

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Industry, Energy and Emissions Reduction

Industry Research and Development Act 1986

Industry Research and Development Regulations 2022

Purpose and Operation

The *Industry Research and Development Regulations 2022* (the Regulations) replace the *Industry Research and Development Regulations 2011* (the 2011 Regulations), which were due to sunset on 1 April 2022. The Regulations are a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

The *Industry Research and Development Act 1986* (the Act) provides the legal framework for the administration of Industry Innovation and Science Australia (the Board) and its committees, functions relating to the Research and Development (R&D) tax offset (hereby referred to as the R&D Tax Incentive), and programs relating to industry, innovation, science and research.

Part III of the Act sets out the functions of the Board, the Minister and other parties relating to the R&D Tax Incentive. These functions include registration of R&D activities, findings relating to the registration of R&D activities, registration of research service providers, and review of decisions made by the Board.

For the purposes of Part III of the Act, the Regulations provide for the matters to be set out in certificates of finding made by the Board and its delegates, the criteria for registration of a research service provider, the conditions of registration of a research service provider, the listed entities which may apply for advance findings on behalf of a R&D entity and particular information that must be required in approved forms for applications and requests for further information.

The Regulations are the same in substance as the 2011 Regulations, with minor technical changes to reflect current drafting practices and to update a limited number of definitions and sections that would provide clarity for the Board and stakeholders.

Details of the Regulations are set out at **Attachment A**.

Background

The Regulations support the administration of the R&D Tax Incentive by setting out the detail of requirements, criteria and conditions in relation to the matters listed above to assist program users better understand their rights and obligations.

References to the Board in the Regulations includes a reference to a delegate of the Board (noting that the Board has the power to delegate its powers under the Act to another person or committee). Further, words in the singular in the Regulations should be read to include the

plural (that is, 'activity' can also be read as 'activities'), and words in the plural should be read to include the singular (that is, 'activities' can also be read as 'activity').

Authority

This instrument is made under section 48 of the Act, which provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters that are required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Consultation

The Department of Industry, Science, Energy and Resources (the department) consulted with the Office of Parliamentary Counsel, the Attorney General's Department, the Treasury, the Australian Tax Office, the Australian Bureau of Statistics (ABS) and the Australian Small Business and Family Ombudsman.

Stakeholder consultation was conducted by the department via the R&D Tax Incentive website between 25 August 2021 and 27 September 2021. Stakeholders were requested to provide feedback on the remaking of the 2011 Regulations with only minor changes to drafting and some definitions. While recommendations were made to make changes to some definitions and conditions, the consultation identified that remaking the Regulations in this form was broadly supported. These recommendations have been addressed in the Regulations.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has assessed that remaking the instrument without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business. As such, a Regulatory Impact Statement is not required. The OBPR reference number is 44680.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at **Attachment B**.

Details of the *Industry Research and Development Regulations 2022*

PART 1 – PRELIMINARY

Section 1.01 – Name

This section provides that the name of the instrument is the *Industry Research and Development Regulations 2022*.

Section 1.02 – Commencement

This section provides that the Regulations commence on the day after registration.

Section 1.03 – Authority

This section provides that the Regulations are made under the *Industry Research and Development Act 1986* (the Act).

Section 1.04 – Schedules

This section provides that each instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 1.05 – Definitions

This section provides for definitions of terms used in the Regulations that are in addition to those defined in the Act. These definitions of terms are consistent with the 2011 Regulations. The note to the section heading clarifies that a number of expressions used in the Regulations are defined in the Act, and apply to the Regulations consistent with their definition in the Act.

Section 1.06 – Research field

This section provides for the definition of ‘research field’ for the purposes of subsection 4(1) of the Act. Research field is defined as a field of research classification mentioned in the Australian and New Zealand Standard Research Classification (ANZSRC) 2020, as it exists at the time the Regulations commence. The ANZSRC 2020 is a statistical classification used for the measurement and analysis of research and development in Australia and New Zealand and can be freely accessed and used on the Australian Bureau of Statistics (ABS) website (www.abs.gov.au).

This definition was updated to replace references to ANZSRC 2008 with ANZSRC 2020, which was released on 30 June 2020 and includes significant updates to the classification. The ABS website includes the previous releases of the ANZSRC from 2008, 1998 and 1993. In accordance with the transitional provision in section 5.01 of the Regulations, the ANZSRC 2008 apply until 30 June 2022. From 1 July 2022, the ANZSRC 2020 apply.

PART 2 – Matters to be set out in certificates for findings

This Part would apply to findings under Part III of the Act about the nature of an R&D entity's activities both before and after registration for the purposes of assessing an entitlement for the R&D Tax Incentive under Division 355 of the *Income Tax Assessment Act 1997* (ITAA 1997). This Part provides for the matters to be set out in certificates of finding for the following findings:

- findings under section 27B of the Act about an R&D entity's application for registration;
- findings under section 27J of the Act about an R&D entity's registration;
- advance findings under section 28A of the Act about the nature of activities being conducted in the current income year and/or the subsequent two income years; or
- findings under section 28E of the Act about whether particular technology is core technology.

The prescribed matters for each finding under Part 2 of the Regulations help ensure that certificates of finding consistently contain key details and information. This ensures that registrants are able to clearly understand the findings about their activities and that the Commissioner of Taxation (the Commissioner) would be able to distinguish between activities that are (or are not) captured by findings when considering an R&D entity's eligibility to claim notional deductions under the R&D Tax Incentive.

The requirements for certificates apply to certificates included in notices issued after commencement of the Regulations. Although a certificate may be issued in relation to a decision made before or after commencement, the Regulations do not have retrospective effect and section 12 of the *Legislation Act 2003* is not engaged. The requirement to set out the prescribed matters in the certificate does not have any substantive effect on the finding or manner in which it was reached.

Section 2.01 – Certificate for finding about application for registration and certificate for finding about registration

This section sets out the matters, additional to those specified in subsections 27C(2) and 27K(2) of the Act, that the Board must include in certificates of finding about an R&D entity's application for registration and a certificate for finding about an R&D entity's registration. The prescribed matters are:

- details to identify the R&D entity;
- details, where relevant, of the member of a consolidated group or multiple entry consolidated (MEC) group that conducted the activity or had services provided to it;
- the times to which the finding relates, where relevant; and
- the core R&D activities to which any supporting R&D activities relate.

The requirements in section 2.01 apply to certificates included in notices after the commencement of this instrument, in relation to findings made before or after commencement. The Board may exercise discretion to also include matters in a certificate for finding in addition to those specified in section 2.01.

Section 2.02 – Certificate for advance finding

This section sets out the matters, in addition to those specified in paragraph 28F(3)(e) of the Act, that the Board must include in a certificate for an advance finding about the nature of activities for the purposes of subsection 28A(1) of the Act. The prescribed matters are:

- details to identify the R&D entity;
- details, where relevant, of the member of a consolidated group or MEC group that conducted the activity or had services provided to it;
- the times to which the finding relates, where relevant;
- the core R&D activities to which any supporting R&D activities relate; and
- the years to which the finding relates.

The requirements in section 2.02 apply to certificates included in notices after the commencement of the Regulations, in relation to findings made before or after commencement.

The Board may exercise discretion to include matters in a certificate for finding in addition to those specified in section 2.02.

Section 2.03 – Certificate for finding about activities to be conducted outside Australia

This section sets out the matters additional to those specified in paragraph 28F(3)(e) of the Act, that the Board must include in certificates for finding about activities to be conducted outside Australia for the purposes of subsection 28C(1) of the Act. The chapeau of this section does not include the words ‘the overseas activity’ after ‘conducted outside Australia’, which were previously in the 2011 Regulations. This is because a finding under section 28C of the Act could be a finding that an activity is not an overseas activity. That is, it does not meet the conditions under section 28D of the Act. This means if a finding is made that an activity was not an overseas activity, the Board must still notify an applicant in writing of the decision under section 28F of the Act.

Paragraph 2.03(a) provides that a certificate of finding should include a reference to the certificate for the finding (if any) about the activity mentioned in subsection 28D(1) of the Act, which is a finding that activities are R&D activities under paragraph 28A(1)(a) or (b) of the Act. This requirement ensures that the certificate expressly refers to the Board’s decision in relation to the eligibility of the activity for the R&D entity and the Commissioner.

Paragraph 2.03(b) provides that a certificate of finding should include for each of the conditions in subsections 28D(2), (4) and (5) of the Act, the finding for whether the condition is met and the reasons for that finding.

Paragraph 2.03(c) provides that, if the Board finds that the activity has a significant scientific link to one or more Australian core activities, within the meaning of subsection 28D(2) of the Act, it must set out one of the times listed in subparagraphs 2.03(c)(i) and (ii). These cover circumstances where a finding specifies a time to which the finding relates, or the times the Board is satisfied the Australian core activities were, or are being conducted.

The requirements in section 2.03 apply to certificates included in notices after the commencement of this instrument, in relation to findings made before or after commencement. The Board may exercise discretion to include matters in a certificate for finding in addition to those specified in section 2.03.

Section 2.04 – Certificate for finding about whether technology is core technology

This section sets out the matters additional to those specified in subsection 28F(3) of the Act that the Board must include in certificates of finding about whether technology is core technology for the purposes of subsection 28E(1) of the Act. The prescribed matters are the:

- details to identify the R&D entity; and
- details, where relevant, of the member of a consolidated group or MEC group that is using or will use the technology.

The requirements in section 2.04 apply to certificates included in notices after the commencement of this instrument, in relation to findings made before or after commencement. The Board may exercise discretion to include matters in a certificate for finding in addition to those specified in section 2.04.

PART 3 – Research service providers

This Part provides the criteria for the Board to register a research service provider, or revoke or vary registration of a research service provider, under Part III, Division 4 of the Act. Research service providers are intended to enable R&D entities to access expertise in Australia's public and private R&D organisations, to reduce unnecessary duplication of R&D facilities, and to improve the overall effectiveness of Australia's R&D effort through collaboration.

The Board must not register a research service provider under subsection 29A(1) of the Act unless the Board is satisfied the entity meets the criteria specified in the Regulations. Registration is subject to the conditions specified in the Regulations on an ongoing basis.

Section 3.01 – Criteria for registration of research service provider

This section sets out the criteria that the Board must be satisfied an entity meets to be registered as a research service provider for the purposes of subsection 29A(2) of the Act. The prescribed criteria for all prospective research service providers are set out at subsections 3.01(2) to 3.01(5).

The Regulations provide that prospective research service providers which are owned and controlled by an Australian tertiary education institution or a government research organisation (identified in the Regulations as 'publicly controlled' research service providers) must also meet the prescribed criteria set out at subsection 3.01(6). Subsection 3.01(9) defines 'government research organisation' as a Commonwealth, State or Territory organisation and includes the Australian Institute of Marine Science, Australian Nuclear Science and Technology Organisation and Commonwealth Scientific and Industrial Research Organisation.

The Regulations provide that prospective research service providers that collect levies from R&D entities within an industry to fund the provision of services in relation to R&D activities under a contract or memorandum of understanding with a Commonwealth, State or Territory government (identified in the Regulations as ‘levy collecting’ research service providers) must also meet the prescribed criteria set out at subsections 3.01(7) to 3.01(8) to make the results of the services available and provide reports about how the levies are used. The purpose of these provisions is to ensure that R&D entities using ‘levy collecting’ research service providers receive the appropriate information to complete the registration of their R&D activities in order to claim the R&D Tax Incentive.

In addition to being applied as part of the initial registration process, the relevant prescribed criteria are also applied when a research service provider wishes to renew its registration after being issued a notice by the Board under section 29E of the Act. If a research service provider wishes to continue to be registered under section 29A of the Act, the Board must make a decision about whether to continue to register or refuse to continue to register the entity subject to the continued compliance with the criteria.

Section 3.02 – Conditions of registration of research service provider

This section sets out the conditions that a registration of an entity as a research service provider is subject to for the purposes of subsection 29A(3) of the Act. These conditions are specified in subsections 3.02(2) and (3). Research service providers are required to demonstrate that they meet the prescribed conditions when seeking to renew their registration. The purpose of the conditions is to ensure that research service providers act in the best interests of the R&D entities to which they provide services, including that they have the resources to do so and that they provide information to the Board to allow oversight.

Section 3.02 differs from the 2011 Regulations by the removal of paragraph 3.02(2)(a) and subsection 3.02(3). The effect of these amendments is that registration of an entity as a research service provider is no longer subject to the condition of being ‘competent to manage and provide services in relation to R&D activities.’ This condition was previously to be assessed by the Board by considering the matters specified in paragraphs 3.02(3)(a) to (d). These matters did not set objective standards for the Board to assess competency, which in turn created uncertainty for both the Board and research service providers.

Subsection 3.02(3) of the Regulations sets out the condition that for any financial year in which the entity is a research service provider (levy collecting), the research service provider gives the Board details of the services provided and use of the levies collected within 10 months after the end of the relevant financial year.

PART 4 – Applications and requests for further information

Division 4.1 – Application for advance finding

Section 4.01 – Entities to make application for advance finding on behalf of R&D entity

This section lists the entities that may make an application for a finding under subsection 28A(1) of the Act on behalf of an R&D entity for the purposes of paragraph 28B(1)(a) of the Act. These entities include a research service provider, cooperative research centre or a partner in a cooperative research centre.

The effect of this section is that it permits entities to make applications for advance findings on behalf of R&D entities in circumstances where they conduct R&D activities on the behalf of one or more R&D entities. This means that an entity can make a single application for an advance finding for the activities conducted, without the need for each of the R&D entities to make separate applications for advance findings in relation to the activities. It is also intended that research service providers will produce higher quality applications due to their specialist R&D experience and knowledge.

Division 4.2 – Approved forms

The Board may approve forms under section 32 of the Act. When approving a form, the Board must ensure it requires the production of information or other material specified in the Regulations. Division 4.2 sets out the prescribed matters for approved forms which are necessary for the Board to make the relevant decisions.

This Division applies to the forms approved by the Board after the commencement of the Regulations.

Subdivision 4.2.1 – Approved forms for certain applications

Section 4.02 – Approved forms for applications generally

This section provides that when the Board approves particular application forms required under Part III of the Act, it must ensure the application forms require the production of certain information or material. This section relates to applications for registration, advance and overseas findings, and findings about technology.

The information or material required under this section is necessary for the Board to determine whether an applicant is eligible for the R&D Tax Incentive and to ensure that the registration or finding is made for the correct entity. The prescribed information and material are for the purpose of identifying the relevant R&D entity (or entities, where they are members of a consolidated or MEC group) and the basis on which the R&D entity is eligible to register for the R&D Tax Incentive.

If the R&D entity making the application is the head company of a consolidated or MEC group and did not conduct an activity itself, the application must also include the details – that is, the name and Australian Business Number (ABN), Australian Company Number

(ACN) or Australian Registered Body Number (ARBN) – of the subsidiary member of the group that conducted or will conduct the activity, had services provided in relation of the activity, or that used or will use technology related to the activity. The application must also state that the applicant is the head company of the consolidated or MEC group.

Section 4.03 – Approved form for application to register activities

This section provides that when the Board approves an application form under section 27D of the Act to register activities under section 27A of the Act, it must ensure the application form requires the production of certain information or material.

The information or material required under subsection 4.03(1) is necessary for the Board to determine whether the activities are covered by findings about the nature of the activities and activities to be conducted outside Australia, and the appropriate level of compliance activities to be undertaken in relation to an application and the R&D entity and to maintain the integrity of the registration process. The form must also require the R&D entity making the application to specify, pursuant to subsection 4.03(4), for activities not covered by advance findings:

- whether they are core R&D activities or supporting R&D activities;
- an estimate of expenditure on the activities; and
- a description of the activities and the new knowledge sought.

If the application relates to activities provided by a research service provider (levy collecting) to an R&D entity, the approved form must require additional information pursuant to subsection 4.03(3) relating to apportionment of levy payments between core R&D, supporting R&D activities and non-R&D activities to ensure that the R&D entity has this information to progress their registration and claim under the R&D Tax Incentive.

Section 4.04 – Approved form for application for an advance finding

This section provides that when the Board approves an application form under section 28G of the Act for a finding under section 28A of the Act, it must ensure the application form requires the production of certain information or material.

The information or material required is necessary for the Board to determine whether an applicant is eligible for an advance finding and to ensure that the registration or finding is made for the correct entity.

Paragraph 4.04(b)(iv) requires evidence to conclude that the activity is expected to be conducted in the income year the application is made or in either of the next 2 income years. This is to ensure findings made by the Board apply to activities that will actually be conducted. The Board may refuse to make an advance finding under section 28A of the Act if the Board is not satisfied the activities will be conducted in the current or subsequent two income years, for which the advance finding would apply.

Subsection 4.04(c) provides that for each supporting activity that an application for a finding relates, the entity must include the details and evidence of eligibility and existence of the related core R&D activities. This requirement applies even if the application for an advance finding under section 28C of the Act does not include these core R&D activities. This is

because the definition of a supporting R&D activity under section 355-30 of the ITAA 1997 requires the activity to be either directly related, or undertaken for the dominant purpose of supporting core R&D activities. If the Board is unable to satisfy itself that a core R&D activity has or will occur that the supporting R&D activity supports, it cannot make a positive finding in relation to the supporting R&D activity put forward in the application.

Subsection 4.04(d) requires ‘a detailed description’ of each activity for which a finding is made and the new knowledge that each activity is intended to generate, to provide the Board with sufficient information to decide whether the activities for which the R&D entity is seeking an advance finding are eligible R&D activities under section 355-20 of the ITAA 1997. A detailed description of each activity needs to include:

- detail of how the activities meet each element of the definition of a core or supporting R&D activity under section 355-20 of the ITAA 1997; and
- detail of plans for resource allocation, timing and milestone dates to achieve the completion of activities.

Section 4.05 – Approved form for application for finding about activities to be conducted outside Australia

This section provides that when approving a form for an application under subsection 28G(1) of the Act for a finding about an activity conducted outside Australia (the overseas activity) under section 28C of the Act, the Board must also ensure the form requires the production of the certain information or material.

The information or material required is necessary for the Board to determine whether the applicant is eligible for a finding about activities conducted outside Australia and to ensure the finding is made for the correct entity.

Subsection 4.05(b) provides that for each supporting activity that an application for a finding relates, the entity must include the details and evidence of eligibility and existence of the related core R&D activities. This requirement applies even if the application for a finding about the overseas activity under section 28C of the Act does not include these core R&D activities. This is because the definition of a supporting R&D activity under section 355-30 of the ITAA 1997 requires the activity to be either directly related, or undertaken for the dominant purpose of supporting core R&D activities. If the Board is unable to satisfy itself that a core R&D activity has or will occur, it cannot make a positive finding in relation to the supporting R&D activity put forward in the application.

Subdivision 4.2.2 – Approved form for request for further information

Section 4.06 – Approved form for request for further information – production of information must be reasonable or necessary

This section provides that when the Board approves a form for information, or kinds of information under sections 27E, 27H, 28H or 29C of the Act, it can only require the production of information that is reasonable or necessary for the Board to make a decision about an application or registration to which the relevant section relates.

For example, the types of information that the Board may require in order to make a decision may include (but are not limited to):

- supporting evidence or independent advice that the outcome of core R&D activities could not be deduced by a competent professional in the relevant research field on the basis of current knowledge or experience of, and information available to, persons in the research field;
- documents explaining research conducted by the R&D entity to gain information or knowledge or develop experience in a research field;
- supporting evidence or independent advice that activities could not be carried out solely in Australia;
- results, or a summary of results, of core R&D activities;
- details about activities that have not already been provided to the Board;
- a reasonable estimate of expenditure by the R&D entity in an income year on any or all activities of the R&D entity about which the Board intends to make a finding;
- records that substantiate the conducting of the activities; and
- the details – that is, the name and ABN, ACN or ARBN – of the subsidiary member of the group that conducted or will conduct the activity, had services provided in relation of the activity, or that used or will use technology related to the activity.

Subdivision 4.2.3 – Other approved forms

Section 4.07 – Other approved forms

This section provides that when the Board approves any other forms under subsection 32(3) of the Act for applications or requests it must require the production of the applicant's name and any relevant information that would identify the applicant (such as an ABN, ACN or ARBN). These include:

- an application under section 27M of the Act to vary an R&D entity's registration;
- a request under section 27N of the Act to revoke an R&D entity's registration;
- an application under section 29B of the Act to register a research service provider;
- an application under section 29F of the Act to vary a research service provider's registration;
- a request under section 29H of the Act to revoke a research service provider's registration; or
- an application under section 30C of the Act for review of a reviewable decision.

PART 5 – Application and transitional provisions

Section 5.01 – Definition of research field

This section provides that section 1.04 of the 2011 Regulations continues to apply for the registration of research service providers for financial years ending on or before 30 June 2022. The effect of this section is that the definition of 'research field' in subsection 4(1) of the Act means a field of research category mentioned in 1297.0 – ANZSRC 2008 for the 2021/2022 financial year.

For income years ending 1 July 2022 onwards, the definition of ‘research field’ in subsection 4(1) of the Act means a field of research category mentioned in the ANZSRC 2020, as it exists at the time the Regulations commence. The ANZSRC 2020 is freely accessible and can be viewed in 2022 on the ABS website (<https://www.abs.gov.au/>).

Section 5.02 – Criteria for registration of research service providers

This section provides that section 3.01 of the 2011 Regulations continues to apply to an application for registration as a research service provider for a financial year ending on or before 30 June 2022.

The effect of this section is that any applications for registration as a research service provider for the 2021/2022 financial year will be decided using the criteria in section 3.01 of the 2011 Regulations. This will be the case whether the application for the registration is received before or after the commencement of the new Regulations. The criteria in the new section 3.01 of the Regulations will then apply for applications for the 2022/2023 financial year and subsequent financial years.

Section 5.03 – Conditions of registration of research service providers

This section provides that section 3.02 of the Regulations applies to an entity that is registered as a research service provider, or continues to be registered as a research service provider, under section 29A of the Act before or after the commencement of the Regulations.

The conditions of registration set out in section 3.02 of the Regulations apply to all currently registered research service providers (including those registered for the 2021/2022 financial year), as well as all research service providers registered in future financial years. This means that the condition of ‘competency’, which was set out in paragraph 3.02(2)(a) and assessed by the Board by considering the matters in paragraphs 3.02(3)(a) to (d) under the 2011 Regulations, no longer applies. The conditions set out in section 3.02 of the Regulations are otherwise the same as those in the 2011 Regulations and are less onerous on research service providers.

Schedule 1 - Repeals

Item 1 of the Schedule repeals the *Industry Research and Development Regulations 2011*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Industry Research and Development Regulations 2022

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Industry Research and Development Regulations 2022* (the Regulations) replace the *Industry Research and Development Regulations 2011*, which were due to sunset on 1 April 2022. The Regulations are a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

For the purposes of Part III of the *Industry Research and Development Act 1986*, the Regulations provide for the matters to be set out in certificates of finding made by the Board and its delegates, the criteria for registration of a research service provider, the conditions of registration of a research service provider, the listed entities which may apply for advance findings on behalf of a R&D entity and particular information that must be required in approved forms for applications and requests for further information.

Human rights implications

This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Angus Taylor MP

Minister for Industry, Energy and Emissions Reduction