



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

17 September 2021

Board of Taxation Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

via email: RandD@taxboard.gov.au

Dear Secretariat

R&DTI – Review of the dual-agency administration model

We welcome the review of the dual-agency administration model of the Research and Development Tax Incentive (R&DTI) program as small businesses face significant compliance and cost burdens due to the program's administration. Since we published our Review of the R&DTI in December 2019, we have seen some improvements to the administration of the program which has better assisted small businesses with their registrations and claims. However, it is still apparent that significant changes are required to achieve the program's policy intent of encouraging and supporting innovative research and development for small business. As such, we offer the following comments.

- 1. The ATO and AusIndustry should provide clarity of their roles in the R&DTI, including their responsibilities and limitations.** A significant concern of the dual administration model is the lack of clarity around the roles and limitations of the ATO and AusIndustry. Small businesses and their advisers tend to have varying experiences with the ATO and AusIndustry, usually with one agency causing significant burdens to small businesses' registrations and claims. We have heard from one small business subject to ATO compliance activities where the ATO made comments about the eligibility of the small business R&D activities, which is understood to be the responsibility of AusIndustry in the program. These actions by the ATO caused the small business to make decisions that came at a significant financial detriment, and could have been avoidable if instead this matter was more appropriately handled by AusIndustry.

These concerns have been exacerbated by the recent ruling of *Commissioner of Taxation v Auctus Resources Pty Ltd* [2021] FCAFC 39 that made passing comments about the ATO Commissioner being able to form his own views about the eligibility of a taxpayer's R&D activities due to the Commissioner's general powers to administer tax laws. The ability to determine the eligibility of activities under the R&DTI program was understood to be the role of AusIndustry, and this ruling has resulted in significant confusion of the roles and limitations of the ATO and AusIndustry.

- 2. We recommend the ATO and AusIndustry collaborate to create clear joint guidance for small businesses on how to make compliant registration and claims.** Guidance materials should be practical for small businesses, clarify areas of confusion and provide certainty when registering and claiming the tax incentive. Guidance materials should assist small businesses with complex issues, such as: determining the eligibility of activities in non-conventional areas of R&D, providing guidance on apportionment, and guides to the expenditure nexus between R&D activities and the costs incurred. Providing clear, joint guidance materials will assist small businesses to make registrations and claims that are compliant, and otherwise avoid costly compliance activities.

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3. **The ATO and AusIndustry need to determine and maintain a consistent interpretation of the R&DTI legislation, and ensure compliance activities are consistent with the interpretation at the time.** Small businesses and their advisers compile registrations and claims with available guidance material, only to discover later that their claims are retrospectively non-compliant. AusIndustry and the ATO should ensure that their interpretation and guidance material is consistently applied, and subsequent changes are communicated with small businesses and their advisers. Claims should also be assessed against the guidance material available at the point the claim was made, rather than retrospectively applying amended interpretation to past claims.
4. **We recommend that the approach to compliance is proactive, professional, collaborative and proportionate.** Small businesses should be better able to work with the ATO and AusIndustry to identify risk areas, improve registrations and otherwise reduce significant compliance costs. During compliance activities it is important that AusIndustry and the ATO :
 - communicate clearly, effectively and with clear intent with to small businesses;
 - understand the commercial realities of business transactions when seeking to substantiate documentation;
 - ensure that compliance activities have clear time frames, and once compliance activities are initiated, there is clear communication as to when the compliance activities are expected to be finalised;
 - provide small businesses with detailed findings upon the conclusion of compliance activities, so that small businesses may improve their R&D claims and registrations; and
 - continue to organise combined education sessions to assist small businesses to better compile R&DTI claims and registrations.
5. **AusIndustry should ensure when reviewing the eligibility of small businesses' registrations, that sufficient expert industry advice is utilised.** Small businesses and R&DTI advisers have received negative findings on their R&DTI registrations with written justification that is either not technically correct or vague and confusing. Small businesses are then required to provide AusIndustry with information to disprove or clarify AusIndustry's errors or omissions. As such, AusIndustry's failure to utilise expert industry advice has placed significant compliance burdens on small businesses.
6. **The provision of advanced and overseas findings needs to be expedited.** Small businesses rely on advanced and overseas findings for their R&DTI registrations and may be required to wait up to 12 months to receive these findings. Advanced findings are especially important because they provide innovative small businesses with certainty about their R&D registrations and reduce the cost burden of AusIndustry compliance activities. AusIndustry should do more to expedite the issuing of advanced and overseas findings.
7. **Whilst we recognise that software development is eligible for the R&DTI, consideration needs to be given as to how software can be fairly treated in the R&DTI program.** In our review of the R&DTI, published in December 2019, we identified that some types of R&D were inequitably treated under the program, including software. Improvements to the treatment of software could be made through publishing guidance that can be relied upon when determining eligibility of R&D activities, improving administrative knowledge on software development, or considering a separate software scheme.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr Paul Buckingham on 02 6243 7821 or by email to Paul.Buckingham@asbfeo.gov.au

Yours sincerely



The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman