IIF program, Policies and Practices Direction No. 1 of 1997

as amended

Subsection 20(1)

*Industry Research and Development Act 1986*

This compilation was prepared on 18 September 2013 taking into account amendments up to *R&D Start Program, policies and practices of the IR&D Board in relation to the Innovation Investment Fund (IIF) Program Direction No. 1 of 1997 (Amendment No. 1 of 1998) (F2008B00471).*

Prepared by the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education.
PART 1—PRELIMINARY

Citation

1. This direction may be cited as the IIF program, Policies and Practices Direction No. 1 of 1997.

Commencement

2. This direction commences on the day on which particulars of the direction are published in the Gazette.

[NOTE: For the publication of the particulars, see s. 20 (3) of the Act.]

Interpretation

3. In this direction:

“Act” means the *Industry Research and Development Act 1986*.

“Associate” of a person means a related entity of the person.

“Board” means the Industry Research and Development Board.

“Board may” is permissive and not mandatory.

“Commonwealth program capital” means amounts invested in or provided to a licensed fund under the IIF program.

“committed capital” means amounts the Commonwealth or another person undertakes to invest in or provide to an IIF licensed fund, conditionally or unconditionally, and “committed” has a corresponding meaning.

“Department” means the Department of Industry, Science and Tourism.

“drawndown capital” means committed capital that has been invested in or provided to an IIF licensed fund.

“eligible investee company” means a company which satisfies the criteria developed under Part 5 of this direction.

“equity” includes any form of debt financing that is approved by the Board which does not compel the borrower or debtor to pay the interest, the coupon or other charge in the nature of interest prior to the end of the term of the debt, except in the event of default.

“fund” includes a firm, body corporate, trust or other structure.

“Government sourced capital” has the meaning given in clause 19.

“include”, “includes” and “including” do not limit the generality of the words which precede them or to which they refer.

“key personnel” in relation to a fund manager, includes individuals whose expertise, experience or abilities are assessed in relation to the awarding of a licence to that fund manager.

“passive business” means a company:

(a) which is not engaged in a regular and continuous business operation (the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation);
(b) whose employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or

(c) which the Board considers is likely to pass substantially all of the proceeds of the financing to another entity.

“person” includes a firm, body corporate, trust or other structure.

“private capital” means amounts invested in or provided to an IIF licensed fund that are not Commonwealth program capital.

“privately sourced capital” means amounts invested in or provided to an IIF licensed fund that are not, in the opinion of the Board, Government sourced capital.

“R&D activities” means research and development activities as defined in s 4(1) of the Act.

“related entity” of an entity, means an entity which is related to the first given in section 9 of the Corporations Law.

“result”, in relation to research and development activities, means a result that is capable of being exploited as contemplated by the Act.

“IIF guidelines” means the guidelines developed by the Board under Part 2 of this direction.

“IIF licensed fund” means a fund whose manager has been granted a licence in respect of the fund in accordance with this direction.

“IIF program” means the Innovation Investment Fund program.

A reference in this direction to an Act or other instrument is a reference to that Act or other instrument as amended or replaced from time to time.

A reference in this direction to “the IIF guidelines, licensing agreement or other contractual documents” or similar words is a reference to any one or more or all of them.
Purpose

4. The purpose of this direction is to set out policies and practices to be followed by the Board in the performance of its functions under the Act in administering the IIF program.

These policies and practices are designed to provide a basis for awarding licences and the ongoing oversight of IIF licensed funds under the IIF program.

For the purposes of this direction and in implementing the IIF program, the Board may enter into such deeds, agreements and other documents as it thinks fit.

Board to have regard to certain policy objectives

5. The Board must have regard to the following policy objectives in the administration of the IIF program:

(a) by addressing capital and management constraints, to encourage the development of new technology companies which are commercialising research and development;

(b) to develop a self-sustaining Australian early stage, technology-based venture capital market;

(c) to establish in the medium term a “revolving” or self funding scheme; and

(d) to develop fund managers with experience in the early stage venture capital industry.

PART 2—IIF GUIDELINES

6. The Board must develop guidelines for the operation of the IIF program (including the requirements to be imposed on IIF licensed funds, their managers or trustees) containing:

(a) the matters contemplated by this direction; and

(b) any other matters the Board thinks fit.

7. Where this direction refers to matters to be included in the IIF guidelines, those references are to be interpreted as a statement of general intent. In including those matters in the IIF guidelines, the Board may elaborate on, define or constrain terms referred to in this direction as it thinks fit in a manner consistent with the policy objectives.

8. The Board may amend the guidelines from time to time, as it thinks fit, including during the currency of any licensing round and after the applications have been received. The amended IIF guidelines apply in respect of that licensing round and to those applicants not withstanding the date on which the applications were made.

9. The Board may include such of the IIF guidelines within the licence agreement or other contractual documents relating to an IIF licensed fund as it thinks fit.

PART 3—AWARD OF LICENCES FOR FUND MANAGERS

Number of licensing rounds

10. The number of licensing rounds will be determined by the Board. The Board must publicise the closing dates for applications for each licensing round.
Application fees

11. The Board must levy a fee to recover part or all of the costs incurred by the Board and the Department in assessing a licence application. The Board may refuse to consider a licence application until such fee is paid.

Consideration of applications

12. Applications invited by the Board must be considered by the Board as soon as practicable.

Award of Licences

13. The Board must consider applications by reference to the IIF guidelines. The number of licences to be awarded by the Board, if any, will depend on:

(a) the total amount of available Commonwealth program capital allocated by the Board in each licensing round;
(b) the suitability of applicants in terms of the IIF guidelines;
(c) the level of Commonwealth program capital requested within individual applications; and
(d) any other matters which the Board thinks fit.

14. The Board is not obliged to award a licence because an applicant satisfies the IIF guidelines or for any other reason.

Requirements concerning applicants

15. Subject to clause 8, the IIF guidelines are to include criteria by which the Board will consider applications. These criteria must include:

(a) a demonstrated ability to access the level of privately sourced capital requested within the application for a licence;
(b) an understanding of and experience in dealing with issues related to Australian and international technology investments, products, services and markets;
(c) expertise and experience in actively seeking and investigating potential equity investments in small early stage companies;
(d) expertise and experience in developing and implementing equity investment strategies to achieve returns by investing in small early stage companies;
(e) expertise and experience in the development and implementation of successful growth and recovery strategies for small early stage companies;
(f) expertise and experience in the successful management of investment portfolios;
(g) experience in providing financial management advice to small early stage companies;
(h) expertise and experience in realising returns from investments through third party transactions such as later round financing, trade sales and initial public offerings;
(i) experience in generating and maintaining a variety of financial data and reports on investment funds;
(j) demonstrated good character and high ethical standards;
(k) commitment to training and developing the skills of Australian based staff in all aspects of making venture capital investments in small, early stage companies; and
(l) demonstrated willingness to operate within the intent of the IIF program.

16. The Board may, if it thinks fit, in respect of any one or more or all applications from time to time:
(a) take into account experience, expertise, abilities and other matters similar or related to the criteria in the IIF guidelines when assessing an applicant; and
(b) attribute to particular categories of experience, expertise or abilities, or other matters, set out in the criteria, a higher level of relative importance than other such categories or matters in considering an application for a licence.

17. The Board must include in the IIF guidelines details of the information to be provided by applicants for a licence. That information must include:
(a) the key personnel of the proposed fund manager including their roles, terms of employment and responsibilities;
(b) the amount of Commonwealth program capital required;
(c) the amount and sources of the private capital raised or proposed to be raised; and
(d) a business plan that includes details of:
   (i) the timing of investments;
   (ii) the level of annual fund management fees; and
   (iii) the scope of the management services to be provided to the fund for the fund management fee.

18. Without limiting clause 8, the Board may, if it thinks fit from time to time, include other requirements relating to applicants and applications in the IIF guidelines.

Government sourced capital

19. The Board must regard as Government sourced capital amounts invested in or provided to an IIF licensed fund by:
(a) an entity or entities funded directly or indirectly by the Commonwealth, a State or Territory;
(b) any person who, as the Board thinks fit, is directly or indirectly in receipt of funding from a source or combination of sources which are funded directly or indirectly by the Commonwealth, a State or Territory to such an extent that it is, as the Board thinks fit, appropriate to treat any amount invested in or provided to the fund by that person as Government sourced capital; or
(c) but excluding any amount of that funding that, in the opinion of the Board, would be inappropriate to treat as Government sourced capital.
PART 4—BASIS FOR THE LICENCE AGREEMENTS

Basis for agreements

20. The Board must not enter into agreements with applicants under the IIF program except in accordance with this Part.

Licences

21. The Board may, within the limits under clause 13, offer licences to applicants who, as the Board thinks fit, have the highest relative merit.

22. The Board must make an offer in writing and include words to the effect that an applicant may accept the offer by:

(a) notifying the Board in writing;

(b) demonstrating to the satisfaction of the Board that the privately sourced capital has been committed;

(c) executing a licence agreement in a form and containing terms acceptable to the Board and in accordance with this direction; and

(d) complying with any other requirements of the Board as notified in the offer of a licence (including entering into documents).

23. The Board must provide for the offer to lapse if acceptance does not occur within six months of the making of the offer.

24. If in any particular licensing round an offer of a licence is not accepted or lapses, the Board may offer a licence to the next applicant in that licensing round that the Board considers would best achieve the objectives of the IIF program.

Pre-licence Investments

25. The Board may make provision in the IIF guidelines for the conditions to apply for investments in or the provision of finance to eligible investee companies made or agreed to be made following the lodgement of an application, but prior to the execution of the licence agreement.

PART 5—THE OPERATION OF IIF LICENSED FUNDS

Eligible investee company

26. The Board must make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund requiring the fund to only invest in or otherwise provide finance to eligible investee companies. For a company to be an eligible investee company, it must satisfy all of the following:

(a) it is commercialising the results of R&D activities or will, under the investment arrangement with the fund, be required to commercialise the results of R&D activities;

(b) at the time the fund first invests in or provides finance to the company it is at the seed, start-up or early expansion stage of its development;

(c) it operates in the traded goods and services sector;

(d) the product or service to which the commercialisation of the R&D activities relates is produced with the primary purpose of multiple sale to a variety of unrelated entities;
(e) it has a majority of its employees (by number) and assets (by value) inside Australia at the time when the fund first invests in or provides finance to it;

(f) at the time when the fund first invests in or provides finance to the company, the average annual revenue over the previous two years of income does not exceed $4 million per year and the revenue in either year is not in excess of $5 million. The calculation of revenue for a year of income must exclude any abnormal items; and

(g) at the time when the fund first invests in or provides finance to the company, it is not related (within the meaning of section 50 of the Corporations Law) to a company which has an average annual revenue, over the previous two years of income, in excess of $4 million per year.

27. Factors indicating that a company is in the seed stage of development include:

(a) that the initial concept of its business is being formed;

(b) prototypes or concepts of the company’s products or services are being developed;

(c) the management team is beginning to form; and

(d) any other matters the Board thinks fit.

28. Factors indicating that a company is in the start-up stage of development include:

(a) that the funds are necessary for product development, staffing, initial marketing and other start-up costs;

(b) the management team is substantially in place;

(c) the company is setting itself up to sell its product or service commercially; and

(d) any other matters the Board thinks fit.

29. Factors indicating that a company is in the early expansion stage of development include:

(a) that the funding is necessary to working capital to help launch the manufacture and sale of the company’s products or services. Typically, the company is not profitable and frequently will be cash-flow negative; and

(b) any other matters the Board thinks fit.

Excluded companies

30. The Board must make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund to exclude companies that conduct the following business from being an eligible investee company:

(a) re-lending or re-investing;

(b) passive businesses;

(c) real estate businesses;

(d) farm purchases; or

(e) mining operations.
31. The Board must make provision in the IIF guidelines, licence agreement or other contractual document relating to an IIF licensed fund to require that the fund not, without prior approval of the Board, invest in or provide finance to companies that:

(a) are related (within the meaning of section 50 of the Corporations Law) to the fund manager;

(b) are related (within the meaning of section 50 of the Corporations Law) to any entity which provides over 10 percent of the privately sourced capital to the fund;

(c) are controlled (within the meaning of section 294B of the Corporations Law) by an entity providing privately sourced capital to the fund;

(d) have a director who is or has been an associate of the fund manager; or

(e) have any other relationship with the fund that the Board considers inappropriate.

32. The Board may make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund to exclude any other persons from being eligible investee companies. The Board must make such exclusions on the basis of activities, corporate structure, industry category, sources of revenue or any other generally applicable basis.

### Determination of an eligible investment company

33. Investment decisions will be made by fund managers, but fund managers may request a determination by the Board as to whether a company is an eligible investee company. If requested to do so, the Board must determine whether or not a company is an eligible investee company.

34. The Board is not restricted in placing conditions, qualifications or disclaimers on a determination of whether or not a company is an eligible investee company.

35. The Board may levy fees that do not exceed the costs incurred by itself and the Department in making a determination under clause 33. The Board may refuse to make or notify a determination under clause 33 until those fees are paid by the IIF licensed fund.

### Control of an eligible investee company by an IIF licensed fund

36. The Board may make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund to limit the level of control exerted by the fund on an eligible investee company. In doing so the Board must consider:

(a) the objectives of the IIF program;

(b) the capital generally required by companies at the early stage of their development and the cost of such capital at each stage of investment;

(c) the ability of the fund to realise a return from an investment in small, early stage companies;

(d) the ability of the fund to protect its investment in small early stage companies;

(e) the role of the fund manager in providing advice, guidance and influence to small early stage companies; and

(f) any other matter the Board thinks fit.
Operation of the IIF licensed funds

37. The Board must include requirements to the following effect in the IIF guidelines:

(a) the ratio of Government sourced capital to privately sourced capital contributed to an IIF licensed fund will not exceed 2:1;

(b) an IIF licensed fund may be a unit trust, company or other structure approved by the Board. A Pooled Development Fund cannot invest in or provide money to an IIF licensed fund;

(c) an IIF licensed fund must not raise monies in the form of debt, or equity with features materially consistent with debt, with the exception of leasing equipment or short term debt for the purpose of maintaining the short term liquidity of the IIF licensed fund, without the consent of the Board;

(d) an IIF licensed fund must source at least 30% of the private capital from entities not associated with the fund manager. The Board may place additional requirements in the IIF guidelines which require an IIF licensed fund to have a diversity of entities providing the private capital;

(e) an IIF licensed fund must provide funding to eligible investee companies only by means of equity purchase, with the exception of short term loans provided for temporary measures to an eligible investee company in which the fund has previously invested or to which it has previously provided finance to. Unless otherwise approved by the Board, the equity purchased must be a new issue;

(f) at least 60% of an IIF licensed fund committed capital must be invested within 5 years of the granting of the licence, unless otherwise approved by the Board;

(g) an IIF licensed fund must not invest in or provide to an eligible investee company more than $4,000,000 or 10% of the fund’s committed capital, whichever is the lesser, unless the Board agrees otherwise;

(h) transactions carried out by an IIF licensed fund in relation to eligible investee companies must be carried out at arm’s length;

(i) an IIF licensed fund and investee company, investor, trustee, director or manager of such a fund must avoid transactions where a conflict of interest exists. Where such transactions are unavoidable, the parties to the transaction must be able to demonstrate that the transaction was carried out on an arm’s length basis in a manner consistent with Part 3.2 of the Corporations Law. The fund or the investor must notify the Board of any such conflict of interest, the nature of the conflict, the nature of the transaction and the terms and conditions of the transaction within thirty days of entering into such a transaction;

(j) a person who has invested in or provided amounts to an IIF licensed fund must not influence or attempt to influence, the individual investment or financing decisions of the fund manager;

(k) an IIF licensed fund must have an appropriate number of suitably qualified and experienced investment managers having regard to the size and type of the fund;

(l) monies provided to an investee company must be applied to advance the company in the commercialisation of its R&D activities via marketing, sales, distribution, administration, production, product development or development of a prototype; and

(m) any other requirements the Board thinks fit.
PART 6—TIMING OF PROVISION OF CAPITAL TO IIF LICENSED FUNDS

Drawdown of capital

38. The Board must determine in the IIF guidelines, the licensing agreement or other contractual documents relating to an IIF licensed fund, the process by which Commonwealth program capital will be invested in or provided to the fund. In determining that process, the Board must consider the following:

(a) that Commonwealth program capital will be invested or expended within a reasonable period by the fund;

(b) where it considers appropriate, the Board may withhold Commonwealth program capital from being drawdown; and

(c) any other matters the Board thinks fit.

PART 7—INFORMATION TO BE PROVIDED BY IIF LICENSED FUNDS

Reporting

39. The Board must make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund to require the fund to provide audited reports, as specified by the Board, within three months of the end of the fund’s year of income unless otherwise specified by the Board. Such reports must be audited by the Commonwealth Auditor-General or an auditor approved by the Commonwealth Auditor-General.

40. The Board must make provision in the IIF guidelines, licensing agreement or other contractual documents relating to an IIF licensed fund to allow the Board from time to time to request information in any format from the fund for the purpose of:

(a) monitoring the performance of the fund, its manager and trustee;

(b) assessing the financial viability of the fund, its manager and trustee;

(c) auditing the activities of the fund, its manager and trustee;

(d) evaluating the performance of the fund, its manager and trustee and the IIF program;

(e) investigating the activities of the fund, its manager and trustee in terms of compliance with the IIF guidelines, licensing agreement or other contractual documents relating to the fund; and

(f) any other purpose the Board thinks fit.

Placing an IIF licensed fund under special conditions.

41. The Board must make provision in the IIF guidelines, licensing agreement or other contractual documents in relation to an IIF licensed fund to ensure that where the Board is of the opinion that the fund or its manager:

(a) is or may become insolvent or suffer what the Board considers to be a substantial loss of capital;

(b) is in breach of the IIF guidelines, any requirement imposed on it under clause 22 or any contractual or other obligation owed to a third party;

(c) has failed to achieve activity milestones contained within the licence agreement or other contractual document relating to the fund; or
a member of the key personnel ceases to be employed or otherwise retained by the fund in the manner stated in the application to be awarded a licence;

the Board may, in consultation with entities contributing private capital (excluding the fund’s manager and associates), place additional conditions on the operations of the fund to protect the value of the monies invested in the fund.

42. These conditions may include, but are not limited to:

(a) replacement of a fund manager;

(b) divestment of specified investments;

(c) limitations on investments, short term debt raising or other financing instruments;

(d) reimbursement of costs associated with correcting the circumstance; or

(e) recruitment by the fund manager of additional staff with appropriate expertise, experience or abilities.

Conditions to apply to investors

43. The Board must make provision in the IIF guidelines, the licence agreement or other contractual document relating to an IIF licensed fund for the conditions to apply in the event a person who has invested in or provided amounts to the fund breaches the IIF guidelines.

Valuation

44. The Board must make provisions in the IIF guidelines for policies and methodologies to ensure a consistent, transparent and realistic valuation of IIF licensed fund assets. Where practicable these methodologies and policies are to reflect what is, in the opinion of the Board, generally accepted practice in Australia.

Other Requirements

45. Nothing in this Part 7 limits the requirements that may be imposed under clause 22.

PART 8—RETURN ON DRAWNDOWN CAPITAL

Distribution

46. In determining the terms on which Commonwealth program capital is invested in an IIF licensed fund, the Board must require the fund to distribute monies upon the receipt of earnings or the realisation of investments or other financings in the following manner:

(a) the Commonwealth has no priority as to distributions;

(b) money subscribed for units or shares in, or provided to, the fund is returned in the proportions invested or provided; and

(c) the balance, if any, remaining is applied as follows:

(i) there is paid to each investor including the Commonwealth an amount equal to the interest on the amount from time to time invested in or provided to the fund by that investor calculated at a rate equal to the ten year bond rate prevailing on the date the offer of a licence is made by the Board and stipulated in the offer document; and
ii) any surplus is to be divided between the Commonwealth (as to 10%) and the other investors and the fund manager (as to 90%).

47. The Board must make provision in the IIF guidelines, licensing agreement or other contractual document relating to the operation of an IIF licensed fund to allow the Board to determine the distribution of fund monies as between the other investors and the fund manager as contemplated by clause 46(c)(ii). In making such a determination, the Board will take into consideration any distribution mechanism agreed between the fund manager and the other investors.

Ten Year Term

48. The Board must make provision for an IIF licensed fund to be wound up after ten years from the date Commonwealth program capital is first contributed, with all monies distributed in accordance with clauses 46 and 47, subject to an extended period to allow for the orderly and prudent disposal of the fund assets or for other reasons the Board thinks fit.

PART 9—FEES

Fund management fees

49. The Board must determine and make provision in the IIF guidelines, licensing agreement or other contractual documents in relation to an IIF licensed fund for an appropriate maximum level of fund management fees based on the amount of the fund’s committed capital. In determining this and any other fees, the Board must have regard to:

(a) the level of resources for fund managers that the Board considers appropriate;

(b) the scope of the management services to be provided by the fund manager to the fund and included in the fund management fee;

(c) the interests of the investors to the fund, including the Commonwealth;

(d) the objectives of the IIF program; and

(e) any other matters the Board thinks fit.

Management Services

50. The Board must include in the IIF guidelines, licensing agreement or other contractual documents in relation to an IIF licensed fund a requirement that any management services provided to an investee company by the fund manager or an associate of the fund manager which are paid for by the investee company are charged at no more than market rates, are optional, and are open to provision by a third party.

PART 10—REMOVAL OF FUND MANAGER

51. The Board must make provision in the IIF guidelines, licence agreement or other contractual document relating to the operation of an IIF licensed fund for the removal of the fund manager in circumstances where the fund or its manager:

(a) is or may become insolvent or suffers what the Board considers to be a substantial loss of capital;

(b) is in breach of the IIF guidelines, any requirement imposed on it under clause 22 or any contractual or other obligation owed to a third party;
(c) has failed to achieve activity milestones contained within the licence agreement or other contractual document relating to the fund;

(d) has failed to comply with any special conditions specified by the Board under clause 41;

(e) a member of the key personnel ceases to be employed or otherwise retained by the fund in the manner stated in the application to be awarded a licence;

(f) is in breach of any provision of the Act or any other law; or

(g) in any other circumstances the Board thinks fit.

PART 11—LIQUIDATION

52. The Board must make provision in the IIF guidelines, licence agreement or other contractual document relating to the operation of an IIF licensed fund for the liquidation of the assets of the fund prior to the ten year term referred to in clause 48 in circumstances where:

(a) the Board is required to do so in compliance with a Court order;

(b) the Board considers that the fund is or may become insolvent or suffer what the Board considers to be a substantial loss of capital;

(c) the Board agrees with a request from the investors in the fund to liquidate the assets of a fund; or

(d) in other circumstances the Board thinks fit.

PART 12—TRANSFER OR WITHDRAWAL OF INVESTORS

53. The Board must make provision in the IIF guidelines, licence agreement or other contractual document relating to the operation of an IIF licensed fund for the conditions to apply upon any of the following circumstances occurring:

(a) the withdrawal of a person who has invested in or provided amounts to the fund or the transfer of ownership of any part of that persons interest in the fund;

(b) where a person (other than the Commonwealth program capital) does not deliver committed capital in accordance with their obligations to do so; and

(c) the transfer of all or part of the Commonwealth program capital.

PART 13—EVALUATION

54. The Board must make provision in the IIF guidelines, licence agreement or other contractual document relating to the operation of an IIF licensed fund for the fund to cooperate in the evaluation of the IIF program.
Note to the *R&D Start Program, policies and practices of the IR&D Board in relation to the Innovation Investment Fund (IIF) Program Direction No. 1 of 1997*

**Note 1**

The Note to the *R&D Start Program, policies and practices of the IR&D Board in relation to the Innovation Investment Fund (IIF) Program Direction No. 1 of 1997* in force under subsection 20(1) of the *Industry Research and Development Act 1986* as shown in this compilation is amended as indicated in the Tables below.

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