



R&D Tax Incentive State Reference Group

November 2021

MEETING RECORD

Agenda	Presenter(s)
1. Welcome	State Chair
2. 10 Years of R&DTI	Kirsty Gowans (AusIndustry) Jade Hawkins / Brett Challans (ATO)
3. Program Management i. Program performance ii. R&DTI customer portal iii. Registration observations	Louise Brian (AusIndustry) Keelie Williams (AusIndustry) Kelley Wiggins / Tom Gilbert (AusIndustry)
4. ATO Program Update –ATO Presenting	Brett Challans (ATO)
5. Legislative Issues i. Coal of Qld decision (High Court decision)	Mike Thompson / Erin Watt (AusIndustry)
6. Determinations i. Update on the clinical trial determination	Chris Enders (AusIndustry)
7. Program Guidance i. Software Guidance	Chris Enders (AusIndustry)
8. SRG Survey	State Chair
9. Meeting Close	State Chair

1. Welcome

Each meeting commenced with an Acknowledgement of Country, welcome to attendees and roll call.

2. 10 Years of R&DTI

Each meeting invited Kirsty Gowans, General Manager, R&D Tax Incentive Branch, AusIndustry, and Jade Hawkins, Assistant Commissioner, Australian Taxation Office (ATO), to provide insights from the perspective of the administering agencies on the growth and reach of the R&DTI over the last 10 years. When unavailable their insights were provided by an alternative speaker.

Kirsty noted:

- 2021 marks 10 years of operation of the R&D Tax Incentive (R&DTI) program. In its first decade, the program has supported well over 30,000 companies to conduct R&D over that they might not otherwise have conducted.
- The R&DTI is now supporting around 12,400 companies. The value of R&D registered in the 2019-20 financial year was \$12.7 billion.
- On average around 3,000 companies register for the program for the first time each income year.
- Beyond helping the companies grow and innovate, the R&DTI provides further value across the R&D ecosystem and Australian economy, we have examples of the R&DTI encouraging:
 - riskier research, resulting in projects that are more likely to have transformational and long-term impact
 - R&D staff gaining additional skills and experience leading to upskilling and improved capability of our workforce
 - greater collaboration within industries and speeding up industry-wide innovation
 - product innovation that promotes upskilling the wider supply chain creating a thriving ecosystem
- While many companies may still conduct R&D in the absence of a tax incentive, the R&DTI allows them to do so with increased intensity.
- Macroeconomic influences have impacted Business Expenditure on R&D (BERD) eg. mining R&D has decreased as the sector moves from an investment to a production phase, while businesses in the Professional, Scientific and Technical Services sector recorded the largest increase in R&D expenditure in 2019-20 (up 19%), followed by Manufacturing (up 4%).
- Australian Bureau of Statistics (ABS) data shows that Australia was able to increase its BERD levels despite the impacts of the COVID-19 pandemic. However, longer-term impacts of COVID-19 vary across sectors, with manufacturing likely to be more heavily impacted (as indicated by the Organisation for Economic Co-operation and Development (OECD)).
- It is too early to assess the impacts of the enhanced reforms to the R&DTI. They were well received when announced and with ongoing improvements to administration, the program continues to influence businesses considering further investments in R&D.

Jade Hawkins/Brett Challans provided ATO insights on the R&DTI:

- In the last 18 months COVID has fundamentally changed Australia. A key component of the rebuild will be the flexible, creative solutions of innovative Australians who we want to encourage to utilise the R&DTI program.
- Australia developed the black box flight recorder, the electronic pacemaker, polymer bank notes, the bionic ear (Cochlear implant), spray-on skin and even the ultrasound scanner. In thinking of past

innovations, which of the 12,400 companies conducting research and development in Australia across a range of industries will be the next breakthrough, reminding us of the importance of the program.

- A key impact of the R&DTI relates to the support provided across all industry sectors and the benefit of refundable tax offsets providing key assistance to small and medium R&D companies, including start-ups as they pursue and resolve the unknowns in their efforts to generate new knowledge.
- In 2011-12, there were only 4,461 companies claiming the R&DTI and in 2020-21, the ATO paid or applied offsets to over 12,400 companies.
- Program administration has changed over time, the initial focus on education moved to education supplemented with compliance as the program matured.
- We receive feedback that those doing the wrong thing – companies involved in promoted schemes, phoenix activities and tax avoidance – should be removed from the program. We also need to assure Government and the Australian taxpaying community that, whilst we encourage companies accessing the program, we will not allow it to be undermined.
- In the year of the 10th anniversary, the ATO are pleased to announce a major update to its guidance products, with a major review of web content based on stakeholder feedback resulting in a significant piece of work to revamp the content and add new material that has been requested.
- The program has also experienced external scrutiny over the years, with the 2016 Ferris, Finkel and Fraser Review, legislative reform, Senate inquiries and the 2019 Australian Small Business and Family Enterprise Ombudsman (ASBFEO) Review. This year, there has been an Australian National Audit Office (ANAO) audit and a Board of Taxation review.
- Over the next 6 to 12 months, the ATO hopes you will see tangible improvements to the program, to make it easy, clear and cost effective.

3. Program Management

Program performance data was presented by Louise Brian (AusIndustry) and Brett Challans (ATO):

AusIndustry

- There were 12,400 registrations and a total R&D expenditure of \$12.7 billion during the 2019/20 income period.
- SMEs account for the majority of registrations (88%) and slightly less than half (49.0%) of R&D expenditure.
- Large companies comprise only 12% of registrations but 51.2% of R&D expenditure.
- The top three sectors by registrations for the 2019/20 income period are Services (58% of registrations and 53% of R&D expenditure), Manufacturing (30% of registrations and 30% of R&D expenditure) and Agriculture (only 4% of registrations but 4% of R&D expenditure).
- State-based data was presented relevant to the location of each meeting. The top three sectors were consistent across the states and territories with the exception of the NT where agriculture was the top sector.
- A comparison based on data from the Business Longitudinal Analysis Data Environment (BLADE) illustrated the higher relative performance of R&DTI participating firms compared to a cohort of firms who did not participate in the program.

ATO

- The ATO presented data from the 2020-21 Commissioner of Taxation Annual Report which showed the number of offsets and claims paid or applied in the 2020-21 financial year.
- There has been an increase of 17.4% of refundable offsets paid in 2020-21 from 2019-20, with an increase of 16.2% of actual claims.
- For the non-refundable offset, there was an increase of 4.8% of offsets applied only a 0.1% increase in claims.
- Total claims have increased by 11.4% for offsets paid or applied and 14.3% increase in claims.

Keelie Williams (AusIndustry) presented on the R&DTI Customer Portal:

- Since the portal went live on 5 July we have received a little over 3,800 applications.
- The customer portal allows us to see how much time is spent on each section of the application. The most time is spent on completing projects and activities. We understand that not all applicants work directly in the portal, but for those that do, early indications are that time spent in the portal is lower than the time taken for completing the PDF registration form based on a customer survey conducted last year. Our portal use data will be supplemented by a forthcoming user survey.
- Some technical issues have been identified and the following is suggested:
 - Companies need to make sure they submit for the correct income year. Non-standard balancers need to be particularly careful, as submitting for the wrong income year cannot be fixed in the system.
 - The portal doesn't auto-save – companies need to save their work before leaving their computers inactive.
 - Portal performance for submissions was monitored during October and didn't meet expectations. Enhancements are underway.
- There is a new section on our portal support page on business.gov.au to share information on common advice/errors.
- Portal updates occurred over the weekend of 6/7 November 2021 including:
 - Tax payer alert warning messages have been toned down
 - More control in sorting businesses on your 'manage access page'
 - Additional questions for Research Service Providers (RSPs)/Non-levy collecting Co-operative Research Centres (CRCs)
 - Ability to add special characters into small text fields
 - Improved help text and warnings and some question reordering
 - Alpha-numeric sorting of project and activities lists
 - Additional questions for R&D Consultants
- The ATO is working to put the Relationship Authorisation Manager (RAM) company linking function back online in December.
- Planning for future portal improvements is underway and expected to be released in February 2022. Some items include:
 - Additional questions for RSPs/non-levy collecting CRCs
 - Further improvements to help text and warning messages
 - Adding totals to expenditure fields
- Longer term, we're hoping to revise the advance/overseas finding (AOF) form so it is better aligned to the assessment process and can link to the registration form to reduce duplication.

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- We are also considering incorporating customer surveys to enable more regular feedback.
- Portal feedback is welcomed and all comments are considered for future portal upgrades.

Kelley Wiggins (AusIndustry) provided some registration observations and guidance:

- Registration submissions on 'unknown outcomes':
 - In previous forms, a question for unknown outcome was asked at the project level. Now R&D entities are asked "*How did the company determine that the outcome could not be known in advance?*" for **each** core activity. A sub-question asks for an explanation as to:
 - what information was found; and
 - why a competent professional could not have known or determined the outcome in advance.
 - SRG participants were advised to note that AusIndustry needs to understand both elements of this question and a full response is needed for each core activity. Without a clear explanation of why there was an unknown outcome the eligibility of activities may come into question.
- Guidance on registering and naming clinical trials:
 - Where an R&D entity's core R&D activities involve clinical trials, please name the clinical trial in full and any relevant reference number. This will become more important as we finalise our first determination on clinical trials
- Caution on requesting Extensions of Time (EoTs) in the lead up to a registration deadline was recommended. These must be requested in the portal so companies must gain access to the portal beforehand. Tax agents were advised not to apply for blanket EoTs for multiple companies as this diverts resources from registrations which can slow processes down in peak periods.

4. ATO Program Update

Brett Challans (ATO) provided an update on ATO guidance and feedstock:

- The ATO has issued the draft Taxation Ruling TR 2021/D3 *Income tax: research and development tax offsets - the 'at risk rule'* and draft Taxation Determination TD 2020/D1 "*Income tax: notional deductions for research and development activities subsidised by JobKeeper payments*" in the last year. Feedback on the drafts is being considered. The draft Determination will not be finalised until TR 2021/D3 is finalised due to the interactions of the 'at risk' rule with this draft TD.
- The ATO is working on specific industry guidance products including a Software Expenditure Guide and a guide for R&D for start-ups. Further online guidance material will be part of the refreshed ATO website in late 2021, including :
 - Apportionment between R&D and BAU expenditure
 - Nexus between the registered R&D activities and the R&D expenditure
 - Record keeping
 - Payments to associates
- Guidance on feedstock was also provided which is no longer calculated as a standardised approximation. Additional guidance and web content is being prepared keeping in mind that the new legislation only applies from 1 July 2022.

5. Legislative Issues

Mike Thompson / Erin Watt (AusIndustry) provided an update on the Federal Court and High Court of Australia decision in the Coal of Queensland case:

- Key points from the Administrative Appeals Tribunal's (AAT's) review of Innovation and Science Australia's (ISA's) decision on Coal of Queensland's applications included:
 - The mining exclusion in subsection 355-25(2) of the ITAA 1997; and
 - Documentation is needed to demonstrate that activities are carried out by applying a systematic progression of work within the meaning of the R&DTI legislation.
- The Full Court of the Federal Court (FCAFC) and then the High Court of Australia both dismissed the appeal and affirmed the AAT and ISA decisions and AusIndustry's position.
- The High Court decision means the FCAFC decision, that Coal of Queensland's claimed activities for the 2011-12 income year were not R&D activities for the purpose of the R&D tax incentive, stands.
- The Federal Court decision affirmed the Tribunal's reasoning and process, and is consistent with the way that AusIndustry assesses R&D activities ie. when activities fall under the mining exclusion, this is sufficient by itself for those activities to not to be found to be core R&D activities.
- The decision also noted that there is a distinction between the data and results generated by an activity, and the outcome of an activity, having regard to determining whether the outcome of an activity can be known or determined in advance.
- The absence of documentation can be one of the factors considered when determining whether activities are carried out.

6. Determinations

Chris Enders (AusIndustry) provided an update on the development of the first determination under the R&DTI program which will be on clinical trials:

- The first draft determination is scheduled for release for public consultation in November 2021 and seeks to make a determination that clinical trials are 'core R&D activities' for the purposes of applying to the R&DTI program.
- Determinations will improve program delivery, administration and stakeholder experience by streamlining applications and providing certainty and clarity about activities that are the subject of a determination.
- This first determination will cover Phase 0, I, II and III clinical trials for an unapproved therapeutic good (Determination (No. 1) 2021)
 - Consultation scheduled to commence in November 2021
 - Expect to publish in February 2022
- Determinations were introduced by the *Treasury Laws amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020*, from 1 January 2021. Section 6A: section 31D provides the legislative provisions to make, amend and revoke determinations.
- Once finalised and published, it is expected that the Board will be able to make findings that phase 0, I, II and III clinical trials for an unapproved therapeutic good that are correctly notified and approved under certain sections of the *Therapeutic Goods Regulations 1990*, *Therapeutic Goods (Medical Devices) Regulations 2002*, or *Therapeutic Goods Act 1989* will be core R&D activities.

- An additional benefit of the clinical trials determination is the opportunity to complement compliance work by the Department of Health and support efforts to attract more Clinical Trials to Australia.

7. Program Guidance

Chris Enders (AusIndustry) provided an update on new guidance on software-related activities:

- A collaborative workshop was held on 28 April 2021 between government and industry to improve the two-way understanding of how software is developed and how it is recognised within the R&DTI program. Participants identified a number of opportunities to work together to improve software-related guidance products.
- A draft software guide '*Software development activities and the R&D Tax Incentive*' was published on the department's Consultation Hub from 17 May to 18 June 2021 for feedback.
- A second workshop on 11 August 2021 focussed on record keeping to demonstrate eligibility of software-related R&D activities and expenditure incurred on those activities.
- A modular approach will be taken to develop software guidance to enable early release of a core product (module 1) with additional guidance being released as developed. Indicative timing for anticipated modules:
 - December 2021 Module 1 - finalised version of the draft that was published for consultation
 - June 2022 Module 2 - guide to record-keeping
 - August 2022 Module 3 - cases studies and examples of classes software-related activities
 - September 2022 Module 4: How to register for the R&DTI (software-specific video product)

8. SRG Participation Survey

SRG participants were invited to complete a survey to assist the future planning of SRGs and to advise on topics of interest. Participants were also invited to complete an in-session feedback poll at the end of the meeting.

End of Summary