

Guide to Findings and Approval for Overseas R&D

Basis for Presentation

This presentation has been based on the following AusIndustry guidance publications titled:

- *Guide to findings*
- *What does 'not available in Australia' mean?*
- <https://www.business.gov.au/Assistance/Research-and-Development-Tax-Incentive/Guidance-and-information/Resources-library>

What are findings?

A finding is a decision by Innovation Australia about the eligibility of a company's activities relative to the R&D Tax Incentive legislation.

Findings are usually made on:

- Where activities are Core, Supporting or not R&D Activities;
- Whether overseas R&D Activities meet the additional requirements for approval.

The objective of a finding is to:

1. provide certainty to companies about their entitlement to the R&D Tax Incentive; or
2. Facilitate compliance activity where an examination or audit is instigated;

Findings are binding on both Innovation Australia and the Australian Taxation Office (ATO).

Who makes the findings?

- The R&D Tax Incentive is administered jointly by ATO and AusIndustry
- AusIndustry, whose scope includes registering and assessing activities, employ officers who are delegated certain powers in relation to findings. During the finding process, AusIndustry officers:
 - conduct the initial investigation into the merits of activities or technology that is the subject of a proposed finding;
 - gather relevant information to analyse whether activities meet the legislative requirements;
 - provide information to Innovation Australia in a report; and
 - make a recommendation based on evidence relating to the finding that should be made.

What are the types of findings available?

There are five types of findings that may occur:

1. Advance findings – are about the eligibility of activities before those activities are registered;
2. Overseas findings – are about eligibility of R&D activities to be conducted outside Australia;
3. Findings about a registration application – are about activities described in a registration application before they are registered;
4. Core technology findings – are about a technology a company has purchased for use in R&D activity; and
5. Post-registration findings – are about activities that have been registered.

Logistics and timeline for findings

Advance and Overseas Findings:

- Instigated and lodged by company;
- These findings must be made before the end of the income year in which the activity was conducted (activities conducted during FY20 must have a finding lodged before 30 June 2020);
- Within the finding application, company must describe activity and provide supporting evidence that allows AusIndustry to understand and assess against the legislation;
- The ATO and AusIndustry is bound as to the eligibility of activities for the income year a request for an advance finding is made, and/or the next two income years;

Logistics and timeline for findings

Finding about a registration or Post Registration Findings:

- Such findings are instigated by AusIndustry or ATO rather than the company, and arise during compliance proceedings;
- Findings can occur before registration or after the registration occurs;
- In a self assessment regime, post registration findings are most common which can occur after a company has lodged a claim and received a benefit.
- Following registration, Innovation Australia can examine a company's activities for the purposes of making a finding about their eligibility. The company is able to provide information and documentation to assist with the finding;
- If activity is found to be ineligible, the finding is binding on the ATO who must then amend tax assessments to wind back the relevant offsets claimed.

The process by which findings are made

Findings are made on the basis of information from multiple sources including:

- a company's application;
- subsequent meetings and correspondence with a company;
- site visits organised in advance with the company;
- information provided by the company in response to information requests from AusIndustry;
- research, including literature searches, by AusIndustry officers; and
- independent experts engaged to provide opinions on particular cases.

Should a company disagree with a finding decision, they can request an internal review.

Overseas R&D Activity – Finding Required for pre Approval

- There are specific requirements for the claiming of overseas activity which apply in addition to the general eligibility criteria;
- Companies seeking to claim overseas R&D Activity must lodge an overseas finding with AusIndustry to demonstrate how the specific requirements are met;
- Companies are not able to claim overseas activities until their overseas finding has been lodged, assessed and approved by AusIndustry;

What are the conditions for receiving a finding about overseas activities?

There are four conditions to be met for a finding to be made that activities conducted outside Australia are eligible under the R&D Tax Incentive.

1. The activities must be covered by an advance finding stating that the activities are eligible.
2. The activities must have a significant scientific link to one or more 'Australian core activities' registered or reasonably likely to be conducted and registered.
3. The activities must be unable to be conducted within Australia because of one or more of the reasons listed in the legislation.
4. Expenditure on activities conducted overseas must not exceed expenditure on certain Australian activities.

Condition 1: The activity is covered by an advance finding

- The first condition is that the overseas activity is covered by an advance finding stating that the activity is eligible as a core or supporting R&D activity. In order to meet this condition, a company must seek an advance finding for the activities to be conducted overseas.
- AusIndustry provides a form that allows an overseas and advance finding to be made in the one application.
- The application must be made in the first income year that the overseas activities are conducted. An application cannot be for activities conducted in previous income years.

Condition 2: The activity must have a significant scientific link to one or more core R&D activities

- The second condition is that the overseas activity must have a significant scientific link to one or more core R&D activities conducted, or to be conducted, solely in Australia.
- Those Australian activities must be registered or reasonably likely to be conducted and registered for an income year.
- This condition requires two things:
 - The presence of one or more core R&D activities conducted in Australia (referred to as ‘Australian core activities’); and
 - A ‘significant scientific link’ between the overseas activity and the above Australian core activities.
- In order to demonstrate a significant scientific link to Australian core activities, the company must be able to demonstrate that the Australian core activities cannot be completed without the overseas activity being conducted.

Condition 3: The activity cannot be conducted in Australia

The third condition is that the activity cannot be conducted solely in Australia because of one of the following factors:

- conducting the activity requires access to a facility, expertise or equipment not available in Australia;
- conducting the activity in Australia would contravene a law relating to quarantine;
- conducting the activity requires access to a population (of living things) not available in Australia; or
- conducting the activity requires access to a geographical or geological feature not available in Australia.

Condition 4: Expenditure on overseas activities does not exceed expenditure on Australian activities

- The fourth condition is that the financial commitment to the Australian core activities and their related Australian supporting activities must exceed the financial commitment to all overseas activities which have a significant scientific link to the Australian core activities.
- Over the life of a project, expenditure on the related Australian activities must exceed expenditure on the total overseas activities.

What does ‘not available in Australia’ mean?

AusIndustry published specific issue guidance to clarify their interpretation of the reasons per the legislation of why an overseas activity cannot be conducted solely in Australia:

- a) *Conducting it requires access to a facility, expertise or equipment not available in Australia; or*
- b) *Conducting it in Australia would contravene a law relating to quarantine; or*
- c) *Conducting it requires access to a population (of living things) not available in Australia; or*
- d) *Conducting it requires access to a geographical or geological feature not available in Australia; or*
- e) *It meets a condition (if any) specified in regulations made for the purpose of this subsection.*

The activity “requires access to ... expertise ... not available in Australia”

Some notable extracts from AusIndustry guidance:

- *AusIndustry considers that expertise ‘not available’ means that a company is unable to find or access the expertise required for the project in Australia.*
- *A company must be able to show that it conducted a reasonable Australia-wide search and/or advertising campaign and can provide evidence that it was unable to obtain the necessary expertise in Australia.*
- *Examples of evidence may include independent advice from research organisations, industry associations or other relevant organisations or individuals addressing the lack of available expertise.*
- *If a company has not carried out its own thorough investigation of Australian-based expertise or experience, or attempted to recruit in Australia, a reasonable explanation substantiated with evidence must be provided.*
- *In some cases a supplier may exist which appears to have the capability to conduct an activity but does not have any proven experience in conducting such activities. The risk of not gaining credible results may be a reason why expertise is not available in Australia;*

The activity “requires access to ... expertise ... not available in Australia”

Some notable extracts from AusIndustry guidance:

- *Examples of evidence to demonstrate the lack of availability of facilities or equipment may include a letter of advice from research organisations, industry associations, or other independent organisations;*
- *AusIndustry considers that ‘not available in Australia’ means there are insufficient suitable human, plant or other animal subjects that would be necessary to conduct the activity in Australia.*
- *AusIndustry considers ‘not available in Australia’ means there is an absence of (for example) a particular rock or soil type, mountain or valley of a specific height, or environment of a particular type relevant to the conduct of the activities in Australia and this feature is unable to be appropriately and readily replicated by some other means.*
- *AusIndustry expects that companies provide appropriate evidence to demonstrate their claims specifically that the feature is not available in Australia and why it cannot be replicated.*

Supporting documents and records

- When assessing whether Activity could have been undertaken in Australia, AusIndustry considers evidence provided in support of claims on a case-by-case basis, taking into account the specific facts of each situation.
- In recent years, AusIndustry has placed emphasis on companies attaining expert opinions on the need to conduct the activity overseas;
- Guidance indicates such opinion statements from experts should include
 - statement of the expert's credentials,
 - disclosure of any relationship with the company that might give rise to a conflict;
 - explanation of why the activities satisfy the appropriate allowable reason.

Programme Administrator Contact

- <https://www.business.gov.au/assistance/research-and-development-tax-incentive>
- <https://www.ato.gov.au>

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