Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Ultimate Vision Inventions Pty Ltd and Innovation and Science Australia (Taxation) [2019] AATA 1633 (27 June 2019)

Division: TAXATION AND COMMERCIAL DIVISION

File Number: **2017/1319**

Re: **Ultimate Vision Inventions Pty Ltd**

APPLICANT

And **Innovation and Science Australia**

RESPONDENT

DECISION

Tribunal: **Mr A. Maryniak QC, Member**

Date: **27 June 2019**

Place: **Melbourne**

The Tribunal affirms the decision under review.

Mr A. Maryniak QC, Member

Catchwords

TAXATION – research and development tax incentive – design and development of an integrated health and fitness program and cloud based decision support systems – whether R&D activities – decision under review affirmed

Legislation

Acts Interpretation Act 1901 (Cth)

Industry Research and Development Decision-making Principles 2011

Income Tax Assessment Act 1936 (Cth)

Income Tax Assessment Act 1997 (Cth)

Industry Research and Development Act 1986 (Cth)

Tax Laws Amendment (Research and Development) Act 2011 (Cth)

Cases

JLSP and Innovation Australia, Re [2016] AATA 23

Moreton Resources Ltd and Innovation and Science Australia (Taxation), Re [2018] AATA 3378

Mt Owen Pty Limited and Innovation Australia (2013) 137 ALD 88

RACV Sales and Marketing Pty Ltd and Innovation Australia (2012) 129 ALD 32

WT95/13-14 and Deputy Commissioner of Taxation, Re [1996] AATA 62

Secondary Materials

Explanatory Memorandum, Tax Laws Amendment (Research and Development) Bill 2010 (Cth)

REASONS FOR DECISION

Mr A. Maryniak QC, Member

27 June 2019

1. This is an application made to the Tribunal pursuant to s 30E(1) of the *Industry Research and Development Act 1986* (Cth) (*IR&D Act*) in respect of a decision of the Respondent made on 3 March 2017 under s 30D(2) of the *IR&D Act* (Reviewable Decision).

2. By the Reviewable Decision the Respondent confirmed the previous decision of a delegate of the Respondent dated 19 October 2016 made under s 27J of the *IR&D Act*, that none of the Applicant's activities registered under s 27A of the *IR&D Act* for the 2013/2014 financial year (2014 year) and the 2014/2015 financial year (2015 year) (the Relevant Years) satisfied the definition of 'R&D activities' in s 355-20 of the *Income Tax Assessment Act 1997 (Cth)* (ITAA 1997).

3. The research and development (R&D) tax incentive is a broadly based program that allows businesses to access tax offsets for expenditure on R&D activities. These R&D activities must be registered with Innovation and Science Australia, through AusIndustry under Part III of the *IR&D Act*.

4. The Applicant's registered activities for the Relevant Years were all registered in respect of "*UV1001: Design and Development of an Integrated Health and Fitness program and Cloud based Decision Support Systems*". The activities were registered with the following titles and activity numbers:

Activity	Activity Title	Core/Supporting
Income year 2013/14[1]		
1.1	Design of fitness management algorithms for calorie consumption measurement	Core
1.1.1	Supporting	Supporting
1.2	Design of health management algorithms for calorie intake measurement	Core
1.2.1	Supporting	Supporting
1.3	Conceptual design and evaluation of a potential implementation of Cloud based decision support systems	Core
1.3.1	Supporting	Supporting
Income year 2014/15[2]		

[1] Application for Registration of R&D Activities 2013/14, registered on 1 July 2014; T4 pp 49-65.
[2] Application for Registration of R&D Activities 2014/15, registered on 1 July 2015; T21 pp180-195.

1.1	Improvements of fitness monitoring algorithms and multi-level search engine	Core
1.1.1	Supporting	Supporting
1.2	Improvements of diet monitoring algorithms and multi-level search engine	Core
1.2.1	Supporting	Supporting
1.3	Improvements of cloud based anti-collision systems with "smoothing" algorithms	Core
1.3.1	Supporting	Supporting

THE LAW

5. The Tribunal[3] recently set out an overview of the legislative framework relevant to applications of this nature. This helpful overview is set out below and adopted for the purposes of this decision.

6. Division 355 of the ITAA 1997 is entitled "*Research and Development*". Its object is set out in s 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.*
>
> *(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)."*

Tax incentive takes the form of a tax offset

7. The tax incentive to which s 355-5(2) refers is provided in the form of a tax offset. Generally speaking, provided notional deductions,[4] which are the subject of s 355-205, are at least $20,000:

---

[3] D.P. Forgie in *Re Moreton Resources Ltd and Innovation and Science Australia (Taxation)* [2018] AATA 3378 [4]-[19].

[4] An exception to the $20,000 threshold is provided for in s 355-100(2) of ITAA97.

*"An *R&D entity is entitled to a *tax offset for an income year equal to the percentage, set out in the table, of the total of the amounts (if any) that the entity can deduct for the income year under any or all of the following provisions:*

(a) section 355-205 (R&D expenditure);

(b) section 355-305 (decline in value of R&D assets);

(c) section 355-315 (balancing adjustment for R&D assets);

(d) section 355-480 (earlier year associate R&D expenditure);

(e) section 355-520 (decline in value of R&D partnership assets);

(f) section 355-525 (balancing adjustment for R&D partnership assets);

(g) section 355-580 (CRC contributions).

…" [5]

8. Section 355-205 sets out when notional deductions for R&D expenditure occurs. In particular, s 355-205(1) provides:

*"An R&D entity can deduct for an income year (the **present year**) expenditure it incurs during that year to the extent that the expenditure:*

*(a) is incurred on one or more *R&D activities:*

(i) for which the R&D entity is registered under section 27A of the Industry Research and Development Act 1986 for an income year; and

(ii) that are activities to which section 355-210 (conditions for R&D activities) applies; and

*(b) if the expenditure is incurred to the R&D entity's *associate – is paid to that associate during the present year."*

What are R&D activities?

9. The expression "*R&D activities*" is defined in s 355-20 of ITAA 1997.[6] It separates "*core R&D activities*" from "*supporting R&D activities".*

---

[5] ITAA97; s 355-100(1).

[6] The definition was added by the *Tax Laws Amendment (Research and Development) Act 2011*; Act No. 93 of 2011 (IRD Amendment Act); s 3, Schedule 1, Item 1 with effect from 8 September 2011; s 2, Item 6. It replaced the definitions that had formerly been included in s 73B of the *Income Tax Assessment Act 1936* (ITAA36), which was repealed with effect from the same day: IRD Amendment Act; s 3, Schedule 3, Item 44. I note in particular the definition of the expression "*research and development activities*" in ITAA36 to mean:

(a) systematic, investigative and experimental activities that involve innovation or high levels of technical risk and are carried on for the purpose of:

(i) acquiring new knowledge (whether or not that knowledge will have a specific practical application); or

(ii) creating new or improved materials, products, devices, processes or services; or

(b) other activities that are carried on for a purpose directly related to the carrying on of activities of the kind referred to in paragraph (a).

A. Core R&D activities

10. Section 355-25(1) was introduced with effect from 8 September 2011 by the IRD Amendment Act.[7] It provides:

> "**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)."*

11. Section 355-25(1) is qualified by s 355-25(2):

> "*However, none of the following activities are* ***core R&D activities****:*
>
> *(a) market research, market testing or market development, or sales promotion (including consumer surveys);*
>
> *(b) prospecting, exploring or drilling for minerals or *petroleum for the purposes of one or more of the following:*
>
> *(i) discovering deposits;*
>
> *(ii) determining more precisely the location of deposits;*
>
> *(iii) determining the size or quality of deposits;*
>
> *(c) management studies or efficiency surveys;*
>
> *(d) research in social sciences, arts or humanities;*
>
> *(e) commercial, legal and administrative aspects of patenting, licensing or other activities;*
>
> *(f) activities associated with complying with statutory requirements or standards, including one or more of the following:*
>
> *(i) maintaining national standards;*
>
> *(ii) calibrating secondary standards;*
>
> *(iii) routine testing and analysis of materials, components, products, processes, soils, atmospheres and other things;*

[7] IRD Amendment Act; s 3 and Schedule 1, Item 1.

(g) any activity related to the reproduction of a commercial product or process:

(i) by a physical examination of an existing system; or

(ii) from plans, blueprints, detailed specifications or publicly available information;

(h) developing, modifying or customising computer software for the dominant purpose of use by any of the following entities for their internal administration (including the internal administration of their business functions):

(i) the entity (the **developer***) for which software is developed, modified or customised;*

*(ii) the entity *connected with the developer;*

*(iii) an *affiliate of the developer, or an entity of which the developer is an affiliate."*

B. Supporting R&D activities

12. Section 355-30 provides:

"(1) **Supporting R&D activities** *are activities directly related to *core R&D activities.*

(2) However, if an activity:

(a) is an activity referred to in subsection 355-25(2); or

(b) produces goods or services; or

(c) is directly related to producing goods or services;

the activity is a **supporting R&D activity** *only if it is undertaken for the dominant purpose of supporting *core R&D activities."*

Registration of an R&D entity in relation to R&D activities under the *IRD Act*

A. Application under s 27D to register under s 27A

13. The IR&D Act provides for registration of an R&D entity in relation to R&D activities and for registration of R&D activities themselves. An R&D entity may apply to register activities in respect of an income year. It must do so in accordance with s 27D and the application must be made within ten months after the end of the income year or within such further period allowed by the Board in accordance with the decision-making principles.[8]

[8] IR&D Act: s 27D(c). "*Decision-making principles*", with which the Board must comply, may be made by the Minister under s 32A. They are set out in the *Industry Research and Development Decision-making Principles 2011.*

14. When an R&D entity applies to the Board under s 27A of the IR&D Act, the Board must decide whether to register, or refuse to register, it for either or both of two types of activities for an income year. One of the types comprises one or more activities specified as core R&D activities conducted during the income year. The other comprises one or more activities specified as supporting R&D activities conducted during the income year.[9]

15. Any finding that the Board makes must be consistent with any that are already in force under s 27B(1) in relation to an application for registration of an R&D entity for R&D activities and any finding under s 28A regarding advance findings about the nature of activities in relation to the R&D entity. Section 27B(1) relates to an activity, or part of an activity, conducted during the income year. The Board may make a finding as to whether or not all or part of an activity mentioned in the application was a core R&D activity conducted during the income year and, if not, whether or not it was a supporting R&D activity conducted during the income year in relation to one or more specified core R&D activities for which the entity has been or could be registered under s 27A for an income year. Those findings are made under s 27B(1) and the Board may specify in the finding, the time to which it relates.[10] Findings may not be inconsistent with earlier findings.[11]

16. For each activity that is registered as a supporting R&D activity for an R&D entity for an income year, the registration must also specify one or more activities as the corresponding core R&D activities.[12] If any of those activities specified under s 27A(1)(a) as a core R&D activity conducted during the income year, the registration must also

---

[9] IR&D Act; s 27A(1)(a) and (b).

[10] IR&D Act; s 27B(2).

[11] IR&D Act; s 32B. Section 32B refers not only to earlier findings made under s 32J but also to any advance findings that an R&D entity has requested under s 28A. Section 28A(1) is concerned with advanced findings that the Board may make about an activity on an application by an R&D entity. The Board may make a finding that all or part of the activity is a core R&D activity or a supporting R&D activity in relation to one or more specified core R&D activities for which the entity has been or could be registered under s 27A for an income year; a finding to the effect all or part of the activity is neither a core R&D activity or a supporting R&D activity; or, if justified in accordance with the decision-making processes, refuse to make a finding about all or part of the activity. The Board must not make a finding under 28A(1) about an activity unless it is satisfied that the activity:

(a) is being conducted, or has been completed, during the income year in which the application is made; or

(b) is yet to be conducted, but that it is reasonable to expect that the activity will be conducted in any or all of the following income years:

(i) the income year in which the application is made;

(ii) either of the next 2 income years.

[12] IR&D Act; s 27A(3)(a).

specify each income year for which that core R&D activity was registered, or is proposed to be registered, for the R&D entity.[13]

17. Section 27B provides that the Board may make one or more findings when considering an R&D entity's application for the purposes of s 27A(1) and give notice of its decision under s 27C in relation to the application. In practice, the Board adopts a "*self-assessment*" system whereby, in the first instance, it registers R&D entities under s 27D in respect of specified activities as a matter of course. It does not necessarily consider whether activities specified in an application satisfy the definition of "*R&D activities*". Registration does not, of itself, render the activities described in the registration eligible as core or supporting R&D activities.

B. Examination of registration by the Board

18. Section 27J(1) provides:

> "*The Board may make one or more findings to the following effect about an R&D entity's registration under section 27A for an income year (the* **registration year***):*
>
> *(a) that all or part of a registered activity was a core R&D activity conducted during the registration year;*
>
> *(b) that all or part of a registered activity was not an activity of a kind covered by paragraph (a);*
>
> *(c) that all or part of a registered activity was a supporting R&D activity conducted during the registration year and in relation to:*
>
> *(i) one or more specified registered core R&D activities; or*
>
> *(ii) one or more specified core R&D activities for which the entity has been registered in an earlier income year; or*
>
> *(iii) one or more specified core R&D activities yet to be conducted for which the entity could be registered in the registration year if those activities were conducted during the registration year; or*
>
> *(iv) several specified core R&D activities, each covered by subparagraph (i), (ii) or (iii);*
>
> *(d) that all or part of a registered activity was not an activity of a kind covered by paragraph (c).*
>
> *Note 1: A finding is reviewable (see Division 5).*

[13] IR&D Act; s 27A(3)(b).

Note 2: *The Board may make a finding under paragraph (b) if, for example, the Board has sufficient information to make a finding under paragraph (a). Similarly, the Board could make a finding under paragraph (d) if it has sufficient information to make a finding under paragraph (c).*"

19. If the Board makes a finding under s 27J(1) in relation to an R&D entity's registration, it may specify in the finding the time to which that finding relates.[14] As s 27J is subject to s 32B, the findings that the Board makes cannot be inconsistent with earlier findings made by the Board.

20. Under s 27M[15] the Board may, by notice in writing to the R&D entity, vary the entity's registration under s 27A for an income year if that entity applies for the variation, the variation is consistent with any findings made by the Board under Part III of the IR&D Act and making the variation is justified in accordance with decision-making principles.

STATUTORY FRAMEWORK ANALYSIS

21. In the Relevant Years, on application by an 'R&D entity'[16] made in accordance with s 27D of the IR&D Act, the Respondent was required by s 27A of the IR&D Act to make a decision whether to register or to refuse to register an R&D entity for either or both of the following for an income year:

    (a) One or more specified activities as core R&D activities conducted during the income year;

    (b) One or more specified activities as supporting R&D activities conducted during the income year.

22. The Respondent was authorised under s 27F of the IR&D Act to conduct one or more examinations of all or part of the R&D entity's registration under s 27A for an income year for the purposes of making findings under s 27J(1). The findings that the Respondent was authorised to make under s 27J(1) of the IR&D Act are all in respect of the R&D entity's registration for a 'registration year', in respect of all or part of each of the 'registered

[14] IR&D Act; s 27J(2).
[15] IR&D Act; s 27M(1).
[16] See the definitions of 'R&D entity' in s 4(1) of the IR&D Act and s 355-35 of the ITAA 1997.

activities'. Broadly, the Respondent had to determine whether all or part of each registered activity was or was not a 'core R&D activity' conducted during the registration year. Further, to the extent that there were any core R&D activities to which another registered activity could be related, that all or part of a registered activity was or was not a supporting R&D activity.

23. Each of the expressions 'R&D activities', 'core R&D activities' and 'supporting R&D activities' take their meaning from the ITAA 1997.[17]

24. Section 355-20 of the ITAA 1997 provides that 'R&D activities' are either core R&D activities or supporting R&D activities.

25. 'Core R&D activities' are defined in s 355-25 of the ITAA 1997. The definition has two limbs: the positive requirements that must be satisfied for an activity to be a 'core R&D activity' in s 355-25(1) and the exclusions in s 355-25(2), which are not relevant here.

26. 'Supporting R&D activities' are defined in s 355-30(1) of the ITAA 1997 to mean '*activities directly related to *core R&D activities*'. This definition is modified under s 355-30(2) if the activity is an activity that: was excluded under s 355-25(2), produces goods or services, or is directly related to producing goods and services. If the modification in s 355-30(2) operates, the activity is a supporting R&D activity only if it is undertaken for the dominant purpose of supporting core R&D activities.

27. A finding made under s 27J(1) of the IR&D Act automatically varies any registration made by the Respondent under s 27A so that the registration is taken always to have existed in a form consistent with the finding (s 27L(1)(b) of the IR&D Act).

28. A finding made under s 27J(1) of the IR&D Act is a 'reviewable decision' in respect of which an application for internal review may be made (item 7 of the table in s 30A and s 30C of the IR&D Act). Under s 30D of the IR&D Act, the Respondent is required to review the reviewable decision after receiving an application for internal review.

29. The internal review decision can be referred to the Tribunal (s 30E of the IR&D Act).

---

[17] See the definitions of those terms in s 4 of the IR&D Act.

Core R&D Activities Defined

30. 'Core R&D activities' in the ITAA 1997 Act is to be interpreted in accordance with established principles governing statutory construction. The statutory text is paramount, but the text must be considered in its context, including having regard to legislative history and extrinsic materials.

31. Part of the legislative context of the definition of 'core R&D activities' is the statement of the object of the R&D tax incentive in s 355-5 of the ITAA 97.

32. An interpretation of s 355-25 of the ITAA 1997 that best achieves this object is preferred (s 15AA of the *Acts Interpretation Act 1901* (Cth)).

33. What constitutes an 'experimental activity' within the meaning of s 355-25(1) of the ITAA 1997 is determined by reference to the ordinary meaning of the word 'experiment'. The ordinary meaning of 'experiment' includes a test or trial, or an act or operation for the purpose of discovering something unknown or testing a principle or supposition.[18] This meaning conforms with the statement at paragraph 2.11 of the explanatory memorandum to the Tax Laws Amendment (Research and Development) Bill 2010 (Cth) (the *2010 R&D EM*) that an experiment '*entails investigating causal relationships among relevant variables to test a hypothesis or determine the efficacy of something previously untried*'.[19]

34. The way in which the definition of 'core R&D activities' is drafted in s 355-25(1) of the ITAA 1997 also makes it clear that it is not enough that the activity merely be 'experimental'. For an experimental activity to be a 'core R&D activity', the outcome of the activity cannot be known or determined in advance, but rather can only be determined by applying a systematic progression of work that is based on principles of established science and that proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions – or, in effect, involves using the 'scientific method'. The

---

[18] *Re JLSP and Innovation Australia* [2016] AATA 23 at [32] (DP Frost). See also *Re RACV Sales and Marketing Pty Ltd and Innovation Australia* (2012) 129 ALD 32 at 86-8[156]-[159] (DP Forgie and SM Fice) in the context of former s 73B of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***).

[19] Section 15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth) permits reference to extrinsic materials to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.

need for the experimental activities themselves to be conducted using the scientific method is also consistent with the objects provision in s 355-5 of the ITAA 1997.

35. An activity will not be an experimental activity to which s 355-25 of the ITAA 1997 applies if it merely demonstrates a known fact or applies established methodologies in a different context.[20]

36. To be an eligible core R&D activity, the outcome of the activity cannot be known or determined in advance without conducting a systematic progression of experimental work based on principles of established science.

37. The words '*cannot be*' in s 355-25(1)(a) of the ITAA 1997 are absolute. For an experimental activity to qualify as a 'core R&D activity', there must be a high level of uncertainty as to whether the outcome can be known or determined in advance based on current knowledge, information or experience, and prior to any experimentation taking place. Further, s 355-25(1)(a) requires that the '*only*' way in which the outcome of the activities can be determined is through the application of, in effect, the scientific method (see paragraph 36 above). The 2010 R&D EM explains at paragraphs 2.13 to 2.15 that this requirement is a '*threshold… knowledge gap*' and the '*threshold will not be met if the knowledge of whether something is scientifically or technologically possible, or how to achieve it in practice, is deducible by a competent professional in the filed on the basis of current knowledge, information or experience*'. Further, there must be *'a clear risk that the outcome of the experiment will not be the desired one*'.

38. Both the way in which s 355-25(1)(a) of the ITAA 1997 is drafted, and the reference to the '*competent professional in the field*' in paragraph 2.13 of the 2010 R&D EM, makes it clear that the uncertainty of outcome associated with the activity must be objectively determined. It is not enough that unqualified individuals without any knowledge, information or experience of the principles of established science cannot determine the outcome of the activity before undertaking it.[21] Similarly, it is not enough that the product

---

[20] *Re Moreton Resources Ltd and Innovation and Science Australia (Taxation)* [2018] AATA 3378 (DP Forgie) at [188].

[21] See also *Re RACV Sales and Marketing Pty Ltd and Innovation Australia* (2012) 129 ALD 32, at 109 [220] (DP Forgie and SM Fice) in the context of the expression 'high level of technical risk' in former s 73B(2B)(b) of the ITAA 1936.

sought to be made is 'new' if it could be produced by a competent professional. The question is whether the outcome of the activity could or could not be known or determined in advance based on current knowledge information and experience, and the only way in which the outcome can be achieved is through a systematic progression of work that conforms with subparagraphs 355-25(1)(a)(i) and (ii) of the ITAA 1997.

39. The juxtaposition of the words '*cannot be*' and '*but can only be determined*' in s 355-25(1)(a) of the ITAA 1997, when considered together with the objects of Div 355 and the extrinsic materials, support the logical interpretation of s 355-25 that requires that there is, objectively, a high degree of uncertainty about the outcome of the activities, and that the risk must be scientific or technical in nature.[22] Paragraph 2.18 of the 2010 R&D EM makes this clear when it states:

> *"The need to employ the scientific method also reflects the degree of novelty in the ideas being tested. That is, the knowledge being sought must go beyond validating a simple progression from what is already known and beyond merely implementing existing knowledge in a different context or location…."*

40. For an activity to be a core R&D activity, the Applicant must establish that it developed a hypothesis capable of being tested by conducting an experiment. The hypothesis must be focused on one or more technical or scientific areas of uncertainty that can only be resolved through experimentation. A hypothesis focused on commercial objectives is not sufficient.[23]

41. The Applicant must also establish that it observed and evaluated the results of its experiment. This requires, at a minimum, that the Applicant observed, measured and recorded the information and results relating to the experiment, before analysing and evaluating those results. The Applicant must therefore demonstrate that the systematic progression of work led to logical conclusions as to whether the hypothesis is right or wrong.

42. Section 355-25(1)(b) of the ITAA 1997 further requires that an activity be conducted for the purpose of generating new knowledge (including knowledge in the form of new or

---

[22] See also paragraphs 2.7 and 2.13 of the 2010 R&D EM.

[23] *RACV Sales and Marketing Pty Ltd and Innovation Australia* (2012) 129 ALD 32 at 55 [24] and 110 [225] (DP Forgie and SM Fice).

improved materials, product, devices, processes or services). The reference to 'the purpose' in s 355-25(1)(b) is not a reference to a dominant or prevailing purpose.[24] However, the use of the definite article 'the' indicates that the relevant purpose must be substantial.[25]

43. The purpose for which activities are carried on '*is the object or aim for which they were carried on at the time*' and is not determined '*according to a rationale developed at a later time to explain why those activities were carried on*'.[26] Moreover, the purpose of the claimed activity must be proved by evidence[27] (which will almost always be in the form of contemporaneous documentation).[28]

44. Under the express terms of s 355-25(1)(b), the knowledge being sought must also be 'new'. 'New knowledge' in this context means knowledge not already available in the public domain at the time the activities are conducted, in the relevant technology, on a reasonably accessible worldwide basis.[29] It does not mean knowledge that is new only to the Applicant.

THE ISSUES

45. The Respondent concedes and the Tribunal finds that the Applicant, Ultimate Vision Inventions Pty Ltd:

(a) is and was an 'R&D entity' for the purposes of the IR&D Act as a body corporate incorporated under an Australian law;

---

[24] *Re Moreton Resources Ltd and Innovation and Science Australia (Taxation)* [2018] AATA 3378 (DP Forgie) at [203].

[25] *Re JLSP and Innovation Australia* [2016] AATA 23 at [52] (DP Frost); cf *Re Moreton Resources Ltd and Innovation and Science Australia (Taxation)* [2018] AATA 3378 at [200] (DP Forgie).

[26] *RACV* (2012) 129 ALD 32 at [24(7)(a)(i)] and [227] (DP Forgie and SM Fice) referring to former s 73B of the ITAA 1936. See also *Re Moreton Resources Ltd and Innovation and Science Australia (Taxation)* [2018] AATA 3378 at [204] (DP Forgie).

[27] *RACV* (2012) 129 ALD 32; [2012] AATA 386 at [24] (DP Forgie and SM Fice).

[28] *Mt Owen Pty Limited and Innovation Australia* (2013) 137 ALD 88 (DP Tamberlin QC).

[29] Paragraph 2.16 of the 2010 R&D EM.

(b) was previously named Ultimate Vehicle Imports Pty Ltd' until 7 June 2016;[30] and

(c) was registered by the Respondent under s 27A of the IR&D Act in respect of the activities detailed in the Applicant's application for registration for each of the Relevant Years.[31]

46. The activities registered by the Applicant in the Relevant Years as part of the project described as '*UVI001 Design and Development of an integrated Health and Fitness program and Cloud based Decision Support Systems*' may be summarised as follows:

No.	2014 year[32]	2015 year[33]	Core or supporting
1.1	Design of fitness management algorithms for calorie consumption measurement	Improvements in fitness monitoring algorithms and multi-level search engine	Core
1.1.1	Supporting	Supporting	Supporting
1.2	Design of health management algorithms for calorie consumption measurement	Improvement in diet monitoring algorithms and multi-level search engine	Core
1.2.1	Supporting	Supporting	Supporting
1.3	Conceptual design and evaluation of a potential implementation of cloud based decision support systems	Improvements of cloud based anti-collision systems with 'smoothing' algorithms	Core
1.3.1	Supporting	Supporting	Supporting

47. The Tribunal is to determine these three issues:

(1) Did the Applicant conduct the Activities?

Has the Applicant proved, on the balance of probabilities, that it conducted the activities as registered by it in each of the years ending 30 June 2014 and 30 June 2015?

---

[30] T40B pp 280 to 282; see also T14 pg 103 (search at 25 March 2015). A copy of screenshots from the applicant's website taken on 29 August 2016 show that its automotive function was still a major part of its business: T38 pg 253. This was in accordance with the functional specifications for the web site as part of a redesign that occurred in May 2015: see Attachment MN-4CC(i) to the MN Statement.

[31] See the notice of registration for the 2014 year at T5 pg 66 and the notice of registration for the 2015 year at T24 pg 202.

[32] T4 pp 49 to 65. Registered on 1 July 2014.

[33] T21 pp 180 to 195. Registered on 1 July 2015.

(2) If the Applicant did conduct one or more Activities that it registered as "core R&D activities", do any one or more of those Activities satisfy the requirements for "core R&D activities" in s 355-25 of the ITAA 1997?

(3) If the Applicant conducted any "core R&D activities", and proved that it also conducted other Activities, do any of those other Activities satisfy the requirements for "supporting R&D activities" in s 355-30 ITAA 1997?

If the answer to question 2 is "yes" in respect of any one or more Activities registered as "core R&D activities", and there are other Activities that the Applicant proved on the balance of probabilities were conducted in the years ending 30 June 2014 and 30 June 2015, then do any of those other Activities meet the requirements for "supporting R&D activities" under s 355-30 ITAA 1997?

The Applicant's claim fails for any Activities in respect of which the answer to the above questions is "no".

48. Hence, the fundamental issue for determination by the Tribunal is not whether the Applicant had an idea that, when described in general terms, could be characterised as being 'innovative'. The question is whether the actual activities were carried out by or on behalf of the Applicant as registered in the Relevant Years and, if so, whether any one or more of those registered activities was an 'R&D activity', as defined. If the Tribunal is satisfied that the activities were conducted, the Tribunal is required to assess the matters in s 27J of the IR&D Act to determine:

(a) whether all or any part of each of the Applicant's registered activities was or was not a 'core R&D activity' within the meaning of s 355-25 of the ITAA 1997 conducted during the Relevant Years (s 27J(1)(a) and (b) of the IR&D Act); and

(b) if part or all of any one or more registered activities is found by the Tribunal to be a 'core R&D activity', then whether all or any part of each of the Applicant's registered activities was or was not a 'supporting R&D activity' within the meaning of s 355-30 of the ITAA 1997 in relation to one or more specified core R&D activities during the Relevant Years (s 27J(1)(c) and (d) of the IR&D Act).

49. The Tribunal must be satisfied that the Applicant has proved that each of the criteria prescribed in ss 355-25 and 355-30 is satisfied (where applicable) in respect of the

registered activities on the balance of probabilities.[34] It is not sufficient for the Tribunal to look generally at the evidence, without giving consideration to each criteria required by the statute in respect of each activity.[35]

50. In addition to the extensive documentary evidence tendered (Exhibits A1 to A4 and R1 to R4), the various witness statements and expert reports provided, the following witnesses gave oral testimony at the hearing, were cross-examined and questioned by the Tribunal:

(a) Mark Nicolau;

(b) Werner Nicolau;

(c) Associate Professor Jean-Guy Schnieder;

(d) Dr Deborah Kerr

51. The way in which the Applicant registered its activities for the Relevant Years is set out above. Critically, the detail of the registrations[36] makes it clear that the experimental activities associated with registered activities 1.1 and 1.2 in the Relevant Years were exercise-related for the purposes of determining calorie consumption for use in the proposed 'fitness algorithm' and diet-related for the purposes of determining calorie intake for use in the proposed 'health algorithm', respectively. The Applicant cannot now endeavour to disavow the description of the activities as registered, by attempting to recharacterise its activities as purely software engineering related,[37] as discussed below. The Tribunal's review is constrained by the focus in s 27J of the IR&D Act on the registered activities.

52. The Applicant submitted its system would integrate the user's health and fitness objectives, with their physical characteristics and their medical history. It would communicate with the gym equipment, smartwatches and the bathroom scale. It would communicate with a secure, contemporary, database of scientific knowledge. It would seek an optimal solution for the user. It would track results and work pragmatically with

---

[34] *Re Moreton Resources Ltd and Innovation and Science Australia* (Taxation) [2018] AATA 3378 (DP Forgie) at [240].
[35] Ibid at [246].
[36] At T4 pp 49 to 65 and T21 pp 180 to 195.
[37] Applicant's closing submissions dated 23 November 2018 (*applicant's submissions*) at para 16, 36 and 54.

user preferences, to take the path that takes the individual to his or her goal. As discussed above, far more than an idea or concept is required to meet the criteria in s 355-25 ITAA 1997.

53. The Applicant submitted that it had an idea to build something new in 2013. In its written closing, it submits that the 'key to this case' is catching what the Respondent has missed. However, clearly it was for the Applicant to put before the Tribunal the necessary material required to support a finding by the Tribunal in its favour.

54. The Applicant submitted that the research before the Tribunal produced several algorithms which were explained in the Functional Specifications and Detailed Design documents. It submitted that the experimentation completed was based on principles established in science, being software engineering, and not fitness or dietary domains of the health industry.

55. The Applicant submitted in software engineering the experiments are carried out for each development phase starting with the conceptual design, functional specifications and detailed design; where concepts are tested for viability, functionality and logic and followed by test planning, source code testing and alpha and beta testing. It was claimed the R&D Manuals contain the evidence of the work progress in accordance with principles of established science.

56. The Applicant submitted that the independent experts, called by the Respondent, were confused about the project scope in stating that the Applicant was trying to develop another fitness or dietary program and not the world's first integration of existing programs with end-user's personal profile, health status and objectives.

57. The Applicant was critical of Dr Kerr's expertise as a dietician, rather than in software engineering. She was said to be '*unable to see the evidence of the software engineering work that was in front of her*'. However, she did testify, relevantly, "*based on the evidence that I had, there is a – you have a concept and an idea that you've presented, however, there is no experimentation or evidence to support the work actually exists*".

58. The Applicant submitted that Dr Kerr and Associate Professor Schneider didn't know what its system was about. "*It was an innovative system, such as done by Apple and Google.*

An iPod is simple, once you've seen it. Not before. The Applicant's Health and Fitness System had not been seen before. It is all easy after it has been done. Then you don't need research".

59. By reason of s 27J of the IR&D Act, it is necessary for the Tribunal to focus upon the registered activities as opposed to the generality of ideas and determine what if any relevant research and development work, in compliance with the IR&D Act, as analysed above, has been completed by the Applicant during the Relevant Years.

60. The Applicant, in its written Closing Submission in Reply, maintained, again, that it is the Respondent which has "*failed to substantiate its case*". The Applicant purported to assert discrepancies in the evidence of the Respondent's experts in respect of their evidence on design and specifications, innovation and experimental activities.

61. The Applicant submitted that "*the systematic progression of work that proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions is applied in the development of its Health and Fitness System as a whole*", and the registered activities which form part of that system are evidenced by:

    (a) algorithms;

    (b) the five Tables at Tab 9.3 on page 492 of the Tribunal Book (Ex R4 pp 492-496);

    (c) the documents referenced in the five Tables;

    (d) the existence of different versions of such documents; and

    (e) that part of the specification and design of transaction processing and the exchange of information, components of the Health and Fitness System which was commenced in the 2015 year falling within the Relevant Years.

62. However, on balance, after a thorough analysis of the documentary evidence in this matter together with consideration of the oral testimony, the Tribunal finds that insufficient evidence exists to indicate that any of the registered core R&D activities were conducted as discussed below.

63. The Applicant filed two witness statements with the Tribunal on or around 16 November 2017:

(a) the witness statement of the sole director and shareholder of the Applicant,[38] Werner Victor Nicolau dated 16 November 2017, together with Attachments WN-1 to WN-8 (the WN Statement); and

(b) the witness statement of Mark Cornelius Nicolau dated 16 November 2017, together with Attachments MN-1 to MN-4DD (the MN Statement).

64. Mark Nicolau is Werner Nicolau's father[39] and also the sole director of Akyman Investments Pty Ltd (Akyman), a company that was a registered research services provider under s 29A of the IR&D Act in the Relevant Years.[40]

65. The Applicant subsequently filed:

(a) a further witness statement from Mark Cornelius Nicolau dated 17 May 2018, together with Attachments MCN-1 to MCN-5[41] (the Supplementary MN Statement);

(b) a further supplementary witness statement from Mark Cornelius Nicolau dated 30 July 2018, which attached a further set of Attachments MCN-1 to MCN-8[42] (the Further Supplementary MN Statement); and

(c) a supplementary witness statement from Werner Victor Nicolau, dated 7 August 2018, together with Attachments WVN-1 to WVN-2 (the Supplementary WN Statement) – although this statement was held not to be relevant on the basis it related to the year ended 30 June 2016 (2016 year), which is not before the Tribunal.

66. These witness statements contained insufficient direct evidence of what was actually done by the Applicant, or by Akyman, in the way of experimental activities in the Relevant Years at a level of detail to support the finding by the Tribunal that the registered activities were

---

[38] Paragraph 1 of the WN Statement. See also T40 pp 280 to 282 and T14 pg 103 (search at 25 March 2015).
[39] Paragraph 2 of the WN Statement) and paragraph 24 of the MN Statement.
[40] Paragraph 1 of the MN Statement; see also the registration for the 2014 year at T18F pg 171 and for the 2015 year at T18F pg 170.
[41] Referred to herein as 'S MCN-#'.
[42] Referred to herein as 'FS MCN-#'.

either 'core R&D activities' or 'supporting R&D activities', as defined. Rather, the witness statements comprise conclusory assertions expressed in general terms.

67. The witness statements do attach documents, but many of those documents are irrelevant, as discussed below. Of the remaining documents, which do appear, on their face, to relate to the Applicant's proposed 'health and fitness program', there are multiple versions of these documents, most of which show very little progression in terms of the work purportedly done by the Applicant – and none of which record anything in the way of actual 'experimental activity' in the form of a systematic progression of work based on the principles of established science, as required.[43]

68. Further, such documents were demonstrated to be unreliable. According to the Applicant's witnesses, the dates on the documents did not necessarily correspond to the actual date of the document.[44] There were also numerous errors in the documents. For instance, by Mr Mark Nicolau's own admission, the invoices produced by Akyman included work not actually performed.[45]

69. The Applicant's witnesses also gave answers during cross examination that were often contradictory, confused or evasive, and not based on any independent recollection of the purported work actually performed on the Applicant's registered R&D activities. By way of specific example:

    (a) Whereas Mr Werner Nicolau gave evidence that his mother was a test subject,[46] Mr Mark Nicolau characterised his wife's (being Werner's mother) involvement as being in an administrative capacity only.[47]

---

[43] Compare the draft conceptual design document dated 12 April 2014 at Attachment MN-4E to the MN Statement; the mislabelled functional specification document dated 26 July 2014 at Attachment MN-4F to the MN Statement, which makes no reference to the Applicant or Akyman conducting any tests whatsoever; the 'upgraded' mislabelled functional specification dated 12 December 2014 at Attachment MN-4G to the MN Statement, version 2 of the draft detailed design at May 2015 at T18A pp 113 to 141 and version 3 of the draft detailed design dated 30 May 2015 (at Attachment MN-4I to the MN Statement). See also MN XXN TS(transcript)281[37]-TS296[45].

[44] See for instance WN XXN TS54[34]-TS57[11] and MN XXN TS284[16]-[46] and TS293[1]-[20].

[45] T18B pp 142 to 147. See also WN XXN at TS115[33]-[39] and TS116[1]-[11], and MN XXN TS307[42]-309[27].

[46] WN XXN TS73 [19]-[36].

[47] MN XXN TS268[8]-[15].

(b) Mr Mark Nicolau could not confirm when he first met with the dietician, Mr Surdut, nor whether he met him four or five times.[48]

(c) The evidence concerning when work began on the health and fitness 'field tests' (or 'pilot program') was inconsistent and confusing,[49] with Mr Mark Nicolau ultimately admitting he had no independent recollection of when work began.[50] Similarly, neither witness appeared to know when testing ended.[51]

70. The oral testimony of the Applicant's witnesses did not add any of the requisite detail to the unsatisfactory state of the documentary evidence relied upon by it.

IRRELEVANT MATERIAL RELIED ON BY THE APPLICANT

71. Much of the material relied on by the Applicant before the Tribunal was irrelevant to the Tribunal's review. This included all the material relating to its registered activities in the 2016 year, in addition to documents relating to the Near Field Communication (NFC) work performed by Akyman on behalf of a different company,[52] as well as the transaction card processing system, 'Find Phone Mobile App', the 'ZAP contract mobile APP' and a 'power socket rotative adaptor'.[53]

72. None of these activities are mentioned in the Applicant's registrations for the Relevant Years. They are therefore irrelevant to the question of whether any of the Applicant's registered activities in the Relevant Years were actually conducted either as core R&D activities within the meaning of s 355-25 of the ITAA 1997 or as supporting R&D activities within the meaning of s 355-30 of the ITAA 1997, in either of both of the Relevant Years. The Applicant's continued attempt to rely on irrelevant material, in an impermissible attempt to extend the scope of its activities,[54] only highlighted the lack of material before the Tribunal relating to the actual registered activities for the Relevant Years.

---

[48] MN XXN TS183[41]-TS189[40]. Cf Further Supplementary MN Statement at [7]-[8].

[49] Compare paragraph 23 of the WN Statement with XXN WN TS69[12]-TS70[24] and TS73[9]-[17]. See also MN XXN TS259[45]-TS261[22].

[50] MN XXN TS263[14]-TS264[11].

[51] WN XXN TS84[33]-TS85[34] and MN XXN TS278[37]-TS280[17], compare paragraph 15 of the Further Supplementary MN Statement.

[52] MN XXN TS124[31]-[47].

[53] WN XXN TS38[39] to TS43[21].

[54] Applicant's submissions at [19]-[22] and [33].

73. Records of personal diets[55] and personal gym programs[56] of the Applicant's witnesses relied on by the Applicant are also irrelevant.

74. In addition, the Applicant persisted in its attempts to rely on notes and documents prepared by staff of the Department during earlier reviews of the Applicant's activities.[57] Notwithstanding that this material was irrelevant to the Tribunal's review of the decision made by the Respondent under s 30D of the IR&D Act.[58]

75. In any event, the decision under review is in no way inconsistent with the conclusion reached by Dr Jessie Hiu Kiu on the original compliance review completed on or around 9 July 2015.[59] By letter dated 9 July 2015, Dr Jessie Hiu Kiu informed the Applicant that its registration had been rated as having a '*medium risk of non-compliance*', and that the Applicant had been '*flagged for further review upon the next registration submission*'.[60]

REGISTERED ACTIVITY 1.1 IN EACH OF THE RELEVANT YEARS

76. In the 2014 year, the Applicant's registration described activity 1.1 as consisting of experiments targeting '*groups of individuals of different ages, sex, personal habits and health status, who performed for a predetermined period of time the same type of physical exercises confined to the same number of repeats, weights and time of the day*' to determine '*consumption of calories…*'.[61] In the 2015 year, the experiments were purportedly modified to experiment with '*how a set of apparently unrelated factors (i.e. elevation, temperature, humidity, etc) would affect the calorie burning rate and how could the accuracy and speed of search for suitable fitness programs can be improved*'.[62]

---

[55] Attachment MCN-2 to the FS MN Statement, a more complete copy is reproduced in the 'Test Manual' at Attachment MN-4L to the MN Statement; MN XXN TS190[24]-[43].
[56] Reproduced in the 'Test Manual' at Attachment MN-4L to the MN Statement; WN XXN TS76[18] -TS77[6]. See also MN XXN TS266[23]-[45] where Mr Mark Nicolau concedes that entries in a 'daily activity log' were just him going to the gym.
[57] Applicant's submissions at [11] and [50]-[51].
[58] *Re WT95/13-14 and Deputy Commissioner of Taxation* [1996] AATA 62 at [8]-[9] (DP Barnett).
[59] Contra paragraph 27 of the Applicant's Reply.
[60] T22 pg 196; see also T23 pp 197 to 201.
[61] T4 pg 56.
[62] T21 pg 187.

77. The registration for the 2014 year also stated that the Applicant's '*hypothesis is that the consumption of calories for the same amount of fitness exercises is dependent upon the age, activity habits and health condition of each individual*'.

78. The evidence did not disclose any experimental activity, of the type described in the registrations, was carried out by or on behalf of the Applicant. Rather, no more than two or three members of the Nicolau family completed test record forms relating to their exercise.[63] Mr Mark Nicolau's evidence is that no women participated.[64] It is difficult to conclude that a scientific method was followed as the activities did not involve a sufficiently large sample of participants strictly following a set exercise program. In fact, the evidence is that the test subjects did not necessarily follow the stipulated program at all.[65] No objective baseline measurements were established to determine calorie consumption resulting from exercise,[66] nor was there any accurate way of measuring environmental conditions for the purposes of the testing purportedly done in the 2015 year. Rather the test record forms all record highly subjective handwritten annotations, such as '*high sweat*', '*good cardio*' and '*v. windy*' and descriptions of exercise such as, '*walked past bench*'.[67]

79. Further, there was also no evidence of any meaningful analysis or evaluation of the results of the Nicolau family's exercise in the Relevant Years.

80. By the Applicant's own admission,[68] none of this activity was carried out in accordance with the principles of established exercise science. The Applicant did not consult an expert in the field of fitness, exercise or medicine. The Applicant did not have a purpose of generating new knowledge – at best, it was indifferent to whether the knowledge generated through its field tests (if any) was new or not.[69]

---

[63] WN XXN TS73[19]-[20], TS75[21]-[44], TS84[5]-[31] and TS97[22]-[25]. See also T46 pg 324 and paragraph 23 of the WN Statement.
[64] MN XXN TS269[1]-[15].
[65] See, for instance, T18C pg 153. WN XXN TS100[19]-[40] and MN XXN TS274[18]-[23].
[66] WN XXN TS78[8]-[14] and TS100[19]-TS103[27]. MN XXN TS251[30]-[35].
[67] WN XXN TS100[42]-TS101[27] and TS102[1]-TS103[27]; MN XXN TS251[1]-[9]. See, for instance, T18C pg 153.
[68] Applicant's submissions at [16].
[69] See also WN XXN TS97[32]-[41] and TS98[9]-TS99[11].

81. If the Applicant had consulted an expert, it would have been informed that the outcome of its registered activity 1.1 could have been known in the Relevant Years. To this end, Dr Deborah Kerr opined in her report dated 7 March 2018, filed with the Tribunal on 8 March 2018 (the Kerr Report):[70]

(a) with respect to registered activity 1.1 in the 2014 year, Dr Kerr stated that '*as at 1 July 2013 it was well known that energy expenditure is largely dependent on an individual's resting metabolic rate*' and that it was '*also well-known at 1 July 2013 that a person's resting metabolic rate was dependent on age, gender, size, and will be influenced by life stages such as pregnancy, lactation, growth and disease conditions*';[71] and

(b) with respect to registered activity 1.1 in the 2015 year, Dr Kerr stated that a search of the scientific literature in existence by 1 July 2013 shows that there were already published papers that dealt with the impact of factors such as humidity, elevation and temperature on metabolic rate.[72]

82. The purported 'algorithms' produced as a result of this activity[73] were so deficient, Dr Kerr did not recognise the diagrams as algorithms.[74] On balance, insufficient evidence was before the Tribunal to support any alternate conclusion.

REGISTERED ACTIVITY 1.2 IN EACH OF THE RELEVANT YEARS

83. In the 2014 year, the Applicant's registration described activity 1.2 as consisting of '*experiments targeting groups of individuals of different ages, sex, personal habits and health status, who will consume for a predetermined period of time the same amount and types of foods and beverages at the same time of the day*' to determine '*calorie intake*'.[75] In the 2015 year, the experiments were purportedly modified to experiment with '*how a set of apparently unrelated variables (i.e. elevation, temperature, humidity, etc) would affect*

[70] After reviewing the Supplementary MN Statement and Further Supplementary MN Statement, Dr Kerr confirmed her views expressed in the Kerr Report in a supplementary expert report dated 6 August 2018 (Supplementary Kerr Report).

[71] Paragraph 42 of the Kerr Report.

[72] Paragraph 45 of the Kerr Report.

[73] MN Statement at [29] and Attachment MN-3.

[74] Kerr Report at [24].

[75] T4 pg 58.

the calorie intake rate and how could the accuracy and speed of search for suitable health programs can be improved'.[76]

84. The registration for the 2014 year also stated that the Applicant's '*hypothesis is that the retention of calories from the same amount of food and beverages is dependent upon the age, activity habits and health condition of each individual*'.

85. Again, the evidence did not disclose any experimental activity of the type described in the registrations was carried out by or on behalf of the Applicant. Rather, the documents before the Tribunal suggest that this 'experiment' consisted of no more than Mr Mark Nicolau following a diet that he had been given by a dietician because of his own personal health issues.[77] There was no 'experiment' as such, because nothing was being tested. Consistent with the fact that Mr Mark Nicolau following a diet for his own health issues was not an experiment, no scientific method was followed. That is, there was no attempt to accurately measure the exact amount of food consumed,[78] to convert the food consumed into calories for the purposes of analysis,[79] or to record the time at which food was consumed.[80] And, again, there was no attempt to quantify Mr Mark Nicolau's basal metabolic rate to enable meaningful conclusions about 'calorie intake' to be drawn.[81]

86. As with registered activity 1.1, the Applicant now admits[82] that none of this activity was carried out in accordance with the principles of established dietary science. Further, the evidence establishes that the dietician, Mr Surdut, did not have any direct input into this activity.[83] If the Applicant had consulted an expert, it would have been informed that the outcome of its registered activity 1.2 could have been known in advance in the Relevant Years. To this end, the Kerr Report states that:

(a) merely keeping a food log was '*nothing new*';[84] and

---

[76] T21 pg 189.

[77] MN XXN TS190[9]-[33], TS190[44]-[45], TS267[11]-[21] and TS267[45]-[46]; see also paragraphs 5 to 12 of the Further Supplementary MN Statement and Attachment MCN-1.

[78] WN XXN TS83[39]-TS84[3] and MN XXN TS251[40]-TS252[31] and TS254[11]-[26].

[79] WN XXN TS83[1]-[37].

[80] MN XXN TS256[40]-TS257[35].

[81] WN XXN TS78[8]-[14] and MN TS251[30]-[35].

[82] Applicant's submissions at para 16.

[83] MN XXN TS258[45]-[48].

[84] Paragraph 82 of the Kerr Report.

(b) to the extent that the Applicant claims that its registered activity 1.2 was used by it to confirm an existing equation for the determination of calorie intake was more accurate than other prediction formulae, '*the idea of measuring which of the existing equations is the most accurate is clearly not novel or capable of generating new knowledge*… [because the Applicant] *simply tested existing measures*'.[85]

87. The purported 'algorithms' produced as a result of this activity[86] were so deficient, Dr Kerr did not recognise the documents as algorithms.[87]

88. In addition, there was no objective evidence that the Applicant had a purpose of generating new knowledge in relation to this activity.

REGISTERED ACTIVITY 1.3 IN EACH OF THE RELEVANT YEARS

89. In the 2014 year, the Applicant's registration described Activity 1.3 as follows:[88]

> *Experiment 1: Design and implement a Cloud based Fitness monitoring program to capture[s] the results of various Fitness exercises undertaken by the user in accordance with Fitness programs certified by reputable organizations or individual trainers.*
>
> *Experiment 2: Design and implement a Cloud based Dietary monitoring program which captures the results of Food, Beverages and Pharmaceutical products intake by the user in accordance with personal Dietary programs certified by reputable organizations or individual diet experts.*
>
> *Experiment 3: Design and implement a Cloud based Decision Support System which will process the inputs received from the Fitness and Dietary programs and of the personal Health and Fitness status and objectives for the purpose of ensuring that the individual's health is not damaged or endangered by either the personal Fitness program of by the personal Dietary program and that the personal Health and Fitness objectives are achieved.*

90. Activity 1.3 was registered in the 2015 year on the basis that the 'experiments' forming part of Activity 1.3 from the previous year were complete: '*We have determined from our experiments that our Cloud based anti-collision program elimination hypothesis was unsustainable in extreme cases such as the absence of suitable Fitness and/or Health*

---

[85] Paragraph 94 of the Kerr Report.
[86] MN Statement at [29] and Attachment MN-3.
[87] Kerr Report at [55].
[88] T4 pg 60.

programs due to user's personal health restrictions and personal wellbeing Objectives'.[89] Thus, it was said to be necessary to develop 'smoothing' algorithms.

91. Although:

(a) the registrations were drafted on the basis that registered activities 1.1 and 1.2 had to be completed before registered activity 1.3 could occur; and

(b) the Applicant had previously told the Respondent that activity 1.3 would '*merge the outputs of Experiments 1 and 2*',[90]

the Applicant's witnesses either tried to deny that it was necessary that the Activities be completed sequentially,[91] or could not explain how registered Activity 1.3 could begin before Activities 1.1 and 1.2 were complete.[92]

92. In these circumstances the Respondent submitted, and the Tribunal finds, that it cannot be satisfied that this Activity occurred as registered in the Relevant Years at all. The sequence of the Activities has not been satisfactorily explained by the Applicant and there is no contemporaneous evidence of what the purportedly experimental activity associated with registered Activity 1.3 was in the Relevant Years. In particular:

(a) the two 'test templates' for the 'Cloud Server APP' before the Tribunal did not actually record any testing or experimentation;[93]

(b) Mr Mark Nicolau's evidence was that producing the diagrams, the detailed design documents and the functional specifications represented the totality of the work Akyman did on behalf of the Applicant with respect to registered Activity 1.3 in the Relevant Years.[94] However, merely drafting documents is not an experimental activity, and the content of these documents did not corroborate that any 'desk-top' testing methodology was undertaken; and

---

[89] T21 pg 190.
[90] T12 pg 98.
[91] MN XXN TS299[29]-TS301[30].
[92] WN XXN TS117[41]-TS118[13].
[93] T18C pp 149 and 150.
[94] MN XXN TS302[22]-[27].

(c) the Applicant agreed that it never produced an application or source code, and therefore did not have anything to do alpha and beta testing on.[95]

93. The Applicant misrepresented the evidence of Dr Jean-Guy Schneider at paragraphs 14-15 and 41 of its submissions:

(a) Dr Schneider's concession that the 'flow diagrams' marked as 'D.11 to D.18'[96] could be characterised as being algorithms[97] needed to be read together with Dr Schneider's report filed with the Tribunal on 8 March 2018 (Schneider Report). At paragraph 51 of the Schneider Report he made it clear that he was not commenting on the content of the purported algorithms associated with registered Activities 1.1 and 1.2 because they were beyond his expertise.

(b) Dr Schneider's evidence was that, in his opinion, the flow charts marked as 'D.11 to D.18' had not been developed to a point where they could be implemented because they contained a multitude of decision points that were non-trivial.[98] Considering the flow charts together with the other various documents prepared by Akyman, including the 'functional specification,' did not change Dr Schneider's view that the purported algorithms had not been developed to a point that they could be implemented.[99]

(c) Dr Schneider stated that, in his opinion, it was not possible to design and test all aspects of the functionality of an application in the absence of source code. That is, a purely 'desktop' methodology, such as the one that Akyman now claims to have used, would not be sufficient.[100]

94. The compelling aspect of Dr Schneider's evidence was that there was insufficient evidence of what was done (if anything) in the way of experimental activity associated with registered Activity 1.3 to evaluate whether the outcome could have been known in

---

[95] See, for instance, the question put to Schneider in XXN at TS238[1]-[3].
[96] Refer to Attachment MN-3 to the MN Statement.
[97] Schneider XXN TS213[28]-[30].
[98] Schneider XXN TS225[8]-[11] and RXN at TS244[11]-[28].
[99] Schneider XXN TS231[42]-TS232[3] and RXN at TS245[10]-[39].
[100] Schneider XXN TS215[1]-[2], and TS214[24]-TS215[7]. See also RXN at TS246[3]-[28].

advance for the purposes of s 355-25(1)(a) of the ITAA 1997. Therefore, it is relevant that Dr Schneider also opined that:

(a) with respect to Activity 1.3 in the 2014 year, the use of a 'cloud based decision support system' is not novel,[101] '*client-server type architectures are nothing new*'[102] and based on the available material there was '*nothing particularly unusual*' about the system proposed by the Applicant;[103] and

(b) with respect to Activity 1.3 in the 2015 year, there were already 'anti-collision' and 'smoothing' algorithms in existence as part of software systems in other domains prior to June 2013.[104]

95. Contrary to paragraphs 36-37 and 57 of the Applicant's submissions, the fact that the experts engaged by the Respondent opined that they could not see any evidence of experimental activities the outcome of which could not be known in advance, does not suggest that the experts somehow misunderstood the Applicant's proposal. The experts were each briefed with the Applicant's own material. Any purported misunderstanding on the part of the experts is simply a reflection of the inadequacy of the material relied on by the Applicant before the Tribunal and does not assist the Applicant's case.

96. For completeness, and contrary to paragraphs 48(b) and 49 of the Applicant's submissions, the Respondent did not contend that the Applicant's proposed product is '*like nothing else yet created and thus impossible to implement*'. The Respondent's case was that there was no evidence that anything was created, let alone implemented, as a result of activities that were conducted in accordance with the Applicant's registrations for the registered activities. The Tribunal agrees. There was also no evidence that the outcome of the Applicant's registered activities could not be known or determined in advance on the basis of current knowledge, information or experience for the purposes of s 355-25(1)(a) of the ITAA 1997. The Applicant's assertion that its concept was new and novel does not answer the statutory criteria. Nor, incidentally, does Dr Kerr's response to

---

[101] Paragraph 97 of the Schneider Report.

[102] Paragraph 105 of the Schneider Report.

[103] Paragraph 106 of the Schneider Report.

[104] Paragraph 125 of the Schneider Report. Dr Schneider subsequently goes on to say that the lack of any detail concerning the work that the applicant claims to have done in respect of this activity means that he '*cannot say whether adapting existing algorithms to meet UVI's requirements would have been easy or difficult*' (at paragraph 126).

a question about whether an application was already in existence that allowed for the '*automated disqualification of incorrect exercise or dietary regimes…*'[105]

97. On balance, the Tribunal finds that there is no objective, contemporaneous evidence before it to support any finding or conclusion that the Applicant had a purpose of generating new knowledge associated with registered Activity 1.3.

CONCLUSIONS

98. In light of the findings above in respect of the absence of any core R&D activities, the Tribunal need not consider the conducting or otherwise by the Applicant of any activities alleged to fall within the definition of 'supporting R&D activities' in s 355-30 of the ITAA 1997.

99. In conclusion the Tribunal is not satisfied that any of the registered activities, being R&D activities within the meaning of ITAA 1997, were conducted by or on behalf of the Applicant in the Relevant Years.

DECISION

100. Accordingly, the Tribunal affirms the decision under review.

I certify that the preceding one hundred (100) paragraphs are a true copy of the reasons for the decision herein of Mr A. Maryniak QC, Member

.....[sgd].....
Associate
Dated: 27 June 2019

[105] Cf Applicant's submissions at [52].

Date(s) of hearing:	**29-30 October & 8 November 2018**
Date final submissions received:	**18 December 2018**
Advocate(s) for the Applicant:	**Mr Werner Nicolau** **Mr Mark Nicolau**
Solicitors for the Respondent:	**King & Wood Mallesons** **Mr Sam Goldsmith**
Counsel for the Respondent:	**Ms Melanie Baker**