



**Administrative
Appeals Tribunal**

**DECISION AND
REASONS FOR DECISION**

**Docklands Science Park Pty Ltd and Innovation Australia [2015] AATA 973 (16
December 2015)**

Division **GENERAL DIVISION**

File Number **2014/6494**

Re **Docklands Science Park Pty Ltd**

APPLICANT

And **Innovation Australia**

RESPONDENT

DECISION

Tribunal **Egon Fice, Senior Member**

Date **16 December 2015**

Place **Melbourne**

The decision under review is affirmed.

.....[sgd].....

Egon Fice, Senior Member

Catchwords

INNOVATION – registration of activities of applicant as core research and development activities – activities of nanoparticle production, geopolymer engineered products and development of environmental engine – insufficient evidence to establish activities conducted were core research and development activities – decision under review affirmed

PRACTICE AND PROCEDURE – Administrative Appeals Tribunal – statutory requirement to conduct private hearing – private hearing requirement does not automatically prohibit publication of name of parties or witnesses

Legislation

Administrative Appeals Tribunal Act 1975 (Cth) s 35

Income Tax Assessment Act 1997 (Cth) ss 355-5, 355-20, 355-25

Industry Research and Development Act 1986 (Cth) ss 27J, 30D, 30E

Cases

RACV Sales and Marketing Pty Ltd and Innovation Australia [2012] AATA 386
(26 June 2012)

Scott v Scott [1913] AC 417

Secondary Materials

J T Gourley, 'Geopolymers in Australia' (2014) 50(1) *Journal of the Australian Ceramics Society* 102

REASONS FOR DECISION

Egon Fice, Senior Member

16 December 2015

1. Docklands Science Park Pty Ltd (Docklands Science Park) is a company comprised of 12 issued shares and a paid-up capital of \$12. On 22 September 2012 Docklands Science Park lodged with AusIndustry (now Innovation Australia) an application for registration of research and development (R&D) activities. Its application was in respect of five projects or activities listed as:

Project 1-2 Nano Particles with CSIRO

Project 2-3 Geopolymer Engineered Products

Project 3-4 Environmental Engine

Project 4-5 Hydro Seeps power generation and water harvesting

Project 5-1 Development of pulse combustion driven thermoacoustic cooling

2. In a letter dated 24 September 2012 AusIndustry approved the registration of those activities. However it reminded Mr John Martin, a director of Docklands Science Park, that:

Registration of activities does not, by itself, render the activities described in this registration as eligible core or supporting R&D activities, nor is it an indication of compliance with the requirements of the R&D Tax Incentive. Determining the eligibility of activities under the R&D Tax Incentive is the responsibility of the R&D entity, under self-assessment.

3. On 12 March 2013 AusIndustry informed Docklands Science Park that it had been identified for compliance desk review and further information was requested regarding the 2012 income year registration. Following that review, AusIndustry wrote to Docklands Science Park on 3 September 2013 stating that its registration was considered to have a high risk of non-compliance with the eligibility requirements of the R&D Tax Incentive program. That was because Docklands Science Park had not demonstrated that the five projects identified were core R&D activities or that the activities were supporting R&D activities. In an accompanying letter also dated 3 September 2013, AusIndustry set out in detail its understanding of the information provided to it in respect of the activities set out in Dockland Science Park's 2012 income year registration.

4. In a letter dated 23 September 2013, Mr Martin wrote to AusIndustry stating that Docklands Science Park wished to amend its claim for the R&D Tax Incentive by withdrawing projects 4-5 and 5-1. On 9 October 2013 AusIndustry advised Docklands Science Park that its request had been approved. On 11 March 2014 Docklands Science Park lodged an application for registration of its R&D activities for the 2013 income year. It included the three projects named in its 2012 income year registration as amended.
5. After a comprehensive review of the activities claimed by Docklands Science Park to be eligible for R&D tax offsets in the 2012 and 2013 income years, on 21 May 2014 AusIndustry found that each of the activities for which the claim was lodged were not core R&D activities for the purposes of s. 27J (incorrectly stated as 28A) of the *Industry Research and Development Act 1986* (R&D Act). Those findings were subsequently reviewed and confirmed by the R&D Incentives Delegate in a letter dated 26 November 2014.
6. In a letter dated 3 December 2014 the Manager, R&D Tax Incentive Integrity Assurance, notified Docklands Science Park that the decision of the Research and Development Incentives Delegate was confirmed and attached a certificate setting out the findings made. That letter also informed Docklands Science Park that the decision was reviewable under Division 5 of the R&D Act.
7. On 16 December 2014 Docklands Science Park lodged an application with the Tribunal pursuant to s. 30E of the R&D Act seeking review of the decision made by Innovation Australia.
8. The only issue which I am required to determine is whether the activities described under each of the three projects in question can be properly regarded as core R&D activities for the purposes of the definition set out in s. 355-25 (1) of the *Income Tax Assessment Act 1997* (ITAA 97).

CORE R&D ACTIVITIES

9. Division 355 of ITAA 97 deals with the entitlement to tax offsets for certain R&D activities. The objects of this Division are set out in s. 355-5 which provides:

355-5(1) *The object of this Division is to encourage industry to conduct research and development activities that might otherwise not be conducted because of an*

uncertain return from the activities, in cases where the knowledge gained is likely to benefit the wider Australian economy.

355-5(2) *This object is to be achieved by providing a tax incentive for industry to conduct, in a scientific way, experimental activities for the purpose of generating new knowledge or information in either a general or applied form (including new knowledge in the form of new or improved materials, products, devices, processes or services).*

10. The expression *R&D activities* is defined in s. 355-20 in the following way:

355-20 *R&D activities* *are*core R&D activities or*supporting R&D activities.*

11. The expression *core R&D activities*, in respect of the 2012 and 2013 income years, is defined in s. 355-25 as follows:

355-25 (1) *Core R&D activities* *are experimental activities:*

- (a) *whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:*
 - (i) *is based on principles of established science; and*
 - (ii) *proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions; and*
- (b) *that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).*

12. According to Docklands Science Park, the three activities for which expenditure was claimed, that is, work carried out by CSIRO on nanoparticles; the geopolymer engineered products; and the environmental engine were or are core R&D activities. However, in its post registration finding dated 21 May 2014, AusIndustry made the following statements in respect of each activity:

- (a) nanoparticle production and achieving bulk production of graphene:
 - Docklands Science Park had not demonstrated that its activities in developing nanoparticle production and achieving bulk production of graphene were core R&D activities;
 - Docklands Science Park had not provided contemporaneous records to demonstrate that the outcomes of experimental activities could not be known or determined in advance on the basis of current knowledge, information or experience;

- the information provided did not demonstrate that outcomes could only be determined by applying a systematic progression of work based on principles of science and carried out according to the scientific method;
- Docklands Science Park had not demonstrated that its activities proceeded from hypothesis to experiment, observation and evaluation, leading to logical conclusions;
- Docklands Science Park had not demonstrated that the experimental activities were conducted for the purpose of generating new knowledge; and
- Docklands Science Park had not provided records which demonstrated it undertook the activities or that they took place within the registration period;

(b) geopolymer engineered products:

- Docklands Science Park had not demonstrated that its activities in developing mixes for engineered geopolymer products and safe mixtures for geopolymers while maintaining the desired qualities were core R&D activities;
- Docklands Science Park had not provided contemporaneous records to demonstrate that the outcomes of experimental activities could not be known or determined in advance on the basis of current knowledge, information or experience;
- the information provided by Docklands Science Park did not demonstrate that the outcomes could only be determined by applying a systematic progression of work based on principles of chemical sciences and carried out according to the scientific method;
- Docklands Science Park had not demonstrated that activities proceeded from hypothesis to experiment, observation and evaluation, leading to logical conclusions;
- the experimental activities were not demonstrated to be conducted for the purpose of generating new knowledge; and
- Docklands Science Park had not provided records to demonstrate that it undertook the activities or that they took place within the registration period;

(c) environmental engine:

- Docklands Science Park had not demonstrated that its activities regarding metallurgical soundness, durability of engine and the development of an electronic

management system capable of altering the motion of a piston in an internal combustion engine were core R&D activities;

- Docklands Science Park had not demonstrated that the outcomes of experimental activities could not be known or determined in advance on the basis of current knowledge, information or experience;
- the information provided by Docklands Science Park did not demonstrate that the activities aimed to test Docklands Science Park's hypothesis that it could develop an environmental engine;
- the information provided by Docklands Science Park did not demonstrate that outcomes could only be determined by applying a systematic progression of work based on principles of engineering sciences and carried out according to the scientific method;
- Docklands Science Park had not demonstrated that it had proceeded from hypothesis to experiment, observation and evaluation, leading to logical conclusions;
- the experimental activities were not demonstrated to be conducted for the purpose of generating new knowledge in relation to environmental engine metallurgical soundness and durability; and
- Docklands Science Park had not provided records to demonstrate that it undertook the activities or that they took place within the registration period.

13. Mr Martin disagreed with AusIndustry's assessment regarding each of the activities referred to above. He provided a number of statements and documents to support Docklands Science Park's claims.

NANO PARTICLE PRODUCTION

14. Common to all the activities claimed by Docklands Science Park, there is scant documentation which points to that entity having conducted any activities at all let alone proceeding to conduct core R&D activities in the manner required by s. 355-25(1) of ITAA 97. In his affidavit sworn 21 August 2015, Mr Martin referred to R&D conducted by Docklands Science Park or conducted on its behalf by CSIRO or RMIT University. One of the documents said to support that research is a CSIRO Research Services Agreement. In fact the document states that it is a proposal to enter into an agreement and that it remained valid for 60 days from the date shown on the cover page, 6 February 2012.

That document was executed on behalf of CSIRO on 27 April 2012 and on behalf of Docklands Science Park on 3 April 2012. The services said to be provided by CSIRO included research to investigate the feasibility of applying CSIRO's Nanocoating Patent in the area of batteries, water treatment and catalysts.

15. The problem with that document, other than the fact that it expired after 60 days and CSIRO did not sign the agreement within that period, is that the payment terms included a payment of \$145,000 plus GST on execution of the document. There was no evidence that this money was paid or that an agreement proceeded. That is despite Mr Martin stating in an email to AusIndustry on 5 October 2015 that CSIRO was paid at least part of the sums due under the contract. Furthermore, the terms of the agreement make it plain that the intellectual property rights vest in CSIRO.
16. Mr Martin also provided a document entitled Technology Licence Agreement Term Sheet. It is expressly stated that the document was not legally binding on either party and that neither party was bound to enter into any formal agreement. It is said to be an aid to commercial-in-confidence discussions providing an indication of the terms on which RMIT might be willing to provide a licence to Docklands Science Park. However, it is couched in such obscure language that it could not possibly be enforced by a court even if a legally binding agreement were said to arise. It appears to propose the parties entering into a license agreement regarding certain patents which are said to be listed in Schedule 1. That schedule was not attached to the document. It also states that other than expressly granted under the Agreement, the licensee (Docklands Science Park) had no right, title or interest in or under the patents, patent applications or know-how. RMIT was said to retain all rights not expressly granted to the licensee. It then states that RMIT retained a right to conduct the research, whatever that may be.
17. The best that can be said in these circumstances is that the document essentially takes this matter no further. It is dated 3 December 2013, and signed by Mr Martin on behalf of Docklands Science Park, but there is no other signature on the document. RMIT does not appear to have been a party to that so-called agreement.
18. In his affidavit Mr Martin referred to a paper from CSIRO which he said was provided for the use of Docklands Science Park. He described its title as: *A novel Process and Apparatus for Mass Production of Nanostructured Materials*. With respect to Mr Martin

that title is incorrect. I had a copy of that document which was lodged with the Tribunal on 9 February 2015 and it is entitled: *Process and Apparatus for Mass Production of Nanostructured Materials*. While the word *novel* appears in the text, it has been inserted in the title by Mr Martin. In any event, as the paper states, CSIRO holds a patent in respect of that process. There is nothing new about the process, it having been patented in about 2009. There is no suggestion in the article that Docklands Science Park was in any way involved in developing the process. Although Mr Martin refers to the article and states that it would satisfy any enquiries, it plainly is a developed process which CSIRO believes has a number of suitable applications. It has nothing obvious to do with the claimed research and development activities by Docklands Science Park.

19. Mr Martin said in his affidavit that for the 2013 income year, the activities related to nanoparticles had *morphed* into graphene production and dispersion with RMIT and the production of a high-pressure pipeline with CSIRO. Although it is not clear, I suspect that the claimed Agreement relating to RMIT formed a part of this activity. Mr Martin described the hypothesis as the production of a flexible pipeline, fortified with Kevlar or reinforced with graphene designed to carry methane and/or other hydrocarbons from Australia to Japan. I had in evidence a document entitled Research Agreement which appears to be a CSIRO document dated 17 January 2013. The named client of CSIRO on that agreement is Docklands Science Park. It sets out the following research project:

The Client entered into discussions with CSIRO in May 2012 in relation to CSIRO researching and potentially developing light weight pipes constructed using fibrous materials. CSIRO conducted some preliminary desktop investigations and submitted a proposal (Proposal) on 29 June 2012 setting out a possible approach to investigating the feasibility of developing flexible pipes to operate at high pressures in a submarine environment. The Proposal is attached to this Agreement. The Client wishes to undertake Phase 1 of the work articulated in the proposal and CSIRO has agreed to conduct that work on the terms of this Agreement.

The work is a scoping study and will include the following investigations, based on a target specification of 760 mm diameter, internal pressure of 100 bar intended for gas and oil with a 20 bar internal pressure version for water and a service life of 30 years.

20. However, despite that Agreement, one of the conditions for proceeding was that Docklands Science Park pay to CSIRO \$35,000 on execution of the Agreement. The problem is that not only has the agreement not been executed by Docklands Science Park, there is no evidence of any payment being made to CSIRO. I did have in evidence a tax invoice issued on 7 May 2013 by CSIRO to Docklands Science Park which referred

to the agreement dated 17 January 2013 (Agreement 2012124946) for \$40,000, and, according to the Agreement, that was payable on completion and delivery of the project or the Finish Date, whichever occurred later. While that tax invoice has the word *Paid* handwritten on it with an initial which appears to be that of Mr Martin, there was no evidence that CSIRO even started on the project let alone completed it. In fact, I had what Mr Martin described as a duplicate invoice from CSIRO which also had the word *Paid* written on it and what appears to be Mr Martin's initials. The strange thing about the duplicate document is that the notation indicating it had been paid is placed in a different position on the same invoice. It is unlikely that the same invoice was paid twice. It appears that the word Paid has simply been written on each document irrespective of proper examination regarding whether that invoice was payable at that time. Delivery of the Project required CSIRO to provide a written report covering activities 1, 2 and 3 referred to in the details of research. I did not have any such report in evidence. Although Mr Martin said that work on the pipeline was proceeding at CSIRO Geelong, it was not part of any claim for rebate to AusIndustry. The evidence clearly begs the question regarding any involvement at all by Docklands Science Park in the development of the technology to produce nanostructured materials. Nor was there any evidence of any research or development in applying that technology by Docklands Science Park.

21. Given the above evidence, I must find that Docklands Science Park has not established that it conducted any experimental activities regarding the production of nanostructured materials. It has not established by evidence that the activities listed under this project fall within the definition of core R&D activities in accordance with s. 355-25 (1) of ITAA 97.

GEPOLYMER ENGINEERED PRODUCTS

22. For the purposes of its 2012 income year registration, Docklands Science Park described this activity in the following way:

Production of geopolymer mixtures without using either potassium or sodium hydroxide. Curing of such mixtures at ambient or at elevated temperatures. Strength testing of samples and weathering of samples....

Strength and heat resistance experiments were carried out in the year as various mixtures were assessed. Our hypothesis is that mixtures can be derived that are safe to handle, in hands lacking in expertise. Heating to 1,100 degrees Celsius then dousing with water did not threaten the integrity of structures which is a useful safety characteristic.

23. I had in evidence an agreement made between Docklands Science Park and Ashprete [sic – Asphrete] Pty Ltd said to have been made on 1 March 2013. A company search retrieved from the Australian Securities and Investments Commission (ASIC) on 15 May 2013 discloses Asphrete to be a company with 2 shares, and a total paid-up capital of \$2. The agreement is unusual. It requires Asphrete to:

... pursue avenues to secure formulas by scientific experiment and testing that enable the manufacture of commercially useful geopolymer objects without exposing the users of the formulas to harm from strong caustic chemicals or other chemicals likely to have an undue adverse effect on human health.

24. The agreement with Asphrete also stated:

In return for the facilitator's services rendered [Docklands Science Park] will pay the necessary outgoings attached to the project without delay or protest.

These fees and payments are only to be put into force when a successful investor has signed and delivered the cash investment into the hands of [Docklands Science Park] or the facilitator, OR, alternative funding has been completed.

This is the agreement nothing more or less and will be re viewed every January of each calendar year for the best interest of all parties.

25. Docklands Science Park's only obligation was, apparently, to pay the necessary outgoings attached to the project without delay or protest. However, no payment was required until such time as a successful investor had made payment to Docklands Science Park in cash or alternative funding had been arranged. It appears, although it is not stated, that the geopolymer objects (whatever they might be) would be sold and Docklands Science Park would be entitled to 50% of the profits. In any event, the agreement is said to be subject to review every January of each calendar year. Presumably, its duration was 12 months unless renewed. There was no evidence of it having been renewed.

26. The basis for the claimed research done on geopolymer engineered products appears to have changed over the passage of time. I say that because in an explanation provided to AusIndustry in an undated letter but which has the date 4 September 2013 entered at the bottom of the first page, the author said:

5. The experiments carried out are on the composition of the geopolymer mix with the aim of improving the ultimate yield strength in megapascals (MPa) of the concrete like material created and its Young's Modulus (elasticity) which indicates its ability to bend under duress. An important factor is the cost of the mix versus the cost of the normally used Portland Cement mix and to date the cost is higher by some 25%, the aim being to reduce the cost below that of Portland Cement mixes....

10. *Physical chemistry to establish inorganic polymers commonly known as geopolymers and usually of alumina and silica are the basis of the project, however our geopolymers vary from that description in that they use other ingredients which would commonly be described as "rubbish". The hypothesis under test is that we can manufacture stable geopolymers with the desired properties from rubbish or otherwise throw away industrial residues at a cost less than that of Portland Cement and with lower greenhouse gas emissions.*

27. The letter dated 4 September 2013 stated that the company which undertook the registered activities was Docklands Science Park. The author also said that any work carried out with CSIRO, Swinburne University and The University of Melbourne was paid for by the respective parties.
28. There are a number of difficulties with what was said in the 4 September 2013 letter. The first arises from the oral evidence given by Mr Martin. In his examination-in-chief Mr Martin was asked whether Docklands Science Park had a contract with Asphrete and his answer was: *We never did have. We had a verbal agreement.* When he was subsequently asked whether there was now a written contract, Mr Martin changed his evidence and said there was. Secondly, I had no objective evidence of the involvement of any other entity except Asphrete. I did have in evidence three invoices apparently issued by Asphrete addressed to Mr Martin. One of those invoices is dated 29 July 2014, which is outside the two income years the subject matter of this application. The remaining two, dated 18 March 2013 and 27 November 2013, indicate those invoices having been paid on 15 April 2013 and 28 November 2013 respectively. That does not accord with the terms of the agreement. Furthermore, the agreement seems to contemplate Docklands Science Park only paying *necessary outgoings* which I understood referred to Asphrete's expenses in procuring materials for the project. The 18 March 2013 invoice is said to be in respect of: *Making of non-cementation & Chemicals* (\$1,931.82). The second invoice (27 November 2013) claims to be for: *In-part Material Costs on geopolymer* (\$2,000). It should be apparent that the claimed expenses by Asphrete are not, except perhaps for part of those invoices, in accordance with the agreement.
29. I also had in evidence documents which describe themselves as Asphrete Pty Ltd Worksheet Data. It appears from those documents that Asphrete conducted some work with a variety of mixtures (four in all) for the purpose of checking compressive strengths. Although it appears flexural strength was also to be determined, only some figures are recorded. The documents disclose that all of the mixtures were made up and cast on

26 November 2012. There were also some preliminary drawings regarding objects that could be manufactured from the geopolymer material although I had no evidence of their construction or testing. Those drawings appear to have been made by Mr Martin. There is no obvious relationship between the two invoices issued by Asphrete during the relevant period and the work done by Asphrete on 26 November 2012.

30. Following a request made by AusIndustry on 12 March 2013, Docklands Science Park said this about the purpose of its experiments regarding this product:

Our aim, via our experiments, is a geopolymer mix which has the properties set out and which is largely made from waste materials such as flyash which is a disposal problem in Australia, Indonesia, China and India, plus many other countries. It will reduce greenhouse gas emissions, save lives and money.

31. As for the hypothesis said to be the basis for research into geopolymers, Mr Martin made the statement to which I have referred at [26].

32. With respect to Mr Martin, and understanding his reference to “rubbish” as a reference to flyash, the use of that substance in the manufacture of geopolymer cement is not something new. The use of flyash as a binder in the production of geopolymer cement products goes back to at least 2000 (see *Geopolymers in Australia*, Journal of the Australian Ceramics Society, Volume 50 [1], 2014, JT Gourley). There is substantial literature on this topic. Furthermore, the hardened material properties are well known and understood, including acid resistance, fire assistance, high strengths, rapid rate of strength gains, shrinkage and creep and durability.

33. The data obtained by the work conducted by Asphrete on 26 November 2012 simply enabled Asphrete to measure the varying compression and flexural strengths of various geopolymer mixes. Furthermore, although Mr Martin said in evidence that the purpose of the R&D in respect of geopolymers also involved reducing the pH levels because of its caustic properties, and that apparently Docklands Science Park was successful in doing so, the Worksheet Data of Asphrete makes no mention of the pH levels of the geopolymer cement produced.

34. As far as new knowledge is concerned, Mr Martin said in his letter of 4 September 2013 that:

The new knowledge is that nil or low cost refuse from existing industrial processes can be used to create geopolymers which are desired, particularly heat and salt tolerance over extended periods. Energy is still a cost that cannot be avoided and heat accelerates the curing process.

35. With respect to Mr Martin, as I have said above, the use of flyash and similar waste products as a binder in the manufacture of geopolymer cement is not new knowledge. It is about as old as the process itself. Those waste products and other sources of aluminosilicate, which are essential for the production of geopolymer cement and other geopolymer products, are foundation materials for the production of the geopolymerization process (Gourley page 103).

36. The evidence before me on the hearing of this matter was insufficient to establish that the experimental activities conducted by Docklands Science Park in respect of geopolymer materials meets the definition of core R&D activities in s. 355-25 (1) of ITAA 97. The outcome of the tests conducted by Asphrete regarding compressive strength and flexural strength of the various geopolymer mixes does not satisfy that requirement. The outcome, that various strengths were recorded depending on the nature of the mix, is not an outcome which could not be known or determined in advance. The significance of the variation is unclear because the hypothesis is not clearly articulated. One would expect the hypothesis to clearly state what Docklands Science Park wished to produce (such as new knowledge, improved materials, products, devices, processes or services) and the means by which that production would be achieved. Then one would have expected a series of experiments, observation and evaluations leading to conclusions about the hypothesis. Not one of those factors was present in this case.

37. Mr Martin in his oral evidence explained that Docklands Science Park did not have any employees, other than himself, and that it simply used consultants to conduct work. The problem in this case is that Asphrete was not, according to the agreement with Docklands Science Park, regarded as a consultant. It had an interest in the production of various mixes of geopolymer cement if Docklands Science Park could obtain funding for any further work on that project. There was no evidence that any further work was conducted. There was no evidence of funding having been obtained from an investor or from any other source. Nothing further was in evidence before me on this project.

38. Therefore, I find that the activities conducted by Docklands Science Park in conjunction with Asphrete regarding geopolymer products does not meet the definition of core R&D activities for the purposes of s. 355-25 (1) of the ITAA 97.

THE ENVIRONMENTAL ENGINE

39. The activity registered in 2012 was stated to be:

Environmental Engine metallurgical soundness, durability of engine

40. The activity registered for the 2013 income year was stated as:

To achieve an EMS [engine management system] capable of altering the motion of a piston in an internal combustion engine at 10,000 RPM

41. In its registration application for the 2012 income year, Docklands Science Park described the objectives of the project in the following way:

Intellectual Property now wholly owned in Australia and a twin cylinder 650 cc engine is being built for use in hybrid electric vehicles. HM GEM engines will build the twin cylinder at Dandenong with input from ourselves and previous design team. Huge market is expected for these engines which have variable compression and can run on any normally available fuel.

42. In his evidence in chief, Mr Martin said there was no contract between Docklands Science Park and any other party for the production of an environmental engine. He said he used Wingmate (the trading name of a company called WheezyTech Pty Ltd) and Peter Wezenbeek, who is apparently the principal of Wingmate. Mr Martin said that he had a verbal contract with Mr Wezenbeek which was to keep on with the work and to produce an engine management system capable of controlling the mechanism, which did not currently exist.

43. Mr Martin attached an article to an affidavit which was sworn on 21 August 2015 dealing with the original environmental engine invented by Dr Joe Ehrlich in the UK. That article refers to a company known as Mayflower, a large engineering company, having formed a joint-venture company with Mr Ehrlich to pursue its development. Rather than using a rigid conrod connecting the piston to the crankshaft, it used a pivoted lever arm between the conrods and pistons. The lever arm could be altered vertically and horizontally thereby changing the engine's capacity and compression ratio. The article also stated:

Some industry experts expressed caution over the concept. Jeff Daniels, an independent engineering consultant and technical commentator, said: "You can see the theoretical appeal of a concept where you can vary every parameter of significance in an engine. The question is whether the advantages are outweighed by complications, and whether there might be long-term problems they haven't anticipated or are keeping quiet about."

44. The reporter added the following comment:

However, the history of the car is littered with failed "revolutionary" engines.

45. That statement appears to have been prophetic. On 31 March 2004, the BBC News reported that Mayflower had entered into administration. The report stated that administrators had stepped in to run the automotive engineering group Mayflower after talks with its creditors failed.

46. In any event, the first point which arises from this material is that the described environmental engine was a *going concern* well before Docklands Science Park and Environmental Engines became involved. However, there was no evidence that any car manufacturers had taken it up. That is despite the fact that it was said to be based on existing engines and that small modifications only needed to be made to incorporate the new technology.

47. In his affidavit, Mr Martin said that Docklands Science Park had purchased all rights to the engine for \$1,200,000. There was no evidence before me of the purchase of rights in the engine or payment of \$1,200,000 or \$1.3 million as was also stated. If, as Mr Martin claimed, Docklands Science Park had acquired the intellectual property rights associated with the engine, such documents would have been in evidence. He did refer to 2 USA patents, numbers 6202623 and 7159542, but copies of those were not in evidence. Mr Martin said that those patents describe the invention and constituted the hypothesis which Docklands Science Park was working to prove. Simply stating that is of no assistance.

48. The second point which arises from that material is why the activity registered for the 2012 income year was necessary at all given that this engine was functioning in the UK in about 2000. Perhaps that query is, in any event, redundant because I did not have any evidence of experimentation determining the metallurgical soundness and durability of the engine. I did have in evidence a number of invoices from Wingmate addressed to the

attention of Mr Martin but only four of those appear to relate to the 2013 income year. There are none which relate to 2012 and the remainder arose in the 2015 income year.

49. The invoices which were raised in the 2013 income year are all described as being about *Project LPG Liquid inject*. The description of the work done in respect of those invoices is uninformative. There is no reference to an EMS.
50. In a document entitled *Notes on Wingmate Support Activities 2012 – 2013* which Mr Martin provided to the Tribunal on 5 February 2015, he referred to the EMS and stated it was to be tested and evaluated in a *real-life environment*. However it appears that the system was then to be tested together with the High Pressure Liquid Inject system apparently designed by Docklands Science Park. Mr Martin set out in a table the hours spent on a number of activities. Nothing is recorded for the 2012 income year. In the 2013 income year, the hours recorded appears in relation to the testing of a high-pressure controller, which is, I expect, not the EMS. Between March 2013 and June 2013 Mr Martin has recorded the testing of Wingmate EMS with external injector driver. The total time spent is some 72 hours. Also included are some tables which deal with the wiring details of the EMS with Bosch drivers. That information is unhelpful.
51. It should be apparent from the above evidence that no hypothesis forms the foundation of any work conducted by Docklands Science Park or Environmental Engines on its behalf. There was no cogent plan or design of experiments, observation and evaluation leading to logical conclusions. Although Docklands Science Park could not, on Mr Martin's evidence, conduct any of the experiments by itself because Mr Martin was the sole person engaged by Docklands Science Park, there was no agreement with any other entity to conduct any research and development activities on its behalf.
52. The engine itself had already been developed in the UK some 14 years ago. As best I could understand Mr Martin's evidence on this topic, Docklands Science Park's role was to engage the services of others to develop a control box to make an EMS. According to Mr Martin, the engine could not practically operate without some form of electronic control device which could alter the variables including compression and capacity of the engine while it was operating. It appears that at some point, this also included establishing its operation with a variety of fuel mixtures. Mr Martin described this as not being a series of experiments but *a long hard slog to write the software and install relevant hardware*,

testing the results continuously. In fact, I did not have in evidence any documents which would indicate experimentation taking place including any results determined from such activity.

53. There was no evidence of any experimentation, observation and evaluation leading to logical conclusions relating to the registered activities for the income years in question. There was no evidence of a systematic progression of work. Therefore, I must find that the activities registered with regard to the Environmental Engine do not fit the definition of core R&D activities as set out in s. 355-25 (1) of ITAA 97.

PRIVATE HEARING – DISCLOSURE OF PARTIES AND EVIDENCE

54. At the conclusion of hearing this matter, Mr Holcombe submitted that there was an issue with the name of the applicant in the decision. Although it is not entirely clear from the file in this matter, it appears the Tribunal allocated a pseudonym to the applicant shortly after it lodged its application on the ground that the hearing of this matter was required to be held in private. In fact, s. 30E of the R&D Act provides:

(4) Despite section 35 of the Administrative Appeals Tribunal Act 1975:

- (a) hearings of proceedings for review of an internal review decision are to be held in private; and*
- (b) during the proceedings, the Tribunal may, by order:*
 - (i) give directions as to the persons who may be present during all or part of a hearing of the proceedings; and*
 - (ii) give directions of a kind mentioned in subsection 35(3) or (4) of that Act.*

55. Prior to 1 July 2015, provisions almost identical to those now found in s. 30E were to be found in s. 39T(4) of the R&D Act. It provided:

The hearing of a proceeding relating to a decision covered by subsection (1) must take place in private and the Administrative Appeals Tribunal may, by order:

- (a) give directions as to the persons who may be present; and*
- (b) give directions of a kind referred to in paragraph 35(2)(b) or (c) of the Administrative Appeals Tribunal Act 1975.*

56. I should also explain that s. 35 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) was amended commencing 1 July 2015. Relevantly, it now provides:

- (1) *Subject to this section, the hearing of a proceeding before the Tribunal must be in public.*
- (2) ...
- (3) *The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:*
 - (a) *information tending to reveal the identity of:*
 - (i) *a party to or witness in a proceeding before the Tribunal; or*
 - (ii) *any person related to or otherwise associated with any party to or witness in a proceeding before the Tribunal; or*
 - (b) *information otherwise concerning a person referred to in paragraph (a).*
- (4) *The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure, including to some or all of the parties, of information that:*
 - (a) *relates to a proceeding; and*
 - (b) *is any of the following:*
 - (i) *information that comprises evidence or information about evidence;*
 - (ii) *information lodged with or otherwise given to the Tribunal.*

57. The issue raised by Mr Holcombe was dealt with by the Tribunal (Deputy President SA Forgie and I) in *RACV Sales and Marketing Pty Ltd and Innovation Australia* [2012] AATA 386 (26 June 2012). The relevant provision at that time was s. 39T(4) of the R&D Act. We concluded, at [235]:

In the absence of an order under s. 35 of the AAT Act, we do not consider that this section either justifies or permits an applicant to be identified by a pseudonym. We will explain why we hold that view.

58. We explained that the mere fact that a hearing was not open to the public did not automatically lead to the conclusion that what was said and done at that hearing could not be spoken of publicly. We referred to the House of Lords decision in *Scott v Scott* [1913] AC 417. We determined, from the authorities, that the fundamental principles which should be applied to the Tribunal are, at [242]:

- (1) *a private hearing, whether required by legislation or ordered by a court or tribunal with appropriate power:*
 - (a) *limits those who may attend the hearing;*
 - (b) *does not of itself impose any restrictions on the publication of the evidence given at, or material or information relating to that private hearing;*

- (2) *a particular enactment may:*
 - (a) *specify the consequences of a private hearing; and/or*
 - (b) *confer power, either expressly or implicitly, on the court or tribunal to make orders specifying the consequences;*
- (3) *a tribunal such as the Administrative Appeals Tribunal, whose power is conferred by statute:*
 - (a) *has no power to impose any restrictions on publication unless:*
 - (i) *the power to do so has been expressly, or by necessary implication, conferred upon it; and*
 - (ii) *it has exercised that power within the bounds upon which it has been conferred;*
- (4) *the matters relevant to Parliament's deciding that proceeding should be conducted in private in a court or tribunal's ordering that they be conducted in private may not equate precisely or at all with the matters that are relevant to whether an order should be made restricting publication of those proceedings.*

59. The current provisions dealing with the mandatory requirement to hold a hearing dealing with the review of an internal review decision in private only differs from the previous s. 39T in that it amplifies the fact that this is a two-step process. The first step is that a proceeding under the R&D Act which is a review of the s. 30D internal review decision must be held in private. That does not restrict the identification of the applicant to that proceeding. The second step (section 30E(4)(b)) now expressly refers to what may be done *during the proceeding* held in private. It is only at this point that an order may be made in accordance with s. 35(3) or (4) of the AAT Act. In determining whether it is appropriate to do so, the Tribunal must pay due regard to the reasons in favour of making such orders including the confidential nature of the information presented during the course of the hearing. I should also point out that the current AAT Act s. 35 provisions differ from the superseded provisions in s. 35 in that they expressly provide for the prohibition or restriction of information tending to reveal the identity of a party or a witness to the proceeding.

60. Therefore, although the Tribunal allocated a pseudonym to the applicant shortly after it lodged its application, that should not have occurred. At that point in time, the Tribunal did not have power to order or direct the nondisclosure of the applicant's name.

61. Having carefully examined all the documents taken into evidence in the course of the hearing and having reviewed the transcript of the oral evidence given, I am unable to conclude that any of that evidence warrants the making of non-publication or non-

disclosure orders pursuant to s. 35 (3) or (4) of the AAT Act on confidentiality grounds or any other grounds. I find that it is in the public interest that the contents of documents received in evidence should be made available to the public and all parties. Furthermore, I also find that it is in the public interest to disclose the identity of the applicant and any persons who gave evidence in the course of the proceeding. The applicant should not be referred to by the pseudonym incorrectly allocated to it.

CONCLUSION

62. On 21 May 2014 Innovation Australia (the Board) made findings pursuant to s. 27J of the R&D Act that the registered activities of Docklands Science Park, being Nano Particles with CSIRO; Geopolymer Engineered Products; and the Environmental Engine were not core R&D activities for the purposes of s. 355-25(1) of ITAA 97. Docklands Science Park sought an internal review of those decisions pursuant to s. 30D of the R&D Act. On 26 November 2014 the Board confirmed the decisions made on 21 May 2014. Having reviewed the s. 30D decisions, I have found that they were correct.
63. I agree with Mr Holcombe's submissions that documentation is necessary to substantiate the R&D activities claimed by an applicant. It is the absence of documentation which has resulted in my findings. Such documents are required for the purpose of evidencing experimental activities whose outcome cannot be known or determined in advance but can only be determined by applying a systematic progression of work based on established science; and which proceeds from hypothesis to experiment, observation and evaluation and leads to logical conclusions. That process will establish that the purpose of conducting the activities is to generate new knowledge in the form of new or improved materials, products, devices, processes or services. An applicant cannot succeed in establishing those requirements in the absence of detailed documentation recording the process of each activity as it develops.
64. Accordingly, I affirm the internal review decision made by the Board on 26 November 2014 in respect of each of the claimed R & D activities.

I certify that the preceding 64 (sixty - four) paragraphs are a true copy of the reasons for the decision herein of Egon Fice, Senior Member

.....[sgd].....

Associate

Dated 16 December 2015

Date of hearing **6 October 2015**

Solicitor for the Applicant **Mr J Dick**

Advocate for the Respondent **Mr L Holcombe**

Solicitors for the Respondent **HWL Ebsworth Lawyers**