
- seeks to reclassify all or part of an activity as a core or supporting R&D activity; and/or
- seeks minor amendments to correct information provided in the application.

[Part 5, 5.3]

1.80 Minor amendments to correct information provided on an application may be, for example, a change of address or change in the number of researchers.

Decision not to vary

1.81 If the entity applies for a variation after the Board begins a process to make a finding under section 27J of the Act, the Board has the right to refuse to make a variation. The Board's decision should be based on whether the Board believes it is appropriate to complete the findings process before considering the application for variation. For example, if the Board believes the R&D entity has deliberately applied to have activities registered which were never in fact conducted, it may prefer to make a formal finding to that effect, rather than accept

a variation application from the R&D entity to remove those activities from the registration *[Part 5, 5.4(1)]*.

1.82 This rule does not apply if the variation only involves a minor amendment to the application *[Part 5, 5.4(2)]*.