



Industry Research and Development Regulations 2011¹

Select Legislative Instrument 2011 No. 216

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Industry Research and Development Act 1986*.

Dated 23 November 2011

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

KIM CARR
Minister for Innovation, Industry, Science and Research

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Regulation 1.01

Part 1 Preliminary**1.01 Name of Regulations**

These Regulations are the *Industry Research and Development Regulations 2011*.

1.02 Commencement

These Regulations commence on the day after they are registered.

1.03 Definitions

(1) In these Regulations:

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

ARBN has the same meaning as in section 9 of the *Corporations Act 2001*.

Australian core activities has the meaning given by subsection 28D (2) of the Act.

cooperative research centre means a cooperative research centre under the CRC program (within the meaning given by subsection 995-1 (1) of the ITAA 1997).

ITAA 1997 means the *Income Tax Assessment Act 1997*.

research service provider (levy collecting) means an entity that:

- (a) meets the criteria in subregulations 3.01 (2), (3) and (7); and
- (b) is registered under section 29A of the Act.

Note Several other words and expressions used in these Regulations have the meaning given by section 4 of the Act, for example:

- Board
- core R&D activities
- income year
- MEC group
- R&D activities
- R&D entity
- supporting R&D activities.

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- (2) In these Regulations, ***government research organisation*** includes the following:
- (a) Australian Animal Health Laboratory;
 - (b) Australian Institute of Marine Science;
 - (c) Australian Nuclear Science and Technology Organisation;
 - (d) CSIRO;
 - (e) Defence Science and Technology Organisation.
- (3) A reference in these Regulations to ***Australia*** includes the external territories.

1.04 Research field

For the definition of ***research field*** in subsection 4 (1) of the Act, a field of research category mentioned in *1297.0 - Australian and New Zealand Standard Research Classification (ANZSRC) 2008*, as it exists on the day these Regulations commence, is specified.

Regulation 2.01

Part 2 Matters to be set out in certificates for findings

2.01 Certificate for finding about application for registration and certificate for finding about registration

For paragraphs 27C (2) (d) and 27K (2) (e) of the Act, a certificate for a finding about an R&D entity's application for registration, and a certificate for a finding about an R&D entity's registration, must set out the following matters:

- (a) the name of the R&D entity;
- (b) the ABN, ACN or ARBN of the R&D entity;
- (c) if the R&D entity is the head company of a consolidated group or MEC group — details of the subsidiary member of the consolidated group or MEC group that conducted the activity, or had services provided in relation to the activity, to which the finding relates;
- (d) if the Board specifies in a finding about an activity the times to which the finding relates — the times that the Board is satisfied the activity was conducted;
- (e) if the Board finds that an activity is a supporting R&D activity — the activity that, in the Board's opinion, is the activity supported by the supporting R&D activity.

2.02 Certificate for advance finding

For paragraph 28F (3) (e) of the Act, a certificate for an advance finding under subsection 28A (1) of the Act must set out the following matters:

- (a) the name of the R&D entity to which the finding relates;
- (b) the ABN, ACN or ARBN of the R&D entity;
- (c) if the R&D entity is the head company of a consolidated group or MEC group — details of the subsidiary member of the consolidated group or MEC group that:
 - (i) conducted, is conducting, or will conduct, the activity to which the finding relates; or

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- (ii) had, is having, or will have, services provided in relation to the activity to which the finding relates;
- (d) if the Board specifies in a finding about an activity the times to which the finding relates — the times that the Board is satisfied the activity was conducted, or is being conducted;
- (e) if the Board finds that an activity is a supporting R&D activity — the activity that, in the Board's opinion, is the activity supported by the supporting R&D activity;
- (f) the income years for which the finding binds the Commissioner under section 355-705 of the ITAA 1997.

2.03 Certificate for finding about activities to be conducted outside Australia

For paragraph 28F (3) (e) of the Act, a certificate for a finding about an activity conducted outside Australia (the **overseas activity**) under subsection 28C (1) of the Act must set out the following matters:

- (a) a reference to the certificate for the advance finding about the overseas activity mentioned in subsection 28D (1) of the Act;
- (b) separately for each of the conditions in subsections 28D (2), (4) and (5) of the Act — the Board's finding for whether the condition is met, and the reasons for the finding;
- (c) if the Board finds that the overseas activity has a significant scientific link to an Australian core activity that was, or is being, conducted — the times that the Board is satisfied the Australian core activity was, or is being, conducted.

2.04 Certificate for finding about whether technology is core technology

For paragraph 28F (3) (e) of the Act, a certificate for a finding about whether technology is core technology under subsection 28E (1) of the Act must set out the following matters:

- (a) the name of the R&D entity to which the finding relates;

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- (b) the ABN, ACN or ARBN of the R&D entity;
- (c) if the R&D entity is the head company of a consolidated group or MEC group — details of the subsidiary member of the consolidated group or MEC group that is using, or will use, the technology.

Part 3 Research service providers

3.01 Criteria for registration of research service provider

- (1) For subsection 29A (2) of the Act, an entity must meet the criteria mentioned in this regulation.
- (2) The entity must:
 - (a) be able to provide services in the research field or fields in relation to which the entity has applied to be registered; and
 - (b) if the entity will subcontract the provision of services to another entity — be able to:
 - (i) manage the subcontracting of the services; and
 - (ii) understand and explain, to the R&D entity to which the services are being provided, the results of the services provided by the subcontractor; and
 - (c) show an intention to provide services to bodies corporate that are not related bodies corporate (within the meaning given by section 50 of the *Corporations Act 2001*) of the entity.
- (3) If the entity charges fees or other charges for providing services:
 - (a) the fees and charges must be based on ordinary commercial terms; or
 - (b) the fees and charges:
 - (i) must not be subsidised by government resources; and
 - (ii) must not be inflated to exploit the tax incentive for R&D activities.
- (4) If the entity is not an entity mentioned in subregulation (6) or (7), the entity must:
 - (a) have access to facilities in Australia:
 - (i) that are suitable for the researchers to carry out their work; and

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- (ii) that are appropriate to the research field or fields in relation to which the entity has applied to be registered; and
 - (b) meet the requirements of subregulation (5).
- (5) For paragraph (4) (b), the entity must:
- (a) employ in Australia at least:
 - (i) one full-time researcher who has:
 - (A) a degree in science or technology from an Australian university; or
 - (B) tertiary qualifications from an overseas education institution that are recognised in Australia as being equivalent to a degree mentioned in sub-subparagraph (A); and
 - (ii) 4 researchers who are full-time, or full-time equivalent, employees, and who each have:
 - (A) a degree in science or technology from an Australian university; or
 - (B) tertiary qualifications from an overseas education institution that are recognised in Australia as being equivalent to a degree mentioned in sub-subparagraph (A); or
 - (C) at least 5 years of relevant research experience in a single scientific or technological field; or
 - (b) if the entity is unable to comply with paragraph (a) — be able to comply with that paragraph in the near future.

Example for paragraph (b)

One of the entity's 5 full-time researchers resigns. The entity immediately undertakes a recruitment process to fill the researcher position so that the entity complies with paragraph (a).

Publicly controlled

- (6) If the entity is owned and controlled by a tertiary education institution or a government research organisation (the **controlling institution**):
 - (a) the controlling institution must be a registered service provider; and

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- (b) the entity must have access in Australia to the research and development facilities and research personnel of the controlling institution that will allow the entity to provide services in relation to R&D activities in the research field or fields for which the entity has applied for registration.

Note An entity that meets the criteria in subregulations 3.01 (2), (3) and (6), and is registered under section 29A of the Act, is known as a **research service provider (publicly controlled)**.

Levy collecting

- (7) If the entity is a body that collects levies from R&D entities within an industry (the **contributors**) to fund the provision of services in relation to R&D activities, and does so under a contract or memorandum of understanding with a government, the entity must have arrangements for:
 - (a) making available to the contributors the results of the services provided that were funded by the levies; and
 - (b) reporting to the contributors:
 - (i) about how much of the levies was used for providing services in relation to R&D activities and how much was not; and
 - (ii) for the levies used for providing services in relation to R&D activities — a ratio for working out how the levies are to be apportioned between the following:
 - (A) core R&D activities;
 - (B) supporting R&D activities.
- (8) For subparagraph (7) (b) (ii), the ratio must be based on a reasonable estimate of how the levies were apportioned between core R&D activities and supporting R&D activities.
- (9) In this regulation:
government means the Commonwealth government, or a State or Territory government.

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3.02 Conditions of registration of research service provider

- (1) For subsection 29A (3) of the Act, a registration of an entity as a research service provider is subject to the conditions specified in subregulations (2) and (4).

Note If the entity breaches a condition, the Board may, under subsection 29H (1) of the Act, revoke the entity's registration as a research service provider.

- (2) The conditions are:
- (a) the research service provider is competent to manage and provide services in relation to R&D activities; and
 - (b) the research service provider acts in the best interests of each of the R&D entities in relation to the services that the research service provider is providing to the R&D entities under contractual arrangements; and
 - (c) the services provided by the research service provider are controlled by the R&D entity, or R&D entities, to which the services are provided; and
 - (d) the research service provider maintains, to the extent required under contractual or other arrangements between the research service provider and an R&D entity:
 - (i) the confidentiality of the services it provides to the R&D entity in relation to R&D activities; and
 - (ii) the security of information given to the research service provider by the R&D entity; and
 - (e) the research service provider has a management structure that is appropriate for the research service provider to manage the provision of services in relation to R&D activities on a day-to-day basis (such as a committee that manages the provision of the service); and
 - (f) the research service provider keeps separate financial records for services provided in relation to each R&D activity; and

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- (g) the research service provider ensures that the R&D entity to which the research service provider provides services in relation to R&D activities owns, or has a right to use, all results of those services, including the results of any services provided by a subcontractor of the research service provider in relation to the R&D activities; and
- (h) the research service provider maintains records of services provided in relation to R&D activities for each R&D entity, including records of the charges made to the entity and a copy of the contract to provide the services, and makes those records available on request by the Board; and
- (i) the research service provider gives the Board an annual report in relation to the services the research service provider provided in relation to R&D activities during the period covered by the annual report, and the annual report is in a form approved by the Board; and
- (j) the research service provider subcontracts the provision of services only if:
 - (i) the research service provider is providing part of the services; and
 - (ii) the research service provider is not able to provide the remainder of the services; and
- (k) if the research service provider provides services outside Australia in relation to R&D activities for an R&D entity — the research service provider must tell the R&D entity and the Board about the services provided outside Australia before the end of the income year in which the service was provided.

Note If expenditure on an activity conducted outside Australia is to be claimed as a tax offset under Division 355 of the ITAA 1997, the activity must be covered by a finding under paragraph 28C (1) (a) of the Act.

- (3) For paragraph (2) (a), when deciding whether a research service provider is competent to manage and provide services in relation to R&D activities, the matters the Board must consider include:
 - (a) whether the research service provider has administrative arrangements for planning and managing the provision of the services; and

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- (b) the performance of the research service provider in relation to services provided in relation to R&D activities (particularly those that produced commercial results); and
 - (c) the annual cost of services provided in relation to R&D activities; and
 - (d) the main source of income of the research service provider.
- (4) If the entity is a research service provider (levy collecting) for a financial year, it is also a condition of the registration that the research service provider:
 - (a) gives the Board details of the services in relation to R&D activities the research service provider provided in the financial year for which the research service provider is registered; and
 - (b) gives the Board a written report about how much of the levies collected by the research service provider in the financial year was used for providing services in relation to R&D activities, and how much was not; and
 - (c) gives the details mentioned in paragraph (a) and the report mentioned in paragraph (b) to the Board within:
 - (i) 10 months after the end of the financial year; or
 - (ii) a further period allowed by the Board; and
 - (d) gives the Board any further information requested by the Board in relation to the services provided during the financial year by the research service provider.

Part 4 Applications and requests for further information

Division 4.1 Application for advance finding

4.01 Entities to make application for advance finding on behalf of R&D entity

For paragraph 28B (1) (a) of the Act, the following entities may make an application for an advance finding under subsection 28A (1) of the Act:

- (a) if the application relates to activities in relation to which a research service provider will provide services — the research service provider;
- (b) if a cooperative research centre is one entity — the cooperative research centre;
- (c) if a cooperative research centre is made up of more than one entity — one of the entities that makes up the cooperative research centre.

Division 4.2 Approved forms for applications and requests for further information

Subdivision 4.2.1 Approved forms for applications

4.02 Approved forms for applications

- (1) Subregulation (2) applies to a form for:
 - (a) an application to register activities under section 27D of the Act; or
 - (b) an application under section 27G of the Act for a finding about an R&D entity's registration under section 27J of the Act; or
 - (c) an application under section 28G of the Act for an advance finding under section 28A of the Act; or

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- (d) an application under subsection 28G (1) of the Act for a finding about an activity conducted outside Australia (the ***overseas activity***) under section 28C of the Act; or
 - (e) an application under subsection 28G (1) of the Act for a finding about technology under section 28E of the Act.
- (2) For subsection 32 (3) of the Act, when approving a form the Board must ensure the form requires the production of the following information or material:
- (a) the name of the R&D entity making the application and any relevant information that will identify the entity (such as an ABN, ACN or ARBN);
 - (b) which requirement or requirements the entity meets under section 355-35 of the ITAA 1997 for the entity to be an R&D entity, including a statement that the entity is not an exempt entity;
 - (c) the aggregated turnover (within the meaning given by the ITAA 1997) of the R&D entity;
 - (d) a declaration by an individual, acting with the express or implied authorisation of the entity, that the information provided by the R&D entity in the application is true and correct at the time of making the application.
- (3) Subregulation (4) applies to a form for an application mentioned in paragraphs (1) (b) to (e) if the R&D entity making the application:
- (a) is the head company of a consolidated group or MEC group; and
 - (b) did not conduct an activity itself.
- (4) For subsection 32 (3) of the Act, when approving a form the Board must ensure the form requires the production of the following:
- (a) the name of the subsidiary member of the consolidated group or MEC group that:
 - (i) conducted, or will conduct, the activity; or
 - (ii) had, or will have, services provided in relation to the activity; or
 - (iii) that used, or will use, the technology;

- (b) the ABN, ACN or ARBN of the subsidiary member mentioned in paragraph (a);
- (c) a statement that the R&D entity is the head company of the consolidated group or MEC group.

4.03 Approved form for application to register activities

- (1) For subsection 32 (3) of the Act, when approving a form for an application to register activities under section 27D of the Act, the Board must also ensure the form requires the production of the following information or material:
 - (a) a reference to any advance findings about the activities under section 28A of the Act;
 - (b) a reference to any findings about the activities under section 28C of the Act (activities conducted outside Australia);
 - (c) if a service was provided in relation to an activity by a research service provider or a cooperative research centre:
 - (i) the name of the research service provider or cooperative research centre; and
 - (ii) details of the service provided by the research service provider or cooperative research centre;
 - (d) a declaration by an individual, acting with the express or implied authorisation of the entity, that the entity maintained records, while the activities were conducted, that substantiate the conducting of the activities;
 - (e) the total expenditure by the entity in the income year on the activities for which the R&D entity is applying for registration.

Note Section 27D of the Act is about an application to register activities under section 27A of the Act. Section 31 of the Act provides that a registration of an R&D entity for an activity under section 27A of the Act has no effect while the R&D entity is a subsidiary member of a consolidated group or MEC group of which the head company is an R&D entity.

- (2) Subregulation (3) applies to the form to the extent that the application does not relate to activities in relation to which a service was provided by a research service provider (levy collecting) to an R&D entity that paid levies to the provider.

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- (3) The Board must ensure the form also requires the production of the following information or material:
- (a) for each activity for which the R&D entity is applying for registration:
 - (i) whether, in the applicant's opinion, the activity is a core R&D activity or a supporting R&D activity; and
 - (ii) when the activity was conducted during the income year;
 - (b) for each activity that, in the applicant's opinion, is a supporting R&D activity:
 - (i) the core R&D activities that, in the applicant's opinion, are supported by the supporting R&D activity, including each income year when the core R&D activities were registered or are proposed to be registered; and
 - (ii) whether the supporting R&D activity:
 - (A) is directly related to the core R&D activities as mentioned in subsection 355-30 (1) of the ITAA 1997; or
 - (B) was undertaken for the dominant purpose of supporting core R&D activities as mentioned in subsection 355-30 (2) of the ITAA 1997;
 - (c) a reasonable estimate of how the total expenditure was apportioned between the following:
 - (i) activities that are, in the opinion of the entity, core R&D activities;
 - (ii) activities that are, in the opinion of the entity, supporting R&D activities;
 - (d) a brief description of the activities, and a brief description of the new knowledge that the activities are intended to generate.
- (4) Subregulation (5) applies to the form to the extent that the application relates to activities in relation to which a service was provided by a research service provider (levy collecting) to an R&D entity that paid levies to the provider.

- (5) The Board must ensure the form also requires the production of the following information:
- (a) how much of the levies was used for providing services in relation to the activities;
 - (b) using the ratio reported to R&D entities under subparagraph 3.01 (7) (b) (ii) — an apportionment of those levies between the following:
 - (i) activities that are, in the opinion of the research service provider (levy collecting), core R&D activities;
 - (ii) activities that are, in the opinion of the research service provider (levy collecting), supporting R&D activities.

4.04 Approved form for application for an advance finding

For subsection 32 (3) of the Act, when approving a form for an application under section 28G of the Act for an advance finding under section 28A of the Act, the Board must also ensure the form requires the production of the following information or material:

- (a) for an application under subsection 28G (2) of the Act:
 - (i) the names of the R&D entities taken to have applied for the identical findings; and
 - (ii) if the entity making the application is an entity mentioned in regulation 4.01, evidence that the entity is acting with the written consent of the R&D entities;
- (b) for each activity for which the entity is applying for an advance finding:
 - (i) whether, in the applicant's opinion, the activity is a core R&D activity or a supporting R&D activity; and
 - (ii) why the applicant considers the activity meets the definition of **core R&D activities** in section 355-25 of the Act, or the definition of **supporting R&D activities** in section 355-30 of the Act; and

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- (iii) if the activity was, or is being, conducted in the income year during which the application is made — when the activity was, or is being, conducted during the income year; and
 - (iv) if the activity is yet to be conducted — evidence from which it is reasonable to conclude that the activity is expected to be conducted in the income year in which the application is made or in either of the next 2 income years;
- (c) for each activity that, in the applicant's opinion, is a supporting R&D activity:
 - (i) the core R&D activities that, in the applicant's opinion, are supported by the supporting R&D activity, including when the core R&D activities were conducted or will be conducted; and
 - (ii) whether the supporting R&D activity:
 - (A) is directly related to the core R&D activities as mentioned in subsection 355-30 (1) of the ITAA 1997; or
 - (B) was, is being, or will be, undertaken for the dominant purpose of supporting core R&D activities as mentioned in subsection 355-30 (2) of the ITAA 1997;
- (d) a detailed description of the activities for which the entity is applying for an advance finding, and a detailed description of the new knowledge that the activities are intended to generate;
- (e) the total actual and reasonably anticipated expenditure by the entity on each activity for which the entity is applying for an advance finding;
- (f) for each activity that, in the applicant's opinion, is a supporting R&D activity in relation to specified core R&D activities that are not registered — the total actual and reasonably anticipated expenditure by the entity on the unregistered core R&D activities.

4.05 Approved form for application for finding about activities to be conducted outside Australia

For subsection 32 (3) of the Act, when approving a form for an application under subsection 28G (1) of the Act for a finding about an activity conducted outside Australia (the ***overseas activity***) under section 28C of the Act, the Board must also ensure the form requires the production of the following information or material:

- (a) for each overseas activity for which the entity is applying for a finding:
 - (i) whether, in the applicant's opinion, the activity is a core R&D activity or a supporting R&D activity; and
 - (ii) if the activity was, or is being, conducted in the income year in which the application is made — when the activity was, or is being, conducted during the income year;
- (b) for each overseas activity that, in the applicant's opinion, is a supporting R&D activity:
 - (i) the core R&D activities that, in the applicant's opinion, are supported by the supporting R&D activity, including when the core R&D activities were conducted or will be conducted; and
 - (ii) whether the supporting R&D activity:
 - (A) is directly related to the core R&D activities as mentioned in subsection 355-30 (1) of the ITAA 1997; or
 - (B) was, is being, or will be, undertaken for the dominant purpose of supporting core R&D activities as mentioned in subsection 355-30 (2) of the ITAA 1997;
- (c) an explanation, with supporting evidence or an independent opinion, of why the overseas activity cannot be conducted solely in Australia;
- (d) in relation to the Australian core activities to which the overseas activity has a significant scientific link:
 - (i) a description of the Australian core activities; or

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- (ii) if the Australian core activities have been registered as R&D activities — identification of the registered activities;
- (e) an explanation of why the Australian core activities cannot be completed without the overseas activity being conducted;
- (f) the total actual and reasonably anticipated expenditure by any entity on:
 - (i) the overseas activity; and
 - (ii) any other overseas activities that have a significant scientific link to the Australian core activities mentioned in paragraph (d);
- (g) the total actual and reasonably anticipated expenditure by any entity on:
 - (i) the Australian core activities mentioned in paragraph (d); and
 - (ii) any supporting R&D activities conducted in Australia that support the Australian core activities.

Subdivision 4.2.2 Approved form for request for further information

4.06 Approved form for request for further information — production of information must be reasonable

- (1) For subsection 32 (3) of the Act, when approving a form in which information or kinds of information must be given under section 27E, 27H, 28H or 29C of the Act (the **relevant section**), the Board must ensure the form only requires the production of information or material that is reasonable for the Board to require in order to make a decision about an application or registration to which the relevant section relates.

- (2) Without limiting subregulation (1), the production of the following information or material is reasonable:
- (a) advice that the outcome of core R&D activities could not be deduced by a competent professional in the relevant research field on the basis of current knowledge or experience of, and information available to, persons in the research field;
 - (b) documents explaining research conducted by the R&D entity to gain information or knowledge or develop experience in a research field;
 - (c) an independent opinion or evidence that activities could not be carried out solely in Australia;
 - (d) the results of core R&D activities;
 - (e) details about activities that have not already been provided to the Board;
 - (f) if the information relates to the making of a finding under section 27B, 27J, 28A or 28C of the Act — a reasonable estimate of the actual or anticipated expenditure by the R&D entity in an income year on each activity to be covered by the finding;
 - (g) records that substantiate the conduct of R&D activities;
 - (h) from the head company of a consolidated group or MEC group:
 - (i) the name of a subsidiary member that:
 - (A) conducted, or will conduct, an R&D activity; or
 - (B) had, or will have, services provided in relation to an R&D activity; or
 - (C) used, or will use, technology; and
 - (ii) the ABN, ACN or ARBN of the subsidiary member.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.