Australian Government

Department of Innovation
Industry, Science and Research

R&D Tax Credit – **KCA Response on Draft Regulations**

R&D Tax Credit Regulations and Decision-making principles

A submission by KCA Inc, August 05, 2011

KNOWLEDGE COMMERCIALISATION AUSTRALASIA

Reference	***Comments - Regulations***	***Comments – Explanatory Statement***
Part 1		
1.01		
1.02		
1.03		
1.04		
Part 2		
2.01		
2.02		
2.03		
2.04		
Part 3		
3.01		
3.02	**3.02(c)** requires that "(c) the research service provider acts in the best interests of the R&D entity". KCA suggests that this is omitted or adjusted to align with normal commercial standards. *It is not contested that a research service provider should strive to satisfy the needs of the R&D entity in accordance with its contractual commitments – and the contract itself will require this. However placing the research service provider under an additional obligation to act in the best interests of the R&D entity means the research service provider is under a higher set of fiduciary standards than normal commercial dealing. This may raise additional questions as to what the research service provider might be required to do satisfy this obligation.* **3.02(h)** requires that "the research service provider ensures that all results of services provided in relation to R&D activities for an R&D entity are owned by the R&D	If KCA recommendations are adopted then there would be need for minor change to the commentary at 1.33 and 1.36 At 1.36 the comment on 3.02(h) states that the ownership requirement condition "assists R&D entities to demonstrate that the R&D activities conducted by the RSP were conducted for the R&D entities". There would be no inconsistency with the underlying intent if a change was made as suggested by KCA to replace the ownership requirement with one of rights of use satisfactory to the R&D entity

	entity, including the results of any services provided by a subcontractor of the research service provider in relation.to the R&D activities". KCA suggests the requirement for ownership of results is replaced with one of rights of use satisfactory to the R&D entity, common to the approach taken with some previous Ausindustry schemes. This would provide the R&D entity with an unimpeded right to exploit the results but not necessarily require allocation of ownership to the R&D entity, as there may be situations in which ownership is best consolidated with the research service provider, especially where the R&D builds on existing research service provider IP and in circumstances where the R&D entity does not intend or is not capable of exploiting the results in fields beyond its areas of interest.	*For example, if an R&D entity, an SME or larger company, holds a prior IP position and approaches a research service provider to extend that IP position, then the agreement between the two parties is likely to be such that the resultant IP would be owned by the R&D entity. However, if the research service provider holds significant prior IP, or if the R&D entity is only interested in exploiting one aspect of the research results and the research service provider is interested in exploiting other aspects in different fields, then it would be sensible to enable the parties to determine who owns the results and who is entitled to use them in particular fields or territories, consistent with normal commercial practice. Regulating these matters without regard to context may produce sub optimal outcomes* *This issue is particularly important for ARC-linkage grants where the R&D entity should have the ability to claim their "cash component" contribution to the grant as R&D tax credit. In ARC-linkage grants there is not an automatic IP ownership by the R&D entity..*
Part 4		
4.01		
4.02		
4.03		
4.04		
4.05		
4.06		

Response template – R&D Tax Credit decision-making principles

Reference	*Comments - Principles*	*Comments – Explanatory Statement*
Part 1		
1.1		
1.2		
1.3		
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Part 2		
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Part 3		
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Part 4		
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Part 5		
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