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THE NEW RESEARCH AND DEVELOPMENT TAX INCENTIVE

SUBMISSION BY LICENSING EXECUTIVES SOCIETY AUSTRALIA AND NEW ZEALAND, INC

About us

LES is an international community of innovation and commercialisation professionals. Our focus is to create an environment for effective and successful commercialisation using open exchange ideas, identifying best practice and encouraging innovation through both networking and education in all areas of intellectual property. The Licensing Executives Society International has over 11,000 individual members worldwide spread over its 28 member societies. Whilst the member societies formally represent 32 countries, there are LES members in more than 60 countries.

LESANZ is the Australian and New Zealand chapter of LES International, with over 500 regional members.

Membership is split approximately evenly between service providers (patent attorneys and lawyers) and others (research organisations, industry, academia), ensuring that our activities and views are broad based, and do not represent the view of a single group.

The organisation's objectives include providing a forum in which members can be educated in relevant professional and business issues, providing opportunities for members to meet and share experiences and learnings, and to inform the public, governmental bodies and international bodies on the economic significance of intellectual property commercialisation.

This response represents the view of the organisation collectively but may not reflect the views of individual members on all issues.

Our submission

LESANZ welcomes the Federal Government's initiative to replace the current R&D tax incentive scheme from one based on tax deductions to one based on tax credits. LESANZ especially welcomes the measures directed to small-medium enterprises (*SMEs*) with group turnover of less than \$20m. Many of LESANZ's members are SMEs who face difficulties in navigating the so-called "valley of death", where expenditure is high and profitability to facilitate use of a deduction is low (or often non-existent).

LESANZ wishes to specifically comment on Question 5 in the Consultation Paper, specifically part (a):

- 5 Should the current list of activities excluded from being considered core R&D be:
- (a) amended in any way?
 - (b) extended to exclude certain activities from being considered supporting activities?

Eligible expense

LESANZ's major focus in relation to the list of exclusions concerns current item (k):

- (k) commercial, legal and administrative aspects of patenting, licensing or other activities

LESANZ submits that where eligible R&D is undertaken, reasonable expenses incurred in protecting, enforcing and commercialising the intellectual property resulting from that eligible R&D ought also to be eligible for the enhanced tax treatment.

The Consultation paper recognises IP as a major outcome of eligible R&D but possibly overlooks the value that expert assistance from specialist IP and commercialisation practitioners can provide in ensuring extraction of maximum value (and "spillovers", as referred to in the paper) from eligible R&D developed pursuant to the government subsidy provided via the proposed scheme.

Rather the paper seems to assume that the value in R&D is provided at the research and development phase, with limited recognition to the role of translating the results of that phase into marketable commodities (such as enforceable and commercialisable intellectual property rights, and licence and other agreements).

Expenditure on IP and sourcing expert licensing and general commercialisation assistance represents a significant expense of LESANZ members. Often large organisations incur this expense via in-house resources, while SMEs generally outsource it. In either case it can be a major expense in traversing the valley of death and often the entity elects to not incur such expense, rather than place further pressure on its precarious financial situation.

LESANZ further submits that failure to obtain this expertise can (and often does) lead to the entity obtaining inadequate protection for the IP and/or implementing sub-optimal commercialisation strategies. A major consequence of such failure is to reduce the return available from the R&D. In other words, the full potential of the R&D is not realised, and this in turn reduces "spillovers" to the Australian community. These lost "spillovers" can comprise reduced (or even nil) royalties and other commercial returns on the R&D, and reduced IP and commercialisation skill within the community.

LESANZ appreciates that the Government may be reluctant to introduce an allowance for these expenses as eligible R&D expenditure and maintain the cash neutral aim of the amendments. However, LESANZ submits that the expense should be limited to apply within the other limits of the scheme (ie incurred by Australian companies) and in connection with the protection, enforcement and commercialisation of the intellectual property resulting from eligible R&D. If necessary, the eligibility could be further tightened by:

- (a) limiting it to IP resulting from eligible core R&D (ie not supporting R&D); and

- (b) limiting it to expense incurred internally, (ie by in-house attorneys and commercialisation experts), although doing so would necessarily exclude its applicability from SMEs who do not have such in-house ability.

We submit that it would be consistent with the policy of encouraging innovative and risky research and development to provide assistance to maximise the prospects of a commercial return being earned on the results of that work. Otherwise, there is a risk that the innovative and risky research undertaken via this government subsidy could "wither on the vine".

While there may be other schemes in place to provide assistance at the IP and commercialisation stage, LESANZ submits that the tax system offers potential for a uniform and industry wide mechanism to provide incentives to Australian companies who conduct eligible R&D to take appropriate steps to protect and maximise the commercial potential of the fruits of that endeavour.

Exclusionary list

LESANZ suggests that an exclusionary list should not be necessary if eligible R&D is defined appropriately.

Whilst such a list provides a degree of certainty as to what is not eligible, that certainty may become detrimental if circumstances subsequently change such that previously excluded activity ought be eligible.

For example, it may be appropriate to exclude certain activities in a sector if appropriate assistance is available to that sector under other government policy current at the time. However if that policy changes and the assistance is removed or materially reduced, it will be necessary to remove the activity from the exclusionary list, lest the activity in that sector "fall through the cracks" and in fact receive less overall assistance than comparable activity in other sectors.

We would welcome an opportunity to discuss our submission with you and invite you to contact Jeff Bergmann if you wish to do so.

Yours sincerely

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