



15 September 2021

Board of Taxation Secretariat  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [RandD@taxboard.gov.au](mailto:RandD@taxboard.gov.au)

Dear Board of Tax,

### Review of R&D Tax Incentive Dual Agency Administration Model

The Corporate Tax Association (CTA) welcomes the opportunity to make a submission on the Board of Taxation's (Board) review of the Dual Administration of the R&D Tax Incentive Dual Agency Administration Model.

Information about the CTA and its 139 large business members can be found on our website at [www.corptax.com.au](http://www.corptax.com.au).

### Background

In order to obtain a cross section of views on the dual administration of the R&D Tax Incentive (**the incentive**) and suggestions for reform, the CTA conducted a member survey in July 2021 receiving 38 responses (28% of membership). The survey sought feedback on the consultation questions raised in the Board's consultation guide and supplemented the survey with questions aimed at providing context to the responses, including information on taxpayer and R&D claim size and whether the taxpayer has been subject to ATO and/or AusIndustry review in the recent past. Respondents could also provide comments in relation to the questions raised and their experiences with both regulators. Information was also sought which enabled an estimate of the cost of compliance as a percentage of the permanent tax benefit to be determined.<sup>1</sup>

### Context

The CTA survey is the fifth CTA survey undertaken in the past five years in relation to the incentive. Whilst the current survey specifically dealt with the dual administration of the incentive for the purpose of the Board's review, a common theme through all five CTA surveys is the view that the incentive has been administered by both AusIndustry and the ATO in a manner that has unduly limited access to the incentive for all large business taxpayers. This approach appears to have been driven by two factors:

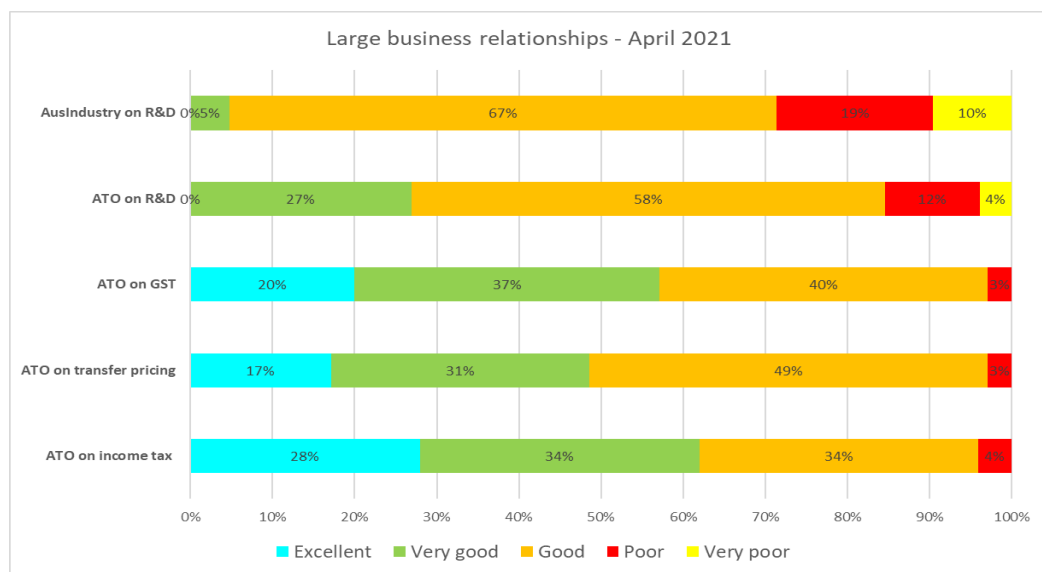
- The release of four joint Tax Alerts in 2017

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<sup>1</sup> This is calculated at 8.5% of the eligible spend. Although the non-refundable offset is calculated at 38.5% of eligible spend, tax deductions would otherwise be claimed at 30% as either expenses or tax depreciation. All respondents do not qualify for the higher rate of tax offset.

- The perceived budgetary cost of the incentive, despite the rising cost being predominantly attributable to increased refundable tax offsets (not non refundable offsets that apply to larger taxpayers).<sup>2</sup>

The CTA has also undertaken eight surveys over the last four years on how members view their relationships with regulators.<sup>3</sup> These surveys have consistently shown that the state of large taxpayer relationships with AusIndustry and the ATO on R&D matters ranks as one of the lowest of all interactions large taxpayers have on tax related matters. In the last survey conducted in April 2021, 29% and 16% of those who responded indicated that they have poor or very poor relationships with AusIndustry and the ATO respectively, with significantly less taxpayers with excellent or very good relationships on R&D matters compared to income tax, GST or transfer pricing matters. In fact, unlike other taxes, no member indicated that they had an excellent relationship with AusIndustry or the ATO on R&D matters.



A ninth survey is currently seeking members views with responses due at the end of September. Preliminary responses indicate the past trend of relatively poor relationships with both the ATO and AusIndustry on R&D matters continues. We would be happy to provide the final results of the survey to the Board if requested.<sup>4</sup>

### Themes emerging from our recent survey

A copy of the results of the dual administration survey are attached as an Appendix to this letter. This includes member comments which provide context around experiences. Whilst the attached does not clearly indicate the administration of the system is broken, the underlying sentiment from the vast majority of respondents is it is in definite need of some care and maintenance, underpinned by a shared understanding of the intent and parameters of the incentive. It is worth noting the latest CTA R&D survey indicated that

<sup>2</sup> See [2016 Review of the R&D Tax Incentive | Department of Industry, Science, Energy and Resources](#) at page 24 which shows the actual and forecast increase in refundable offsets.

<sup>3</sup> The surveys were undertaken in July 2016, February 2017, September 2017, April 2018, November 2018, May 2019, March 2020, and April 2021.

<sup>4</sup> Preliminary results show that 50% have indicated poor or very poor relationships with the ATO and AusIndustry on R&D matters,

no-one in the large market has a better experience since previous reviews of the incentive, with some CTA members some indicating worse experiences.

The key themes emerging from our recent survey can be summarised as follows:

1. **Clearer administrative accountabilities are needed** between AusIndustry, the Industry Innovation and Science Australia Board (**IISA Board**) and the ATO, especially after the [Auctus](#) decision clarified the respective roles can overlap as a matter of law. As was noted by the Full Federal Court, until the IISA Board has made a finding, the ATO is able to determine not only the quantum of any claim, but also its eligibility. There is also no requirement for the ATO to refer matters of eligibility to the IISA Board, although there is a requirement for the Board to consider eligibility if the matter is referred to it by the Commissioner.<sup>5</sup>

The CTA survey results confirm the uncertainty in the market as to the roles of the ATO, AusIndustry and the IISA Board. Only 3% of the survey respondents indicated the accountabilities of both administrators are clear. 23% of the survey respondents indicated roles were unclear, with the balance of the respondents indicating it was clear “for some or the most part” (74%).

Whilst a significant proportion of the survey participants indicated a single administrator would be preferable as a means to solve the uncertainty, views were divided as to whether that should be the ATO or AusIndustry. In the CTA’s view, “hard wiring” the administration to one or other administrator would not be necessary if there is clarity of roles in administering the incentive in accordance with its purpose. Such clarity would require clear, publicly available protocols which set out the respective roles of the administrators.

2. **The current dual administration acts as a brake on making legitimate claims**, as the cost of defending claims (and dual review in some cases) is leading to larger players deciding not to register legitimate claims. It is not clear if this is a conscious decision of the administrators to reduce legitimate large business claims, or a consequence of the dual administration process.
3. **The cost of compliance (before taking into account the cost of review) is approximately 10% of the permanent difference of the R&D tax offset and is a significant deterrent.** The major costs of compliance (before taking into account review costs) are documentation requirements, external advisor fees and time associated with the calculation of claims. We suspect the cost of compliance for smaller taxpayers would be larger as a percentage of claim size.<sup>6</sup>
4. **Lack of up to date ATO guidance on cost allocations including indirect cost allocations and guidance on “nexus” of costs is creating uncertainty.** It is worth noting that the ATO has indicated in its Top 1000 Findings report that low R&D assurance ratings are caused by insufficient evidence on the nexus of expenditure to R&D activities and methods of allocation of expenditure.<sup>7</sup> The ATO providing further guidance on these matters would assist in addressing these issues.<sup>8</sup> We note the ATO suggests that taxpayers apply for a private binding ruling to obtain certainty on

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<sup>5</sup> See paragraphs 32 to 35 of the [Auctus](#) decision.

<sup>6</sup> The amount calculated is similar to that in the 3Fs review at page 25 which was 9%.

<sup>7</sup> See page 16 at [Top\\_1000\\_tax\\_performance\\_program\\_report\\_2020.pdf \(ato.gov.au\)](#)

<sup>8</sup> Some information is provided. See [Keeping records and calculating your notional deductions | Australian Taxation Office \(ato.gov.au\)](#)

apportionment methods. Whilst we accept this is possible, it is suggested a Public Ruling or Practical Compliance Guideline would be a more efficient means to provide wider taxpayer certainty.

5. **AusIndustry reviews do not always fit within the more co-operative and user focussed process** that normally applies in Top 100 and Top 1000 reviews. Coordination of review activity and information requests is required to remove duplication where possible. As one member noted:

“The problems I have with the reviews conducted was that both agencies wanted to do a review but they refused to co-ordinate with each other - the ATO literally said to me AusIndustry won’t return our calls. Accordingly we ended up with the ATO reviewing cost claims on projects which AusIndustry then might come along and strike out as a project in its entirety. It made no sense for the ATO review to come first, but that is what occurred. Further, when I did try to get the agencies to co-operate (literally I got them on a conference call together) they both stated they couldn’t breach confidentiality by discussing our review with the other agency, even though I’m on the call saying I have no issue with this. Considering they’re both government agencies looking at the same activities of ours, the co-ordination was dismal, and ended up wasting time.”

6. **Website information on the incentive has improved, but some of it is not user friendly, needs updating or better co-ordination between ATO and AusIndustry.** For example, the ATO R&D website guidance still refers to the EM of the old law and has not been updated for the law effective from 1 July 2021.<sup>9</sup>

7. **Whilst current guidance has improved, there is currently no binding AusIndustry guidance (other than an IISA Board Finding).** The recent position on software development guidance has been seen by many as an example of an unacceptable administrative U-turn that has been applied retrospectively. Moreover current guidance is not binding. We note that the current published guide on software development says:

“The Commonwealth disclaims all liability for any loss or damage arising from you or anyone else erroneously relying on this guide or any statement contained in it.

It is ultimately your responsibility to seek and obtain your own advice about the eligibility of your activities for the R&D Tax Incentive.”<sup>10</sup>

This casts doubt on reliance on any guidance provided, adding to the high level of uncertainty already in the large market around the treatment of software development.

As one member noted in their survey response:

“We will never claim R&D again given the U-turn that occurred on software claims”.

8. **There is a need for more public transparency on the administration of the incentive** to improve taxpayer confidence in the administration of the system. For example:

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<sup>9</sup> See for example: [Steps to claiming the tax offset | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/ATO/your-support/articles/Steps-to-claiming-the-tax-offset) which was last modified in 2016 and [Legislation | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/ATO/your-support/articles/Legislation) which was last modified in 2017.

<sup>10</sup> See: page 17 at [Software development sector guide for the R&D Tax Incentive | business.gov.au](https://www.business.gov.au/Software-development-sector-guide-for-the-R&D-Tax-Incentive)

- a. unlike for income tax, there is no regular public transparency on how many R&D registrations are subject to review, number of audit adjustments or their outcome.<sup>11</sup>
- b. there is no information we could find on the number of advance findings and overseas findings.
- c. we are unaware of any inter-departmental protocol that governs the process for determining cases for review or the process by which the ATO contact AusIndustry to undertake a review.

## Recommendations

1. The Government should provide a Statement of Expectations for the incentive which outlines the Government's expectations of how the administrators will achieve its objectives, carry out functions and exercise powers.<sup>12</sup> Such a statement should go some way to ensuring the incentive is viewed and administered as an investment in the Australian economy, rather than simply a revenue cost.
2. If administering the totality of the incentive by either the ATO or AusIndustry is not feasible, a protocol or charter needs to be developed that clearly articulates the respective roles of the ATO, AusIndustry and IISA Board. This should be made public and could include:
  - a. A clear "Responsible, Accountable, Consult and Inform" (RACI) matrix.<sup>13</sup>
  - b. When matters will be referred to the IISA Board for a finding.
  - c. Time frames for review when matters not referred to the IISA Board for a review.
3. Processes or protocols should be in place when a matter of eligibility is being undertaken by the ATO to enable taxpayers to provide input into reviews.
4. The ATO should provide public advice or practical guidance on nexus and cost allocation issues. Such guidance should include practical examples on what is considered acceptable. Something similar to the NZ IRD R&D guide could be used which incorporates both eligibility and cost allocation matters in one document (or one web page), including simple examples.<sup>14</sup>
5. The IISA Board should consider using its powers to make determinations under the amendments contained in [Treasury Laws Amendment \(A Tax Plan for the COVID-19 Economic Recovery\) Act 2020](#) possibly by making current non-binding guidance (such as software guidance) into formal determinations. AusIndustry could also

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<sup>11</sup> Some information can be found in Roundtable summaries, but it is adhoc and incomplete. See [R&D Tax Incentive events and information sessions | business.gov.au](#). Some data on tax offsets can be gleaned from ATO company statistics, but it is difficult to decipher. See: company table 3A at [Taxation Statistics 2018-19 - Company - Table 3 - data.gov.au](#). Some data on numbers of claims and their value is contained in the ATO annual reports.

<sup>12</sup> See <https://asic.gov.au/about-asic/what-we-do/how-we-operate/accountability-and-reporting/statements-of-expectations-and-intent/>

<sup>13</sup> See [What is RACI Matrix - Rules for Using the Matrix \(managementstudyguide.com\)](#)

<sup>14</sup> See [research-and-development-tax-incentive-guidance-2020.pdf \(ird.govt.nz\)](#)

consider creating a list of potential issues for public consultation on R&D determinations similar to the processes adopted by the ATO in its matters under consultation<sup>15</sup>.

6. More public transparency on the administration<sup>16</sup> of the scheme including at least yearly updates on:
  - a. costs of the ATO and AusIndustry in administering the incentive.
  - b. numbers of applications and decisions on advance findings and overseas findings that are favourable and unfavourable.
  - c. number of reviews, adjustments, and outcome of review activity including the quantum of an adjustments made, and what is driving adjustments.
7. In Top 100 and Top 1000 income tax reviews, the removal of assurance ratings for the incentive until eligibility has been reviewed by AusIndustry. Ratings can still be given for other aspects of any such review.

Should you have any questions on the above or the attached survey results, please do not hesitate to contact the CTA.

Yours sincerely,



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<sup>15</sup> See : [Matters under consultation | Australian Taxation Office \(ato.gov.au\)](#)

<sup>16</sup> A recent publication titled [Making Tax Work](#) makes some very relevant observations around the need for scrutiny and transparency of the tax strategies of tax administrations:

“The state is entrusted with the stewardship of collective resources that are expected to be used for collective wellbeing. As in any situation where stewardship is involved, good governance requires that those so entrusted are held to account for the decisions that they make. This process of holding a government to account requires that data be available to ensure that a government’s intentions, plans, actions, and outcomes are known and can then be appraised. This process helps ensure that accountability is established. In a democracy this can then lead to informed decision making within that process.”



## Member survey results into the dual administration of the R&D tax incentive

Compiled August 2021

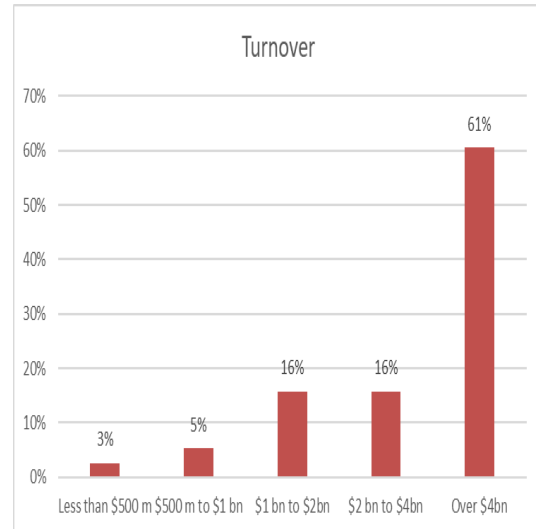
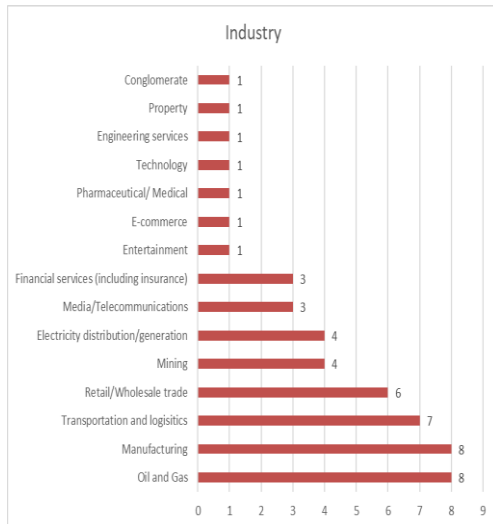
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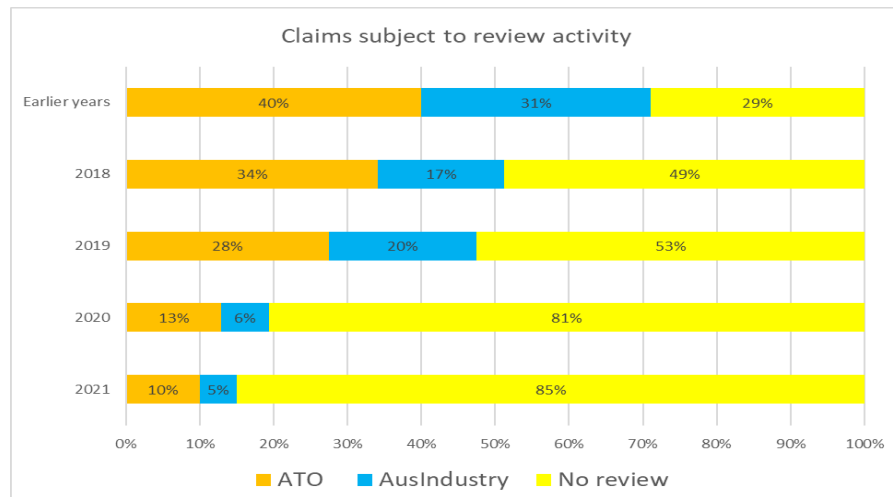
# 1. Industry and turnover

The survey received responses from across a broad industry spectrum as disclosed below. 25 out of the 38 (65%) respondents were either Australian ASX listed groups or privately owned. 61% of the respondents had turnover in excess of \$4 billion and would generally be considered in the ATO's Top 100 program that involves continuous review of their income tax position.

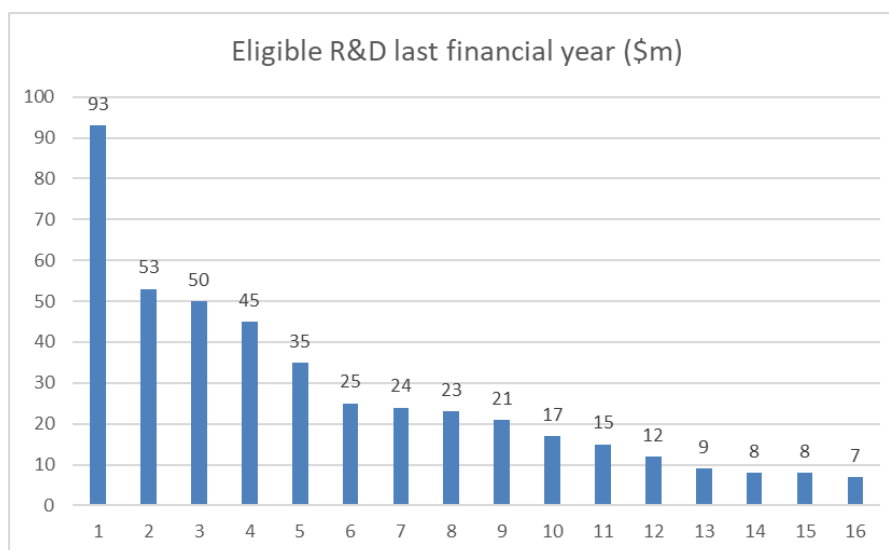


# 2. Experience with reviews of R&D claims

To ensure context is given to the comments and survey responses, this question sought to determine what claims maybe have been subject to review by the ATO, AusIndustry or both.



### 3. Eligible R&D spend, average cost of compliance and the drivers of compliance costs.



From the above, assuming a 8.5% tax benefit, for those respondents that provided data the average incentive claim was \$2.3 million (median \$1.8m). Information on the cost of compliance was also provided by the above taxpayers which indicated the average cost of external fees was \$119,000 and the average internal organisational hours spent on R&D compliance was 834. We have used \$114 per hour as an average hourly rate.<sup>17</sup> All respondents utilised external advisors in the preparation of R&D incentive claims, and on average these costs accounted for around 50% of total compliance costs.

As a rough guide, the average cost of compliance is \$214,000 on an average incentive claim of around \$2.3 million (the permanent difference of 8.5% of the eligible R&D expenditure). In other words, the cost of compliance is on average about 9% of the cost of claiming the incentive for large corporates before taking into account any cost associated with subsequent ATO or AusIndustry review activity. Removing a large outlier from the data reduces the average claim to around \$1.9 million (median \$1.6m), average external fees to \$111,000, but internal hours increase to 883. The average total cost remains similar at around 11% of the incentive, before taking into account subsequent ATO and AusIndustry review activity.

	All data (\$000)	Excluding outlier (\$000)
Average external fees	119	111
Average internal cost	95	101
<b>Total cost</b>	<b>214</b>	<b>211</b>
Average internal hours	834	883
Average R&D permanent benefit (@8.5%)	2320	1920
Total cost to claim ratio	9%	11%

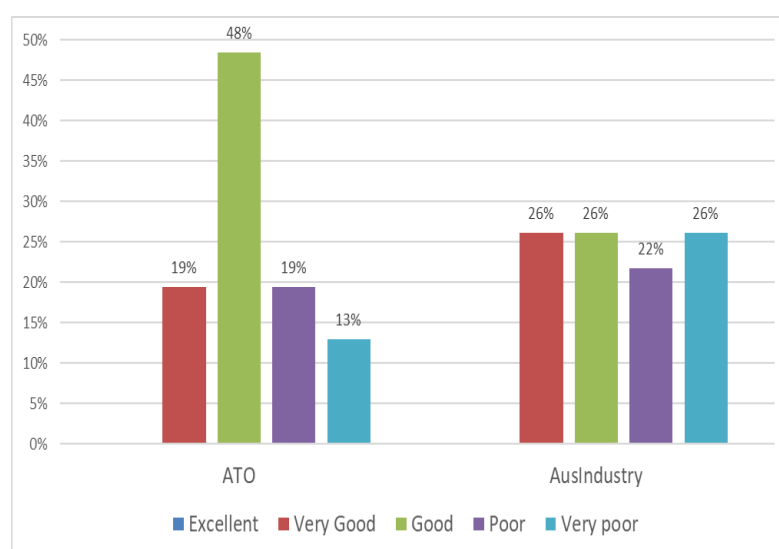
The survey also asked respondents to rank (from 1 to 4) the drivers of compliance costs, with 63% indicating 'technical team documentation requirements' was the main driver of cost followed by external fees (23%) and the time involved in calculating the eligible

<sup>17</sup> This is calculated as the average hourly cost of an ATO staff member, gleaned from the ATO 2020 annual report of \$100,000 per annum grossed up for on-costs of \$100,000 divided by 231 days @7.6 hours a day = \$114 per hour.

expenditure ranked third (9%). 6% ranked the largest driver of cost being the cost of subsequent ATO and AusIndustry reviews.

#### 4. Overall rating of taxpayer experience with dealing with the ATO and AusIndustry on R&D matters

Respondents were asked to give an overall rating in relation to their experience with dealing with both regulators. The choice of rating included "excellent", "very good", "good", "poor" and "very poor". None of the respondents indicated an "excellent experience" with either the ATO or AusIndustry. The following graph shows overall results. It indicates 67% had very good to good relationships with the ATO, compared to 54% for AusIndustry. 32% had poor or very poor relationships with the ATO, compared to 46% for AusIndustry.



##### Comments received

1. Generally positive engagement with the ATO case team on R&D matters, however there appears to be an increasing level of detail required to be provided and expectations around substantiation of expenditure etc. These need to be balanced against practicalities of how R&D projects are normally run, what level of documentation and support is typically maintained, particularly given the absence of clear ATO guidance in this area.
2. For AusIndustry, basic 'desktop reviews' have been OK experiences. However, where the reviews have needed to go into quite technical and detailed subject matter areas, AusIndustry have struggled to grasp concepts and gain the requisite understanding which has made the process less smooth and efficient. For the ATO, we have given a "Good" rating rather than a higher positive rating as their line of responsibility/jurisdiction has become blurred. They seem to crossover into what should be seemingly AusIndustry jurisdiction, making their own judgements/questioning the R&D eligibility of activities.
3. The AusIndustry sessions on the new software guidance did not encourage feedback. Prior to introducing the online registration form, AusIndustry asked for feedback none of which was acted upon.

4. The crossover between the two regulators in reviewing the R&D information is inefficient, e.g., both reviewing eligibility. The ATO seems to be overreaching on AusIndustry's area of expertise re eligible activities. There appears to be a lack of alignment and communication between the two (ATO requests and reviews data already provided to AusIndustry). The role of the R&D cluster at the ATO is unclear, as is its interaction with AusIndustry.
5. ATO provided a lower rating at the previous streamlined assurance review for a specific R&D project without understanding the technical aspects of the project - this is not their area of expertise but resulted in a lower rating and comments to the effect that they would recommend a review to AusIndustry.
6. The ATO is reasonable to deal with around R&D. AusIndustry are abysmal. A wretched amalgam of incompetence and inaction. Very limited capability in what is valid R&D and what is not. No understanding at all in how to communicate the beach flags to claimants.
7. Just too much red tape, duplicated provision of information, and the ability of the agencies to subject my team and our operations to reviews which can be massively time consuming, we have chosen not to pursue this incentive.
8. Business decision was made not to pursue any R&D claims due to uncertainty of AusIndustry interpretation and focus on banking platforms following the last claim made.
9. We generally deal with the ATO Large Business Team and we have been able to liaise with people who understand our questions and issues. We have not had direct contact with AusIndustry for many years so can't comment.
10. Past experience was difficult.
11. AusIndustry's review was poorly resourced and appeared to have a pre-determined outcome that was counter to the legislative intent. Internal reviews were undertaken by staff who were previously part of the initial review and appeared to lack both independence and a genuine intent to achieve the legislative intent. This overlap between assessor and reviewer appeared to result from the level of staffing available to carry out a limited function.
12. There would appear to be a "default setting" of low assurance by the ATO in their Justified Trust review over R&D claims. Its not apparent if this is due to resource constraints or other limitations.
13. The ATO is focused on numbers. If the projects fall within their radar (eg: IT related projects), the ATO seems to get hung up that there is something wrong and request AusIndustry to review. Communication from AusIndustry during the review is minimal as the AusIndustry team do not want to engage in a dialogue - "We will call you when we need something".
14. The problems I have with the reviews conducted was that both agencies wanted to do a review but they refused to co-ordinate with each other - the ATO literally said to me AusIndustry won't return our calls. Accordingly we ended up with the ATO reviewing cost claims on projects which AusIndustry then might come along

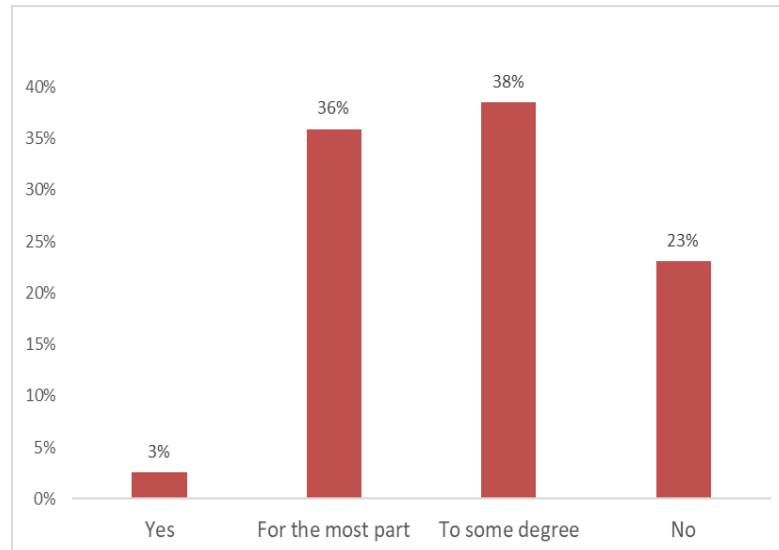
and strike out as a project in its entirety. It made no sense for the ATO review to come first, but that is what occurred. Further, when I did try to get the agencies to co-operate (literally I got them on a conference call together) they both stated they couldn't breach confidentiality by discussing our review with the other agency, even though I'm on the call saying I have no issue with this. Considering they're both government agencies looking at the same activities of ours, the co-ordination was dismal, and ended up wasting time.

15. Regarding experience with the ATO, we have never been reviewed in detail for our R&D calculations with the ATO. As part of our SAR and CAR, the ATO advised that the CAR/SAR programs are not set up to give high assurance on R&D due to the effort that would be required on the ATO's part to get high assurance. So for assurance reviews our highest rating is only ever Medium - due to the detailed calculation information we do provide to the ATO. We could only ever get high assurance if the ATO were to do a full audit on R&D. As we have never been audited on R&D by the ATO I can't really give a rating. Regarding AusIndustry, we have dealt with them only on our R&D overseas findings applications. The last overseas finding and application took over 12 months to get achieved and the process of dealing with the case officer at AusIndustry was protracted and at times difficult. We had to escalate the matter. The finding was eventually successfully concluded however I would not say the relationship between us and AusIndustry is at the same level as it is with the ATO on R&D. Hence I have selected good and poor in the rating - I would say the rating is 'average' with AusIndustry, not necessarily poor.
16. ATO take an aggressive position on the types of costs that can be claimed for eligible projects; fail to factor in salary package costs for dedicated R&D staff.
17. We are having a really poor experience with the R&D team at the ATO and AusIndustry. The ATO wants to review out of time R&D claims in relation to software R&D activities which we have got external QC for support. They instructed AusIndustry to ask for information and conduct a review. We submitted our tax position paper and asked for the ATO's position on their claim that they are not out of time. In the meantime, we asked for a pause on the submission of the response. They replied with an email with no technical analysis and repeated that they have a right to review and amend. They then instructed AusIndustry to repeat the demand for the information without any further extension of time. AusIndustry complied with the ATO's demand and also indicated to us that our submission of the information for those historical claims need to be a complete submission by the due date as they will not entertain any material new submission after the deadline. We had to go through a difficult process to collate the responses for those earlier years under review because of system changes, people have moved on. The issue we have is that the ATO and AusIndustry has created pressure on the taxpayer for the submission of the information to them but they are currently sitting on the information as the AusIndustry team reviewing the matter is in transition and their review has not progressed much. We submitted the information in early Feb 21. We have not heard back from the ATO or AusIndustry at this stage. We also feel that the ATO and AusIndustry's attitude on software claims have changed over time and a higher yard stick is being applied to historical claims where those views were not made known to taxpayers on a timely basis.

18. Still waiting for an outcome from AusIndustry - but so far the experience has been very good - they like interactive and presentation style engagement and have provided practical feedback. This rating might change if the outcome goes South. Our experience with the ATO generally on income tax and GST justified trust reviews and engagement is excellent. As for R&D, the R&D team initially tried to squeeze in questions on eligibility - we were lucky to get these taken out. We presented to them, answered their questions but were then given a low assurance rating. We had specifically asked them to engage with AusIndustry and also invited them to attend our AusIndustry meetings but they didn't take this up. The R&D team takes a very linear approach and their questions did not enable us to provide more evidence on Governance. They want an open and engaging relationship but have a very set view on the way they want things done and don't have an interest in AusIndustry engagement.

## 5. Do you consider that the roles and responsibilities of the two administrators (ATO and AusIndustry) are distinct and clearly understood?

This question sought views on the clarity of roles and responsibilities of the two administrators as requested by question 1 of the Board's consultation paper. 38 responses were received with respondents given an option of 4 responses. The results indicate the roles and responsibilities are not distinct and not particularly clearly understood with only 3% agreeing with the statement. 36% indicated "for the most part". 38% indicated "to some degree" and 23% a no.



### 5.1 Comments received from respondents to the question "If roles are not distinct and clearly understood, how might they be enhanced?"

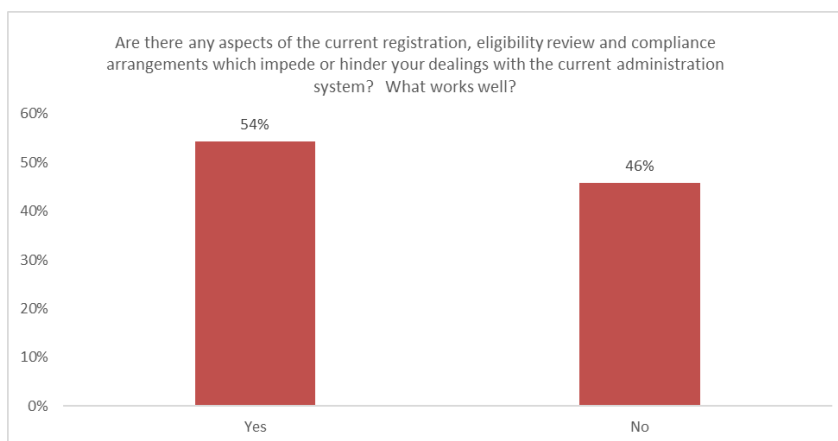
1. There should be greater clarity on the role of the ATO as an R&D incentive administrator. There should also be clarity on how the two administrators' roles complement each other, and how do they work together. Who should taxpayers go to in which circumstances?

2. We believe the roles and responsibilities in print are pretty clearly defined from our taxpayer viewpoint, being AusIndustry is responsible for examining and making findings about eligible R&D activities, whilst the ATO is responsible for determining whether expenditure is validly incurred for those eligible activities. However, we believe in practice this delineation of roles is not operating and there is a blurring of the lines. In particular, we have found that in practice the ATO is often trying to second guess the AusIndustry positions taken on eligible activities.
3. There seems to be some confusion between the administrators as to roles, eg as part of the TAR the ATO asks about documentation etc which is within AusIndustry's domain. AusIndustry asks questions about R&D spend.
4. "Clearer roles and responsibilities around review and audit activities. Do they both have the same approach and expectation to governance? More transparency about the two administrators' interaction and expected approach to risk areas to set taxpayer's expectations. It is not clear whether both regulators' review and/or can undertake compliance activities in respect of the R&D taxpayer alerts.
5. A single administrator with clear guidelines and support for taxpayers.
6. The assessment of eligible activities seems to be well understood, however the assessment of whether costs form part of the eligible activities (and therefore part of the R&D tax incentive claim) does not seem to be clear.
7. Do away with the concession. The whole concept of innovation is too ephemeral and most advancements are incremental in any event. Use targeted grants or investment allowances that piggy back off existing legislation e.g. capital allowances rules.
8. Whilst the roles are clear from a description point of view, how this practically plays out can sometimes contradict what is understood to be the role of each regulator.
9. The roles are not clearly understood and it is difficult to comply without heavy adviser input. However, unfortunately some advisers have been too aggressive with other taxpayers and that provides further concern on compliance generally.
10. One party responsible for oversight of the entire program.
11. I believe the roles are distinct and broadly understood, however the sequential approach to assessing project eligibility (AusIndustry) and then reviewing costs (ATO) extends the review timeframe and severely impacts on compliance timelines.
12. AusIndustry role is focussed on eligibility of R&D activities - but the ATO in its Justified Trust review comments on eligibility of software etc.
13. It could be enhanced if it was made clear the ATO's responsibility lies in reviewing "the numbers" (i.e. the "expenditure" allocated to R&D where AusIndustry has responsibility over determining whether the "activity" is in fact R&D.
14. The ATO are not technical R&D experts but they clearly think so and request AusIndustry review when the projects falls within their radar.

15. Theoretically it may make sense in terms of which agency is best to regulate the relevant criteria, however in practice there's a disconnect and cross over between the two agencies and the taxpayer is caught in the middle. The quantum being claimed is derived from the categories of eligible expenditure which is dependent upon the eligibility and type of activities undertaken in the project and whether it qualifies as R&D. If the eligibility of the activities or project are key, it would make sense for that agency (AusIndustry) to also regulate and determine the eligibility and quantum of the expenditure.
16. If one agency can't take on the entire role, then one should operate under the clear instruction of the other when it comes to R&D. In addition, these confidentiality chinese walls need to be removed as it just leads to inefficiency.
17. Based on my interactions with both parties to date, I feel the roles and responsibilities are understood. However, from a broader perspective I do know that companies have issues with the ATO and their responsibilities regarding R&D. Essentially overstepping their role from focussing on expenditure to actually having concerns over eligibility which is the responsibility of AusIndustry.
18. The ATO assert themselves in determining eligibility of projects and this should be stopped.
19. The ATO has it made clear to us that they have the authority to amend R&D claims in a situation under tax law even if AusIndustry is precluded from making a finding if is out of time. If that is the case, why do we still need AusIndustry if the ATO can amend without a finding from AusIndustry? There is an R&D team with the ATO (we have met them). It looks like the R&D claims are examined by both AusIndustry and the ATO which seems like a duplication.
20. I say to some degree as we were lucky to negotiate eligibility out of consideration by the ATO - that is because we have a great case manager who fights for us. I think the ATO needs to engage better with AusIndustry.
21. I don't see it as a major issue but it is very immaterial for us.
22. My view is that there is still tension at the boundaries of their responsibilities.



6. Are there any aspects of the current registration, eligibility review and compliance arrangements which impede or hinder your dealings with the current administration system? What works well?



Comments received:

1. For the last couple of years the registration and ITR claim process has been going well. It is possible that this is because we have been in "rely" justified trust years.
2. R&D tax rules are fairly complex, combined with lack of useful guidance (e.g. details of what is/is not eligible R&D, methodology for apportioning overhead costs etc) and detailed registration requirements makes the R&D tax process fairly inaccessible to most in-house teams (with reliance on placed on R&D advisers).
3. To date, I have a greater understanding of the role of AusIndustry in reviewing the R&D application and providing an AusIndustry number for an R&D tax incentive schedule. However, lack of understand on the role of the ATO impedes our ability to understand who to go to on which matters. There is little understanding on why there needs to be two administrators. It would be easier if there was one administrator.
4. We are finding there is duplication of information provided to the ATO and AusIndustry. We provide detailed project descriptions and supporting numbers as part of the initial AusIndustry registration application form. However, in the ATO information requests as part of our Annual Compliance Arrangement processes that come through later in the year, we are asked to again provide detail about the project activities. A lot of this has already been provided to AusIndustry and we feel we would not need to be asked if there was better coordination between the ATO and AusIndustry (ie very similar info but we are having to provide it to multiple audiences). Further, the ATO in their information requests have asked for project descriptions in "lay terms" - this requires additional work/time for project technical teams and would again not be required if AusIndustry and the ATO had better collaboration (eg AusIndustry should be better assisting the ATO with any questions over the eligibility or technical side of activities). Additionally, we are seeing issues with the recent updates to the AusIndustry application process:

- a. The new registration online form has character limitations that make it very difficult to fully explain the technical positions.
  - b. Additional administrative burden with the use of items such as MyGov, which can create their own lodgement difficulties for advisors lodging on behalf of taxpayers.
5. Problems: new AusIndustry registration form does not allow attachments, restrictive character limits, doesn't accept special formatting (tables, video etc). Anecdotally, previous interactions were strict and rigid, eg email only (no phone calls), only dealt with authorised persons (as per the application form which has two contact names), didn't want face to face meetings. ATO interactions have been OK.
6. Pre 1 July 2021 registration process worked well, although the document is not clearly set out and sometimes difficult to tell where one activity/subactivity/supporting activity begins and ends. Registration process works well. Documentation expectations of the ATO are high.
7. There is not enough guidance from either of the administrators on the R&D tax incentive, with taxpayers using external advisors to support claims.
8. Dual administrators with different timelines makes the process challenging.
9. We outsource management of that process so we don't need to deal with it.
10. AusIndustry as an administrator is totally broken. No claimant that I have spoken to has any confidence in them to properly and reasonably assess claims.
11. I think R&D could be simpler and it seems it does not necessarily need to be part of the tax law (and therefore could be more appropriately dealt with by the operations team, rather than tax).
12. Nothing specifically, but it would be preferred from a practical perspective for all R&D matters be managed by one authority.
13. Separate registration process administered by AusIndustry and then ATO for the numbers! The documentation and project descriptions provided to AusIndustry need to be extremely detailed (ours was +190 pages this year).
14. Having to get registration numbers prior to lodging returns.
15. The dual administrator arrangement is detrimental to good administration.
16. Mismatch timing on AusIndustry lodgement and tax return lodgement. Not many options in their appeal process unless you want to go to the Tribunal. It is negative review and then you appeal.
17. Our R&D claims have only been reviewed by the ATO as part of the Justified Trust review, with only a minor issue identified. We have not had any interaction with AusIndustry.

18. Documentation requirements are too arduous. The detailed level of reviews are too high. It does not feel like the Government wants to encourage the claiming of the concession. Rather it feels like they want to fight taxpayers the whole way. If they hate it so much, why don't they just cancel it.
19. The filing experience with both administrators is generally ok. On the ATO side it is a filing in the tax return, the schedule is not complicated. For AusIndustry, the filing requirement is much more burdensome in preparing all the plans for registration. However, AusIndustry have revamped their online portal for registration so hopefully that should streamline and make it easier. The actual compliance aspect of filing is not an issue.
20. The deadlines are all a bit hard to deal with. but actual administrative contact is pretty minimal for us.
21. So much effort is taken to ensure eligibility and costings are aligned to ATO and AusIndustry expectations. The ambiguity around BAU v R&D continues in the mining sector, which hinders potential opportunities to chase the "new knowledge". I consider the Australian R&D regime as a non-incentive to revolutionise the mining sector and other innovative sectors. The mindset by regulators is more about catching those not getting it right, rather than providing assistance to encourage innovation.
22. We have ceased to claim due to the ATO's approach to the benefit.

## 7. Have you experienced any difference in the way the program has been administered in response to previous reviews undertaken on the administration of the incentive?

The question sought views on experiences with the program in response to previous reviews. 26 respondents couldn't comment as they have had no contact since reviews, but 12 provided comments on the ATO and 8 on AusIndustry experiences since reviews. Overwhelmingly no one noticed any difference in experience (83% ATO, 88% AusIndustry). No-one indicated a better experience with either regulator, with 17% having a worse experience with the ATO (13% for AusIndustry). Whilst the question did refer to the recent Small Business Ombudsman report, the inference that could be drawn is nothing positive has arisen with large business experiences.

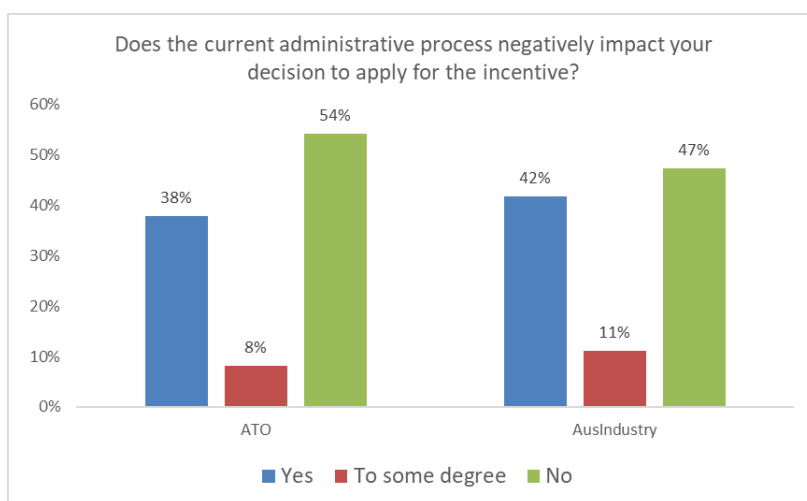


## Comments received

1. We have given this rating for the ATO due to the excessive amount of information that is now being required as part of their review processes and duplication of information being required by the ATO compared to what has already been provided to AusIndustry. The ATO have been slow to provide feedback to information request responses.
2. One might be excused for reading the (SBO report) as relating to large business - as similar concerns exist. Further the recommendations are equally as relevant.
3. The program requires a fairer, more consistent, educative, and customer-focused approach by both the Department of Industry, Innovation and Science (AusIndustry) and the Australian Taxation Office (ATO) embedded consistently throughout both networks. Our recommendations are based on the importance of the characteristics of good governance including transparency, clarity, and certainty to ensure that companies are encouraged to undertake research and development and claim the R&DTI.
4. Justified Trust for the PCRs have meant deeper dive into the R&D incentive and more requests for information by the ATO.

## 8. Does the current administrative process (including review activity) negatively impact your decision to apply for the R&DTI?

The question received 37 responses and indicated that 46% of those that responded indicated current ATO administrative process and 53% of those that responded indicated that AusIndustry processes negatively impacted decisions to apply for the incentive.



## Comments received

1. The R&DTI is an important and substantial incentive available to us and we continue to apply for the tax incentive. Also, since we do not deal directly with the ATO or AusIndustry on R&D matters, it is currently not a factor that affects our decision to apply for the R&DTI.

2. All decisions as to whether to proceed with an R&D claim for projects is done based on a cost benefit analysis. Given in particular how detailed the ATO information requests have become as part of their review processes, the administrative cost of getting a claim through these processes is certainly being factored in as an increased cost of compliance that offsets our potential cash benefit from making a claim.
3. Historically, we obtained a benefit of ~\$3M at a total cost of compliance of about \$300K. We thought about stopping altogether as I know many other taxpayers have decided to do about 3 years ago but chose to continue. However, the level of qualifying expenditure being claimed has reduced due to:
  - a) COVID;
  - b) has been viewed through a lens of only claiming low hanging fruit i.e. low risk projects; and
  - c) being conservative on the expenditure claimed.

As such, our claim is getting closer to deriving a benefit of about \$1M for the same cost. Further, given recent ATO Justified Trust enquiries, we may choose to stop claiming the RDTI moving forward, given our level of expenditure and ATO scrutiny.

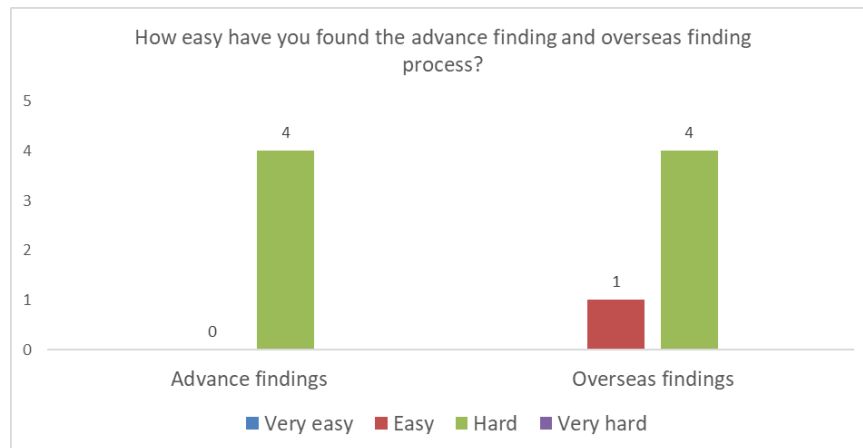
4. AusIndustry documentation guidelines are written from an academic and scientific perspective, and do not reflect "real world" business practices, e.g. some AusIndustry guidance suggests that Agile methodology will not satisfy the eligibility criteria. The general AusIndustry focus has been negative as opposed to positive as to what is acceptable.
5. The potential 'double review' of activities, level of compliance and documentation required raises questions about applying for the incentive from a cost-benefit perspective.
6. From the previous experience it appears the ATO assumes AusIndustry's role during the streamlined assurance review in determining the eligibility of the R&D projects when they clearly do not have the technical expertise. As the new online platform has launched, the cost/ benefit analysis for claiming the R&D tax incentive will be more closely scrutinised in organisations.
7. Administrative requirements (and effort to address review activity) is a significant investment of the business for, in the context of our group, is not a high value benefit.
8. We will never claim R&D again given the U-turn that occurred on software claims.
9. The level of documentation required to support even the smallest projects is so burdensome that applying for Advanced Overseas Findings is not economically beneficial to the company. It is also evidently clear that AusIndustry has no fundamental understanding how experimentation and innovation is fostered and undertaken in the tech industry. There also appears to be an inherent targeting of R&D claims from tech companies by AusIndustry. The lack of clear guidance from AusIndustry on how to apply the R&D tax incentive to the digital software industry is a clear impediment to innovation for Australian technology companies (the

recent guidance released is not helpful, and arguably makes issues more confusing).

10. It is more beneficial to move R&D functions offshore, where operational costs are cheaper and regulatory regimes are more simple to navigate from a compliance point of view and regulators are more consultative / business friendly.
11. We rely on advisers (who charge success fees) when we should be able to do this ourselves, but the rules are complicated, change frequently, and the outcomes for large business are often not worthwhile.
12. Due to the nature of preparing and submitting onerous documentation which generally requires engaging external consultants and taking people out of our business to provide information.
13. We only claim the biggest items now rather than all the other work that would likely qualify but which would cost more to defend in review / audit than the R&D benefits provide.
14. Certainly, encourages you to be conservative. We aren't a big player but definitely have to think whether it is "worth it".
15. The current (periods to 2019) AusIndustry process was disruptive and created a reluctance to pursue applications which most likely had merit but were of a kind that AusIndustry had previously treated adversely.
16. Not at this stage. However, there is likely some influence "at the margins". Smaller initiatives that may qualify are often excluded where the cost of determining eligibility is likely to outweigh any expected benefits.
17. Too hard basket for us as time consuming to prepare R&D documentation and it is a waiting game if it gets reviewed by ATO and AusIndustry. The costs outweigh the benefits especially if you are in tax losses.
18. R&D is a huge interruption on commercial staff in the business. Making the decision to use up their valuable time is not taken lightly. If the regulators are going to start knocking back what we consider to be valid projects, then given the minimal impact to the Group's income tax profile, we may decide to just abandon making claims, as too much business interruption.
19. The RDTI is so significant for us that the administrative process of applying for the incentive by no means outweighs the benefits obtained that would mean we wouldn't claim. Once you are set up internally to manage the process and have integrated it into your processes and have good relationships with your engineers to understand the eligibility requirements (which we have over many years) then the process itself is embedded and you just get on with it every year. So yes, while it is a lot of work to be able to apply for the RDTI - this in my view makes it no different to any other compliance requirement as part of the tax system.
20. The incentive is relatively low compared to other countries which have less rigorous administration. This does lead to global decisions to undertake the majority of R&D in other countries instead of Australia.

## 9. How easy have you found the Advanced Findings process and the Overseas Findings process?

31 members responded to the question, with 4 having experience with the Advanced Findings process and 5 with the Overseas Finding process. All found the Advanced Findings process "hard" (on a scale from very hard to very easy), with 4 finding the Overseas Findings process hard, and 1 finding it easy.

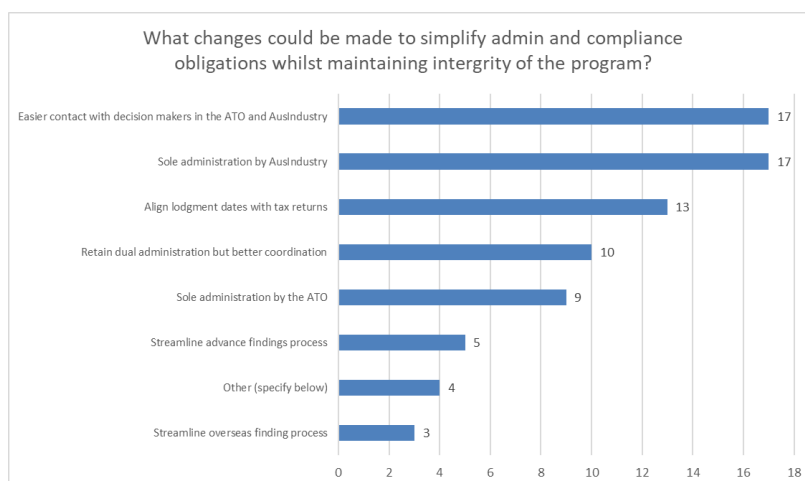


### Comments received

1. We do use these tools to obtain certainty. While we have invariably received positive findings, we have found the experience a difficult one - albeit it is our consultants that have had to deal with AusIndustry.
2. Waste of time - guaranteed negative response.
3. We pursued an Advance Finding only once several years ago. Have not participated in the regime in the last 4 years.
4. In the cases we sought Advance/Overseas findings all applications resulted in AusIndustry reviews.
5. We have applied for one Advance Finding (many years ago) and multiple Overseas Findings over the years. We are actually due to embark on another Overseas Finding shortly. I have trepidation in applying for the next Overseas Finding based on our experience last time (it took over 12 months, protracted discussions, needing to go over the case officer to the NSW state manager etc to get the last Overseas Finding).
6. The biggest barrier is cost vs uncertain outcomes. as a lot of this cannot be done internally, you need the guidance to get it done, but once you make that step the process is I think relatively simple, but that may be because I outsourced it, so maybe didn't see it all.

## 10. What changes could be made to simplify the administrative and compliance obligations for taxpayers, whilst maintaining the integrity of the program?

This question provided the opportunity for respondents to provide suggestions for improvements to the administration of the system, giving 8 options (one being 'Other'). Respondents could answer more than one suggestion. The equal highest ranking response was easier contact with decision makers in both the ATO and AusIndustry and having the sole administration for the incentive in the hands of AusIndustry (17).



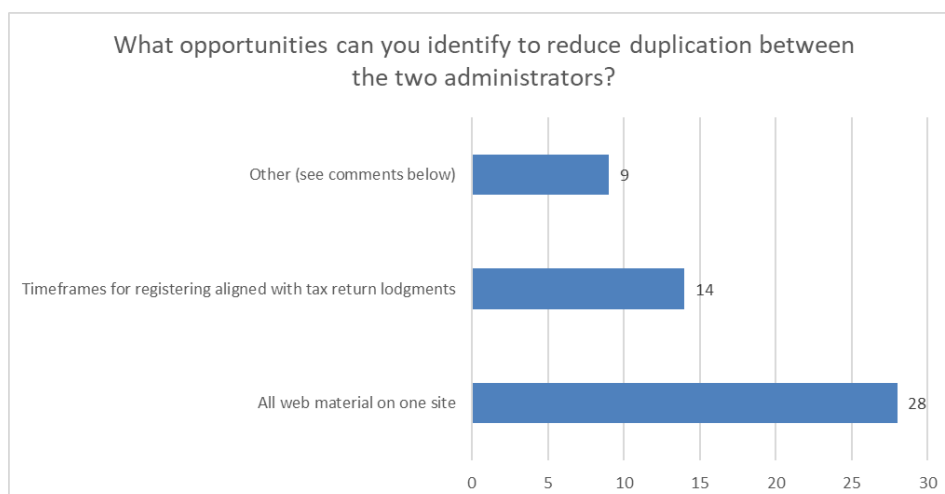
### Comments received

1. Availability of practical guidance material.
2. We would consider it highly inappropriate for the ATO to have overall coverage of the R&D incentive. In recent years the culture of the ATO has changed materially. They no longer administer the law in a fair and objective way. The ATO now has a culture of maximising revenue, without due regard to the actual operation of the law. Their approach to the R&D incentive would be to minimise taxpayer claims wherever possible, including taking extreme positions with a view to getting negotiated outcomes with taxpayers. This is our experience with how they now administer the other taxes. The R&D incentive should be administered by a body which appropriately treats it as an incentive program, encouraging taxpayers to make claims, and interpreting the rules in a fair way which is consistent with it being an incentive program. If dual administration is retained, there certainly needs to be better coordination achieved though. Additionally, increased access to ATO and AusIndustry decision makers is certainly requested. We have found in instances where there is a technical point we would like to liaise with administrators on, there is no easy process to contact the relevant RDTI teams and decision makers.
3. No reason exists as to why AusIndustry can't be responsible for the entire program including expenditure reviews. I feel that the only way to get the ATO to stop reviewing eligibility is to remove them from the process altogether.



4. The ATO is a good administrator across many subject matters, including non-tax. AusIndustry may not always agree with the ATO, but they are respected as administrator.
5. One administrator. Given R&D is part of your tax return, it should be the ATO.
6. Alignment within the ATO will bring together the eligibility and expenditure reviews under one administrative structure. Choice of ATO as the sole administrator will enable the expenditure to be reviewed with a tax lens. ATO also has substantially more resources available to ensure independence of reviews by using Tax Counsel and other escalation processes that do not exist within AusIndustry.
7. If it has not already been done, the publication of examples/matters the ATO has had issue with (on an anonymised basis) in an easy to find guide for taxpayers.
8. Clearer R&D eligibility guidance by providing examples and comfort zone, similar to PCG guidance.
9. The administration of the program should NOT be solely managed via AusIndustry. AusIndustry do not have the skills or staffing levels to manage the entire program. As the expenditure is claimed via the tax return this wouldn't work anyway as the ATO is always going to have a level of review. One of the biggest issues is the processes within AusIndustry if you have an issue with eligibility. There is no real avenue for review or process up a chain of review, there is not much guidance, they get very defensive if you question their decisions - particularly if you try to raise issues of actual law with them. They are not set up like the ATO where, as much as there might be difficulties, the ATO is much better at having discussions, chains of review and responsibilities towards taxpayers.
10. Definitely think we need it managed just by one administrator - and it should be AusIndustry.

## 12. What opportunities can you identify to reduce duplication between the two administrators?



## Comments received

1. We suggest that in instances where the ATO is looking to gain an understanding of the eligible R&D activities for their processes, AusIndustry should be better consulted than what is currently taking place. The taxpayer as part of ATO information requests is having to re-explain the eligible activities in detail as well as lay terms to the ATO, when AusIndustry should really be the conduit for this if needed by the ATO.
2. Remove the ATO from the process altogether.
3. Delineation in review activities. Better coordination and no double handling.
4. Align the cost information and automate the application for the R&D tax incentive so the taxpayer doesn't have to do the AusIndustry application, wait for the registration number and then amend the income tax return. For example, if the cost information was centralised with the application process and all information required for the tax return was included, AusIndustry could automatically feed approved claims to the ATO for automatic processing.
5. Bringing all information under one administrator would assist in getting alignment between the information provided for eligibility as well as for expenditure calculation. Alignment of timeframes is not necessary but would reduce by some months the alignment of assessment and reviews. Large business would benefit from R&D coming into ATO PCR and Justified Trust review arrangements.
6. I don't think there is duplication between the two administrators. What we file with AusIndustry is completely different to what we file with the ATO and vice versa.
7. I think having guidance and materials all on one website would be helpful/useful. As far as timelines are concerned, the ATO is clear that you can't claim in your tax return unless you have a registration number from AusIndustry. I don't agree with aligning timeframes for registering with the tax return because a taxpayer may actually need more time to file with AusIndustry (due to all other competing priorities) and so may wish to file registration later and then do an amended tax return to include the R&D later. I don't think the registration timelines vs tax return lodgements really have a burdensome impact.
8. Have only one administrator.
9. Not in favour of aligning with tax return lodgement as this is already a tight deadline i.e., have to determine tax payable by 1/12 and lodgement by 15/1. Streamlined process for making amendments for R&D Claims after lodgement of the tax return.

**13. From your experiences with similar programs abroad, is there any jurisdiction in particular that you consider to be appropriate for the Board to focus on for further analysis?**

10 respondents provided comments as follows:

1. New Zealand R&D tax credit system has largely been modelled off the Australian regime, however the administration and registration process appears to be simpler and more transparent (can be done closer to real time). Seems to also be more in the way of guidance provided to taxpayers. Also provides large corporates with refundable credits which are useful to keep funding R&D when companies are in losses.
2. I don't know but I am sure someone must be doing it better and we should learn from that.
3. Experience with NZ, Singapore and UK suggests more practical and helpful administration.
4. Singapore
5. FYI - New Zealand has just restarted its R&D incentive, but it has proven to be very slow with all claims being vetted by the NZ "Callaghan department" and this has held up a corporate tax refund.
6. The United Kingdom.
7. We also file R&D claims in the US and UK. The UK claim is only filed with HMRC - there is no dual authority. The project plans that must be prepared are also more streamlined and do not require the level of detail that historically has been required for AusIndustry (although this may change with the new portal form). HMRC have people who are 'more experienced' in R&D internally that sign off the R&D credit claim. In the US it is also the same - no dual authority. You must have project plans prepared and all documentation ready to go to support the claim in the event of a review - but it is just treated as any other claim/offset in the tax return (e.g., FITOs).
8. Singapore, China.
9. Singapore.
10. Singapore, New Zealand.

## 14. Other comments

The final question enabled respondent to provide any general comments not captured in earlier questions. The responses received were as follows:

1. It would be helpful if AusIndustry hired people from industry.
2. Have to move to one regulator running the show. Two is a debacle.
3. The relative benefit of the R&D tax systems has declined over successive Federal Governments. Query if a broader review should be undertaken as to whether the R&D credit scheme is encouraging R&D or discouraging, and the ongoing operation and administration of the scheme.
4. Like a number of large corporates, we have ceased claiming the R&D benefit as the risk/time/effort does not warrant it. So, in that context, a significant portion of the survey is irrelevant to us.