

## Edition #130-February 2022

### MODERNISING BUSINESS REGISTERS

There have been further updates to the ATO fact sheet on this topic.

As part of its Digital Business Plan, the government has announced the full implementation of the Modernising Business Registers (MBR) program, to:

- establish the new Australian Business Registry Services (ABRS)
- streamline how you register, view and maintain your business information with government.

#### About the MBR program

The MBR program will establish a new and modern registry service, the Australian Business Registry Services (ABRS).

The ABRS will:

- progressively roll out between 2021 and 2024
- bring together the Australian Business Register (ABR) and more than 30 Australian Securities and Investments Commission (ASIC) registers in one place
- introduce the director identification number (director ID) initiative.

The program aims to:

- make it easier for businesses to meet their registration obligations – giving them more time to focus on their customers and business operations
- improve the efficiency of registry service transactions

- make business information more trusted and valuable.

The ABRS high-level milestones are to:

- establish the foundations for the new registry service
- introduce director IDs
- transition existing registers to the new registry service, including
  - companies
  - business names
  - Australian business numbers (ABNs)
  - professional and historical registers.

#### What's changing

The new ABRS website is live, with information on the director ID requirement and how to apply.

As the program rolls out, the ATO will keep you updated with any changes that may affect you.

#### What's already changed

On 15 April 2021, ASIC registry staff moved to the ATO in a machinery of government (MoG) administrative change to help the Registrar.

This was a staffing change only. It doesn't change your registry obligations, how you interact with the ASIC registers or the ABR, at this time.

#### What's not changing

Registry data will continue to only be provided to other parties, including other areas of ASIC and the ATO:

- to maintain the registers

- if authorised by law.

The existing requirements for the collection, storage, integration, and management of data will be upheld.

For now, how you register, search, and get extracts of the registers, and interact with the ABR and ASIC remains the same. You can still search ASICs registers.

There is a clear separation between registry functions and other functions of the ATO.

### Director ID

Director identification number (director ID) is a unique identifier you apply for once and keep forever.

You must apply for your director ID yourself, so we can verify your identity. No one can apply on your behalf.

Your tax, BAS or ASIC agent can't apply for a director ID for you. They can help you understand the new requirement if you need to apply and when.

Visit [abrs.gov.au](https://abrs.gov.au) for more information and to apply.

### Administering the MBR program

On 4 April 2021, the Commissioner of Taxation was appointed as Registrar under the:

- *Business Names Registration Act 2011*
- *Commonwealth Registers Act 2020*
- *Corporations Act 2001*
- *National Consumer Credit Protection Act 2009.*

The Registrar's role is to:

- lead and implement the MBR program
- perform statutory registry functions
- exercise powers under the relevant laws.

Initially, this will also include assisting ASIC to perform statutory registry functions and exercise its powers as a delegate of ASIC. At a later stage, the Registrar will assume primary responsibility for those functions under law.

The ATO are rolling out the MBR program in partnership with the:

- Treasury
- Australian Securities & Investments Commission
- Department of Industry, Science, Energy and Resources
- Digital Transformation Agency.

### ALL IS NOT WELL IN MCDONALD'S LAND – RONALD HAS SOME EXPLAINING TO DO!

We note in passing McDonald's Australia was convicted and fined on 14.1.2022 for failing to provide documents to the Australian Taxation Office (ATO).

The information the ATO needs to administer the Australian tax and superannuation systems in the main resides with taxpayers, their advisers or other parties involved in their business and tax affairs. Where the required information is not given to the ATO cooperatively, they have formal information-gathering powers available to them, including notice powers.

There are consequences in protecting the tax system's integrity if you fail to comply with a notice.

The circumstances in which the ATO issues a notice are varied and range from simple verification procedures to situations where there is evidence of serious tax avoidance.

Details of the number and types of notices issued are available in the Annual report.

The ATO maintains it is committed to ensuring a level playing field for all businesses, including those within the franchising sector.

### MAKE YOUR ABN DETAILS...EVEN MORE DETAILED

You can now include up to 4 additional business activities when you update your ABN details. This is in addition to the main business activity currently stored.

Recent events have highlighted the importance of capturing accurate business information. It helps government agencies provide businesses with appropriate support and access to stimulus measures. Adding additional business activities and related Australian and New Zealand Industry Classification (ANZSIC) code means your ABN will reflect the full range of operations your business undertakes.

For example, Julie owns a café that includes a bookstore and accommodation in an apartment upstairs. She also offers catering services for private functions.

Previously, Julie had her main business activity listed as Cafe operation (45110). The new ANZSIC code feature enables Julie's ABN to provide a wholistic picture of her business by including:

- Bed and breakfast operation (ANZSIC:44000)
- Book retailing (ANZSIC:42442)
- Catering services (ANZSIC:45130).

### Next step

- Update your ABN details services, using myGovID and Relationship Authorisation Manager (RAM) to log in.

### DIRECTOR ID FOR SMSFS: YOUR QUESTIONS ANSWERED

If you're a corporate trustee of a self-managed super fund (SMSF), you can now apply for your director ID. Applying for a director ID is free, quick and easy.

You can apply via Australian Business Registry Services (ABRS) online. You will need a myGovID with a Standard or Strong identity strength to apply for your director ID online.

When you need to apply for a director ID depends on when you first became a director. If you:

- were appointed on or before 31 October 2021, you had until 30 November 2022 to apply. If you have not applied, this should be attended to as soon as possible.
- are appointed between 1 November 2021 and 4 April 2022, you need to apply within 28 days of your appointment
- will be appointed on or after 5 April 2022; you need to apply before you're appointed.

The ABRS is available now, so you are encouraged to apply for your director ID today.

Remember, no one can apply on your behalf because you need to verify your identity.

### TAXATION RULING TR 2021/5

#### Income Tax: Research and Development Tax Offsets – The 'At Risk' Rule

This is an area of ATO focus as it would be fair to say that there have been a large number of R&D claims in recent years that have been artificial and contrived. This article outlines the topics discussed in the Ruling.

If you are contemplating making R&D claims or have been approached by a 'specialist', it is important that you understand the key issues. While we outline below the discussion points and several examples contained in the Ruling, if you are making R&D claims, it is strongly recommended that you read the Ruling in its entirety.

### Topics

- The 'at risk' rule
- Consideration
- Legal meanings of consideration
- Consideration includes non-monetary benefits
- Meaning of 'consideration' in section 355-405
- Nexus to expenditure test
- Direct or indirect result
- Regardless of results test
- Quantification of the consideration

### What this Ruling is about

This Ruling is about provisions in the research and development (R&D) regime that prevents an R&D entity (you) from notionally deducting expenditure that is not 'at risk'.

In particular, this Ruling considers the tests for determining whether your expenditure is 'at risk' under section 355-405 of the ITAA 1997 (the 'at risk' rule). It will provide certainty to taxpayers about whether the 'at risk' rule is satisfied, for instance, where R&D activities are carried out in the context of commercial contracts for the supply of products or services.

This Ruling does not consider other exclusions or conditions relating to notional deductions for expenditure on R&D activity. Therefore, a statement in this Ruling that the 'at risk' rule applies or does not apply does not imply that the expenditure would otherwise be notionally deductible under Division 355.

### Ruling

#### The 'at risk' rule

Expenditure can be claimed for the R&D tax offset only when you can notionally deduct it under Division 355. The 'at risk' rule compares consideration with R&D expenditure and may deny or reduce the expenditure you can claim for the R&D tax offset. Expenditure that is not notionally deductible under Division 355 may otherwise be deductible or depreciable outside of Division 355.

The amount of consideration relevant to any denial or reduction in notional deduction is worked out as at the time you incurred the expenditure. It is the consideration that you, or an associate of yours, received or could reasonably be expected to receive:

- as a direct or indirect result of expenditure being incurred (the nexus to expenditure test), and
- regardless of the results of the activities on which you incur the expenditure (the regardless of results test).

The 'at risk' rule applies to that 'part' of the consideration that meets the nexus to expenditure test and the regardless of results test. The 'at risk' rule does not require the total consideration to satisfy the nexus to expenditure test and the regardless of results test. We consider each test in further detail in paragraphs 23 to 37 of this Ruling, with examples.

The notional deduction is denied in full where the amount of consideration is equal to or greater than the expenditure. Where the amount of consideration is less than the expenditure, the notional deduction is reduced by that amount.

The 'at risk' rule applies when you incur the expenditure that you seek to notionally deduct. If you incur the expenditure at different points in time for the same R&D activity, you must apply the 'at risk' rule at each of those points in time.

When considering the application of the 'at risk' rule at the time you incur the expenditure, regard is to be had to anything that happened or existed before or at that time, and anything likely to happen or exist after that time.

The 'at risk' rule does not apply to expenditure incurred on R&D activities covered by either paragraph 355-210(1)(b) or (c). Paragraph 355-210(1)(b) or (c) deal with R&D activities conducted by a permanent establishment for other parts of a body corporate and R&D activities conducted for foreign residents that are connected or affiliated with you.

### Consideration

The term 'consideration' in the context of Division 355 is not legislatively defined. It is a technical term in the law of contract, but whether it is used in a technical or non-technical sense in Division 355 depends upon the statutory context. Where words in an Act have acquired a legal meaning prior to enactment, it is presumed the legislature intends them to have that meaning unless a contrary intention appears from the context.

### Legal meanings of consideration

The term 'consideration' has various legal meanings, including contract law, conveyancing and revenue statutes. For example, in *Chevron*, Robertson J held that the meaning of 'consideration' in the context of the transfer pricing provisions in Division 13 of Part III of the *Income Tax Assessment Act 1936* was not limited to the contract law meaning.

While there exists a statutory definition of 'consideration' in the ITAA 1997, that definition is in the specific context of consideration 'for a taxable supply'. It has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*. That definition is not determinative of the meaning of 'consideration' for all income tax purposes.

In *Bogiatto*, Thawley J interpreted the meaning of 'consideration' within paragraph 290-60(1)(b) of Schedule 1 to the *Taxation Administration Act 1953*. As noted by Thawley J, non-monetary benefits that are not 'consideration' for the purposes of the law of contract may also fall within the meaning of 'consideration' for the purposes of other tax provisions.

In *Scully*, it was held that the expression 'consideration ... for or in respect of', in the context of the taxation of eligible termination payments, indicated that the use of the word 'consideration' was not used in a technical sense.

Likewise, the Commissioner considers the phrase 'direct or indirect result' to indicate that the word 'consideration' is not used in a technical sense.

### Consideration includes non-monetary benefits

The Commissioner's view is that the term 'consideration' includes non-monetary benefits. There is nothing in the text of section 355-405, or its legislative history, to indicate that the term 'consideration' should be given an unduly strict interpretation, such as excluding non-monetary benefits. Middleton J noted in *Ludekens* that if the legislature had intended to strictly confine a provision to monetary benefits, it could have employed a more definite term such as 'payment' or 'amount'.

If 'consideration' were narrowly interpreted as confined to monetary benefits situations. Where no payments had been made would be excluded from the application of the 'at risk' rule. This outcome would be contrary to the express language of the provision and deny application of the provisions where the consideration 'could reasonably be expected'.

Furthermore, 'consideration' means more than merely non-monetary consideration 'involved with offer and acceptance' for the purposes of the law of contract. The text of section 355-405 clearly demonstrates an intention for the 'at risk' rule to apply where a *reasonable* expectation of receiving consideration exists, rather than only where a promise to pay is received in the formation of a binding contract.

### Meaning of 'consideration' in section 355-405

Commencing with the text of section 355-405, read in context, and having regard to the purpose of the R&D scheme and the R&D integrity rules, the Commissioner's view is that 'consideration' incorporates a wider notion than consideration in a contractual sense (see Example 3 of this Ruling). The Commissioner considers that a broad interpretation of 'consideration' in this context best achieves the object of Subdivision 355-F, namely as an integrity rule designed to deny or reduce an entity's notional deduction where their R&D expenditure is not 'at risk'.

Use of the preposition 'of' instead of the conjunction 'for' in the phrase 'as a direct or indirect result of the expenditure being incurred' also supports this. There is no requirement that the consideration be received for you to incur the expenditure. The consideration also need not be received for or as a result of any activities being conducted. The respective subject matter of the nexus enquiry for application of the 'at risk' rule is expenditure.

Whether monetary or non-monetary benefits constitute 'consideration' depends on the circumstances. Nonetheless, that which would constitute 'consideration' for the purposes of the law of contract would generally, if not always, constitute 'consideration' for the purposes of section 355-405.

If there is a consideration, the amount of consideration for applying the 'at risk' rule is the total of both the monetary benefits and the value of any non-monetary benefits to which both the 'nexus to expenditure' test 'regardless of results' test are satisfied.

### Nexus to expenditure test

If at the time you incur expenditure on R&D activities, you or your associate have received or could reasonably be expected to receive consideration as a result of that expenditure being incurred, the 'at risk' rule may apply.

The natural construction of the term 'expenditure' in section 355-405, having regard to the broader statutory context within which the 'at risk' rule operates, is that it refers to expenditure incurred by an entity on R&D activities for which it seeks to claim a notional deduction under section 355-205 or 355-480 (R&D expenditure). Therefore, the consideration captured by the nexus to expenditure test is that amount of consideration that can objectively be concluded as being received or receivable as a direct or indirect result of having incurred that R&D expenditure.

The nexus to expenditure test is concerned with the actual expenditure that an R&D entity has in fact incurred, rather than other expenditures or courses of action that the R&D entity could have chosen.

### Direct or indirect result

Consideration is received 'as a direct or indirect result' of incurring R&D expenditure when it is a direct or indirect consequence, outcome or effect of incurring the expenditure.

The fact that consideration may also be received as a result of something other than the expenditure being incurred does not alter the conclusion that the consideration is received as *a result* of that expenditure being incurred.

The use of the indefinite article 'a' supports this view. Particularly in its application to indirect situations, the degree of connection required is less demanding than would be required by the phrase 'caused by'.

For the nexus to expenditure test to apply, you or your associate must have received, or have a reasonable expectation to receive, consideration at the time you incur the expenditure. For example, the 'at risk' rule does not apply to include consideration from a contract you had not reasonably expected to enter into at the time you incurred the expenditure, such as supplying an effective ownership interest in the results of past R&D activities for consideration (see Example 4 of this Ruling).

The fact that expenditure is incurred on R&D activities conducted in the course of providing something for which the consideration is received or expected does not, of itself, cause the nexus to expenditure test to be satisfied. The nexus to expenditure test is an objective enquiry as to whether the consideration is a result of the R&D expenditure.

It is not an enquiry as to whether the R&D expenditure is incurred as a result of the consideration. The fact that the consideration might fund the expenditure does not of itself determine whether the consideration is as a result of that expenditure (see Example 5 of this Ruling).

### Regardless of results test

The 'at risk' rule applies only where you or your associate have received, or can reasonably be expected to receive, consideration regardless of the results of the activities on which you incurred the expenditure. This is referred to as the 'regardless of results' test.

The words 'regardless of' mean without regard to, without paying attention to, or irrespective of the results of the activities on which you incurred the expenditure.

Given the context of section 355-405 in Division 355, the reference to 'activities' is considered a reference to the R&D activities. It is not a reference to the commercial or contractual activities of the entity in any broader sense.

The 'results' are the outcomes of your R&D activities on which you incurred R&D expenditure rather than the process that led to those outcomes. You or your associate can receive consideration regardless of the results, even if you are required to conduct the R&D activities in a particular way (see Examples 1 to 3 of this Ruling).

The regardless of results test is an objective one. It is a question of fact whether you or your associate have

received, or could reasonably be expected to receive, consideration regardless of the results of the R&D activities on which you incurred R&D expenditure. From a practical perspective, it may be useful to ask:

Disregarding the outcomes of the R&D activities (whatever those outcomes may or may not be), can it be objectively concluded that you or your associate have received or could reasonably be expected to receive consideration?

Examples of where consideration is received or could reasonably be expected to be received, regardless of the results, are where the consideration depends only on:

- incurring the expenditure (see Examples 1 and 3 of this Ruling)
- conducting the activities on which the expenditure is incurred (see Example 2 of this Ruling), or
- supplying an effective ownership interest in the outcomes of the R&D activities, whatever those outcomes may be (see Example 7 of this Ruling).

In contrast, consideration is not regardless of the results to the extent that you or your associates' receipt of that consideration can be affected, directly or indirectly, by the results of the R&D activities you incurred expenditure on (see Examples 6, 8 and 9 of this Ruling).

## Quantification of the consideration

To apply the 'at risk' rule, you must quantify the amount of consideration you or your associates receive or could reasonably be expected to receive.

Where non-monetary benefits are received, a value of that non-monetary consideration needs to be determined as at the time the expenditure is incurred (see Examples 10 and 11 of this Ruling).

Where only part of the total consideration satisfies the nexus to expenditure test and the regardless of results test, the 'at risk' rule applies only to that part.

A contract may require multiple deliverables, but for which a single or undissected lump sum will be received. In these circumstances, the part of the consideration that satisfies the tests is to be determined on a fair and reasonable basis, having regard to the economic substance and not just legal form (see Example 9 of this Ruling).

An entity might also receive consideration as a result of incurring both R&D expenditure and non-R&D expenditure. The 'at risk' rule only applies to deny or reduce a notional deduction for R&D expenditure in relation to that portion of the consideration received as a result of incurring the R&D expenditure. A fair and reasonable basis for determining that portion of consideration is required.

In working out the amount, portion or value of consideration you or your associate received or can reasonably be expected to receive, consider the circumstances as a whole, having regard to what has happened and what is likely to happen.

## Examples

These examples do not and are not intended to consider the application of Division 355 more generally, including whether or not the underlying activities would be R&D activities or the subject expenditure otherwise notionally deductible. They cannot be used to draw any further conclusions about notional deductions beyond the application of the 'at risk' rule.

### Example 1 - contract to conduct research for variable consideration

Misschien Pty Ltd (Misschien), an R&D entity, enters a contract with Perchance Ltd (Perchance) that requires Misschien to conduct botanical research to specified quality standards.

Under the contract, Perchance obtains an ownership interest in the results of the research. In return, it pays Misschien \$1.20 for every \$1 Misschien incurs on the research.

Misschien retains a majority ownership interest in the research results.

Two months after entering the contract, Misschien spends \$100,000 on the research.

The 'at risk' rule applies because when it incurred the R&D expenditure, which it intends to claim as a deduction, Misschien could reasonably expect to receive \$120,000 consideration:

- as a direct or indirect result of incurring the expenditure on the research
- irrespective of the results of the research.

As the consideration is greater than the R&D expenditure incurred, the 'at risk' rule denies Misschien's notional deduction in full.

### Example 2 - contract to conduct research for fixed consideration

Perchance Ltd (Perchance) has a contract with Fortasse Pty Ltd (Fortasse), an R&D entity that conducts hydrological research. Perchance agrees to pay Fortasse \$120,000 for research that meets quality and timeliness standards in exchange for a minority interest in the results. The contract provides for the payment to be made regardless of the results of the research.

Fortasse spends \$100,000 on the research three weeks after entering the contract, which it intends to claim as a deduction under section 355-205.

To ascertain whether the 'at risk' rule applies, Fortasse needs to consider the terms of the contract and anything that happened or existed before or at the time the expenditure was incurred.

Fortasse reasonably expects to receive \$120,000 of consideration as an indirect result of incurring the expenditure on the research.

Fortasse's receipt of the consideration does not depend on anything other than it is performing hydrological research to the required standards. The consideration is received irrespective of the research results.

Fortasse is not required by the contract to spend anything, but it will practically need to do so to conduct the research.

The consideration is reasonably expected to be received as a direct or indirect result of incurring the expenditure on the research, irrespective of the results. The 'at risk' rule therefore applies. As the consideration is greater than the R&D expenditure incurred, the 'at risk' rule denies Fortasse's notional deduction in full.

### Example 3 - subsidy as a result of incurring expenditure

Under a state government incentive scheme, Kannski Pty Ltd (Kannski), a fluid mechanics research company, is entitled to receive a subsidy of 30 cents for every \$1 of expenditure it incurs on research that meets specified quality standards.

Kannski incurs \$100,000 of expenditure while conducting its research. It is aware of the state government incentive scheme at the time it incurs the expenditure.

Kannski reasonably expects to receive \$30,000. It does not matter that there is no contractual requirement for Kannski to incur the expenditure. The subsidy is consideration Kannski reasonably expects to receive as a direct or indirect result of the expenditure incurred on research. The consideration has the necessary nexus to the expenditure.

The consideration does not depend on anything other than Kannski performing research to the required standards. The consideration is received regardless of the research results.

As the consideration Kannski expects to receive is less than the R&D expenditure it incurred, the 'at risk' rule reduces Kannski's notional deduction to \$70,000.

In the event that Kannski had not received, or could not reasonably be expected to receive, the subsidy when it incurred the expenditure, the 'at risk' rule would not apply. For example, this may occur if the subsidy was announced and applied retrospectively to previously incurred expenditures. In this situation, the R&D recoupment rules in Subdivision 355-G may apply.

### **STUDENT AND WORKING HOLIDAYMAKER VISA HOLDERS**

On 19.1.2022, the Government announced a series of visa measures to provide an incentive for fully vaccinated Student and Working Holiday Maker visa holders to return to Australia as soon as possible to help address current workforce shortages caused by COVID-19.

#### **Refunds of Visa Application Charges**

Working Holiday Maker visa holders who are currently offshore and come to Australia during the next 12 weeks will be eligible for a refund of their Visa Application Charge.

Any Student visa holder who is currently offshore and comes to Australia over the next 8 weeks will be eligible for a refund of their Visa Application Charge.

The current Visa Application Charge for a student is \$630, and for a Working Holiday Maker, it is \$495.

These changes will also apply for new applications, which will be processed quickly so applicants can come to Australia during the refund window.

As well as providing an incentive for existing offshore visa holders to bring forward their travel, these changes will generate new interest in Australia and new visa applications.

The provision of refunds and priority visa processing, together with a Tourism Australia advertising campaign, will generate fresh interest in Australia from students and Working Holiday Makers who contribute greatly to our economy and fill vital skills gaps.

#### **International Student – Working Hours Flexibility**

The Federal Government has supported Australian businesses during the pandemic by allowing Student visa holders to work additional hours in critical sectors.

Due to current workforce shortages, the Government is temporarily extending this arrangement by removing the limit on Student visa holders' working hours across all sectors of the economy.

This measure takes effect immediately for all ongoing students as well as new student arrivals who start a job prior to their course commencement and will be reviewed in April 2022.

#### **Working Holiday Makers – Employer Flexibility**

In addition, effective immediately and until the end of 2022, there will be no limit on the length of time Working Holiday Makers can work for the same employer.

The above measures are temporary and designed to provide immediate assistance to Australian businesses facing critical workforce shortages to continue delivering goods and services to the community.

There are currently around 150,000 Students and 23,500 Working Holiday Maker visa holders offshore.

All international arrivals must meet Australia's entry requirements, including vaccination.

Further details will be available on the Department of Home Affairs website.