



Industry Research and Development Decision-making Principles 2011¹

Industry Research and Development Act 1986

I, KIM CARR, Minister for Innovation, Industry, Science and Research, make these Decision-making Principles under section 32A of the *Industry Research and Development Act 1986*.

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Part 1 Preliminary

1.1 Name of Principles

These Principles are the *Industry Research and Development Decision-making Principles 2011*.

1.2 Commencement

These Principles commence on the day after they are registered.

1.3 Definitions

In these Principles:

Act means the *Industry Research and Development Act 1986*.

interested person means any of the following:

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

Note Several other words used in these Principles have the meaning given by the Act, for example:

- Board
- core R&D activities
- income year
- MEC group
- R&D activities
- R&D entity
- research service provider
- supporting R&D activities.

1.4 Overview of Principles

- (1) Part 2 sets out general decision-making principles that must be complied with by the Board when making any decision under Part III of the Act that requires that decision to be made in accordance with these Principles.
- (2) Part 3 sets out extra principles that must be complied with when the Board is deciding whether to allow a thing to be given under a provision in Part III of the Act within a further period than that specified in the provision. The extension of time may relate to any of the following:
 - (a) an application to register R&D activities;
 - (b) further information requested by the Board;
 - (c) a form to continue registration as a research service provider;

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- (d) an application for review of a reviewable decision.
- (3) Part 4 sets out extra principles that must be complied with when the Board is deciding whether refusing to make a finding sought under a provision in Part III of the Act is justified. The finding may relate to any of the following:
- (a) examination of an entity's registration;
 - (b) advance findings about an activity;
 - (c) conduct of activities outside Australia;
 - (d) whether technology is core technology.
- (4) Part 5 sets out extra principles that must be complied with when the Board is deciding whether making a variation of an entity's registration following an application under section 27M of the Act is justified.

Part 2 Principles applying to certain decisions under Part III of Act

2.1 Application

The principles set out in this Part apply to all decisions of a kind mentioned in paragraphs 32A (a), (b) and (c) of the Act.

2.2 Proper decision-making process

- (1) The Board must give an interested person an opportunity to present the person's case in a manner approved by the Board.
- (2) The Board must give proper consideration to the case before it by:
 - (a) considering the evidence and any explanation given by or for the interested person about the case; and
 - (b) taking all relevant considerations into account, including the interested person's past or present behaviour; and
 - (c) not taking an irrelevant consideration into account; and
 - (d) considering relevant precedents from similar cases.
- (3) The Board must consider the case in good faith and in an unbiased manner.

2.3 Making the decision

Decisions of the Board must be based on the following:

- (a) the merits of the particular case;
- (b) the tested evidence;
- (c) all relevant considerations.

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Part 3 Principles applying to decisions about extensions of time

3.1 Application

- (1) The principles set out in this Part apply to decisions made under subparagraph 27D (c) (ii), paragraphs 27E (2) (b), 27H (2) (b), 28H (2) (b), 29C (5) (b), 29E (2) (b) and 30C (3) (b) and subsections 27M (3) and 29F (3) of the Act.
- (2) For this Part, the provisions of the Act mentioned in subsection (1) are *relevant provisions*.

3.2 When extension of time must, or may, be given

- (1) The Board must allow a thing to be given by an interested person within a further period of up to 14 days if, before the thing is due to be given (as specified in the relevant provision of the Act), the interested person explains to the Board:
 - (a) why the thing cannot be given by the time specified in the relevant provision of the Act; and
 - (b) that the thing can be given to the Board within 14 days after that specified time.
- (2) The Board may also allow a thing to be given by an interested person within a further period only if the act, omission or event that led to the need for the further period was not the fault of the interested person and was not within the interested person's control.

3.3 Considering reason extension of time is required

When considering whether to allow a thing to be given by an interested person within a further period under subsection 3.2 (2), the Board must decide, based on information given to the Board by the interested person, if the need for the further period has arisen because of:

- (a) an act or omission of the Board; or
- (b) any other reason, including the following:
 - (i) an act or omission of the interested person;
 - (ii) an act or omission of another person;
 - (iii) an event for which no one is responsible.

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3.4 If there is an act or omission of the Board

- (1) For paragraph 3.3 (a), if the need for the further period has arisen because of an act or omission of the Board, the Board must allow a further period that enables the interested person to be in the same position that the person would have been in if the act or omission had not occurred.
- (2) The further period mentioned in subsection (1) must be reasonable in the circumstances and may be a period other than a period requested by the interested person.

Examples of acts or omissions of the Board

- 1 Provision of incorrect information that is detrimental to the interests of the interested person.
- 2 Failure to correctly address correspondence to the interested person.

3.5 If there is some other reason an extension is required

- (1) For paragraph 3.3 (b), if the need for the further period has arisen because of a reason other than an act or omission of the Board, the Board, in considering the further period to be allowed, must take into account:
 - (a) any delay by the interested person in requesting the further period and the reasons (if any) for that delay; and
 - (b) the amount of time that will pass between when the thing is due to be given (as specified in the relevant provision of the Act) and when the interested person proposes that it should be given.
- (2) The Board must be satisfied that any extension of time it allows is in proportion to the severity of the interested person's level of inability to give the thing at the time specified in the relevant provision of the Act.
- (3) For subsection (2), the longer the further period of time requested by the interested person:
 - (a) the higher the level of inability of the interested person to give the thing at the time specified must be; and
 - (b) the stronger the evidence of the level of inability the interested person must provide.

3.6 Effect of extension on findings

In deciding whether to allow a thing to be given by an interested person within a further period under Part III of the Act, the Board must consider whether allowing the further period would mean that a finding mentioned in subsection 355-705 (1) or 355-710 (1) of the *Income Tax Assessment Act 1997* could not be properly made by the Board within the time specified in the subsection.

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Part 4 Principles applying to decisions about findings

4.1 Application

- (1) The principles set out in this Part apply to decisions made under paragraphs 27F (4) (b), 28A (1) (d), 28C (1) (c) and 28E (1) (c) of the Act.
- (2) A refusal to make a finding is justified only if the finding is refused in accordance with this Part.

4.2 When refusal to make a finding is justified

- (1) A refusal to make a finding about all or part of an activity or technology for an activity is justified if any of the following circumstances applies:
 - (a) the applicant is not an R&D entity or entity acting on behalf of an R&D entity in accordance with section 28B of the Act;
 - (b) a finding has already been made, or is in the process of being made, for the R&D entity in relation to the activity or technology, or a substantially similar activity or technology;
 - (c) the Board has previously refused to make a finding for the R&D entity in relation to the activity or technology, or a substantially similar activity or technology, and the entity is unable to show that the previous reason for refusal does not apply;
 - (d) the activity is conducted or technology is used during a period when the R&D entity making the application is a subsidiary member of a consolidated group or MEC group and the head company of the group is also an R&D entity;
 - (e) if an application form is required in relation to the finding — the application form that has been submitted does not contain all the information required by the form;
 - (f) if the Board has requested further information under section 27H or 28H of the Act — the information has not been provided in accordance with that section;
 - (g) if a fee must accompany an application under section 27G or 28G of the Act — no fee has accompanied the application.
- (2) Also, for decisions under paragraphs 27F (4) (b), 28A (1) (d) and 28E (1) (c) of the Act, a refusal to make a finding about an activity or technology for an activity is justified if:
 - (a) the Board has made available on its website public advisory material or a general public finding about whether an activity is a core R&D activity or a supporting R&D activity; and

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- (b) the advisory material or public finding:
 - (i) relates to a finding of the kind that is the subject of the application; and
 - (ii) could reasonably be relied upon by the R&D entity; and
 - (c) the Board refers the R&D entity to the advisory material or public finding on the website.
- (3) However, subsection (2) does not apply in relation to a decision under paragraph 28A (1) (d) of the Act if the application for a finding is made to meet the condition in subsection 28D (1) of the Act.

4.3 Refusal to make an advance finding

- (1) Also, for a decision under paragraph 28A (1) (d) of the Act, a refusal to make an advance finding about all or part of an activity is justified if the circumstances in subsection (2), (3) or (4) apply.
- (2) The circumstances are that for an application for an advance finding under paragraph 28A (1) (b) of the Act, the Board is not satisfied that the R&D entity has shown:
- (a) that the activity claimed to be a core R&D activity would be a core R&D activity; or
 - (b) that the R&D entity has carried out, or intends to carry out, that activity.

Note Paragraph 28A (1) (b) of the Act allows the Board to find that all or part of an activity is a supporting R&D activity in relation to one or more specified core R&D activities for which the R&D entity making the application has been or could be registered for an income year.

- (3) The circumstances are that the Board is not satisfied that the activity will be conducted within the current or subsequent 2 income years.
- (4) The circumstances are that the Board is not satisfied that the R&D entity has shown that the entity has, when making the application for the finding about an activity, investigated the state of the art in relation to the field relevant to the activity.

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

Also, for a decision under paragraph 28C (1) (c) of the Act, a refusal to make a finding about all or part of an activity is justified if:

- (a) the R&D entity does not provide evidence or an independent opinion that the activity cannot be conducted solely in Australia or the external Territories; or
- (b) the Board is not satisfied that the R&D entity's estimate of the total actual and reasonably anticipated expenditure on the activity for the purposes of subsection 28D (5) of the Act is a reasonable estimate.

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4.5 When refusal to make finding is not justified

- (1) If:
- (a) a refusal to make a finding is otherwise justified under sections 4.2 to 4.4; and
 - (b) the Board considers that the interested person may be able to quickly resolve the problem leading to the circumstances that the Board would rely on to refuse to make the finding;
- the Board must ask the interested person if the person can resolve the problem quickly.
- (2) If the interested person quickly resolves the problem in a manner that satisfies the Board that the circumstances no longer exist, a refusal to make the finding is not justified.

Example

A person makes an application for a finding, but the application does not contain all the information required by the form. Under paragraph 4.2 (1) (e), the Board could refuse to make a finding. However, when contacted by the Board, the person is immediately able to provide the missing information in a manner that satisfies the Board.

Part 5 Principles applying to decisions about variation of registration

5.1 Application

- (1) The principles set out in this Part apply to a decision made under paragraph 27M (1) (c) of the Act.
- (2) Making a variation of a registration is justified only if the registration is varied in accordance with this Part.

5.2 When a variation of registration may be made

- (1) The Board may make a variation of an R&D entity's registration under section 27A of the Act for an income year within 10 months after the end of the income year.
- (2) After the period mentioned in subsection (1), the Board may make a variation of an R&D entity's registration only if it is justified under section 5.3.
- (3) Except as provided in paragraph 5.3 (d), the Board must not make a variation of an R&D entity's registration under section 27A of the Act:
 - (a) during the period that an application for review of a reviewable decision may be made under subsection 30C (3) of the Act; or
 - (b) while a reviewable decision is the subject of internal review under section 30D of the Act; or
 - (c) while a reviewable decision is the subject of external review under section 30E of the Act.

5.3 When a variation is justified

A variation of an R&D entity's registration is justified if any of the following circumstances applies:

- (a) the application seeks removal of all or part of an activity from the entity's registration;
- (b) the application involves a change of the time when an activity occurred (without increasing the time during which an activity occurred) or reducing the length of time during which an activity occurred;
- (c) the application seeks to reclassify all or part of an activity from a core R&D activity to a supporting R&D activity or vice versa;
- (d) the entity applies only to make minor amendments to correct information provided in the application for registration.

Example for paragraph (d)

Change of address or number of researchers.

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5.4 Decision not to vary

- (1) However, the Board may decide not to make a variation to an R&D entity's registration if:
 - (a) the R&D entity applies for the variation after the Board commences examination of the entity's registration for the purpose of making a finding under section 27J of the Act; and
 - (b) the Board considers it appropriate in the circumstances of the case to make the finding under section 27J of the Act before considering the application for variation.
- (2) Subsection (1) does not apply to a variation mentioned in paragraph 5.3 (d).

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.