


BUSINESS ENTITIES
EARLY STAGE INNOVATION COMPANIES


Paper 003-045


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BUSINESS ENTITIES

EARLY STAGE INNOVATION COMPANIES

Paper 003-045

1. Object Of Early Stage Innovation Company

The object of an Early Stage Innovation Company (ESIC) is to encourage new investment in small Australian innovation companies with high growth potential by providing qualifying investors with a tax offset and a modified Capital Gains Tax treatment.

2. Eligibility For Early Stage Innovation Company

An Early Stage Innovation Company is a company that was:

- incorporated in Australia within the last three income years (the latest being the current year); or
- incorporated in Australia within the last six income years (the latest being the current year) and across the last three of those income years the company and its 100% subsidiaries (if any) incurred total expenses of \$1M or less; or
- registered in the “Australian Business Register” within the last three income years (the latest being the current year); and
- the company and its 100% subsidiaries (if any) incurred total expenses of \$1M or less in the income year before the current year; and
- the company and its 100% subsidiaries (if any) had a total assessable income of \$200,000 or less in the income year before the current year. (Assessable income does not include any Accelerating Commercialisation Grant received by the company); and
- at the test time none of the company’s equity interests are listed for “in the official list” of any stock exchange in Australia or a foreign country.

At the test time the company has at least 100 points under the 100 Point Innovation Test (Gateway Test) or the company qualifies under the principles based test.

Is involved in innovation by either:

- satisfying the Gateway Test through self-assessment; or
- satisfying the Principles Based Test through self-assessment; or
- receiving a determination from the Australian Taxation Office.

3. Company Must Satisfy Two Limbs

A company that wishes to be classified as an Early Stage Innovation Company must satisfy two limbs:

- The first limb determines that the company is "early stage" against criteria related to:
 - expenditure;
 - assessable income;
 - stock exchange listing and incorporation. (Refer Item 2)
- The second limb determines that the company is involved in innovation by allowing the company to self-assess against either a Principles Based or Gateway Test or by receiving a determination from the Australian Taxation Office. (The ATO may need to consult with the Department of Industry Innovation and Science).

4. Gateway Test

The Gateway Test contains an objective set of tests to provide additional assistance to identify an Early Stage Innovation Company.

If a total of 100 points is achieved the company will be considered an eligible innovation company for the purpose of the legislation.

Points will be given for a range of activities including:

Innovation points potentially available at that time in the current year		
Item	Points	Innovation Criteria
1	75	At least 50% of the company's total expenses for the previous income year is expenditure that the company can notionally deduct for that income year under s.355-205 (about R&D expenditure).
2	75	The company has received an Accelerating Commercialisation Grant under the programme administered by the Commonwealth known as the Entrepreneurs' Programme.
3.	50	At least 15%, but less than 50%, of the company's total expenses for the previous income year is expenditure that the company can notionally deduct for that income year under s.355-205 (about R&D expenditure).
4.	50	(a) the company has completed or is undertaking an accelerator programme that: <ul style="list-style-type: none">(i) provides time-limited support for entrepreneurs with start-up businesses; and;(ii) is provided to entrepreneurs that are selected in an open, independent and competitive manner; and (b) the entity providing that programme has been providing that, or other accelerator programmes for entrepreneurs, for at least six months; and
		(c) such programmes have been completed by at least one cohort of entrepreneurs.

Innovation points potentially available at that time in the current year		
Item	Points	Innovation Criteria
5.	50	(a) a total of at least \$50,000 has been paid for equity interests that are shares in the company; and (b) the company issued those shares to one or more entities that: <ul style="list-style-type: none"> (i) were not associates of the company immediately before the issue of those shares; and (ii) did not acquire those shares primarily to assist another entity become entitled to a tax offset (or a modified CGT treatment) under this Subdivision; and (c) the company issued those shares at least one day before the test time.
6.	50	(a) the company has rights (including equitable rights) under a Commonwealth law as: <ul style="list-style-type: none"> (i) the patentee, or a licensee, of a standard patent; or (ii) the owner, or a licensee, of a plant breeder's right; Granted in Australia within the last five years (ending at the test time); or (b) the company has equivalent rights under a foreign law.
7.	25	Unless item 6 applies to the company at the test time: (a) the company has rights (including equitable rights) under a Commonwealth law as: <ul style="list-style-type: none"> (i) the patentee, or a licensee, of an innovation patent granted and certified in Australia; or (ii) the owner, or a licensee, of a registered design registered in Australia; Within the last five years (ending at the test time); or (b) the company has equivalent rights under a foreign law.
8.	25	The company has a written agreement with: <ul style="list-style-type: none"> (a) an institution or body listed in Schedule 1 to the <i>Higher Education Funding Act 1988</i> (about institutions or bodies eligible for special research assistance); or (b) an entity registered under s. 29A of the <i>Industry Research and Development Act 1986</i> (about research service providers); To co-develop and commercialise a new, or significantly improved, product, process, service or marketing or organisational method.

5. Commentary On Eligibility Requirements For 100 Points

Research and Development Claims About A Certain Threshold

- .1 A company will be awarded 75 points if it has at least 50% of its total expenses for the previous income year constituting expenses which are eligible for the tax offset for research and development activities provided under Division 355 of the Income Tax Act.
- .2 A company will be awarded 50 points if it has at least 15% and less than 50% of its total expenses for the previous income year constituting expenses which are eligible for the tax offset for research and development activities provided under Division 355.
- .3 Companies can only claim points under one of the research and development tax offset categories.

Received an Accelerating Commercialisation Grant

A company will be awarded 75 points if at any time it has received an Accelerating Commercialisation Grant under the Accelerating Commercialisation Programme.

Accelerate Programme

A company will be awarded 50 points if it is undertaking or has completed an eligible accelerator programme. An eligible accelerator programme is a programme that provides time-limited support for start-ups for which an open independent and competitive application process is required for entry provided the entity running that programme has been operating for at least a six months period and has provided a complete programme of this kind to at least one cohort of entrepreneurs. Accelerator programmes that cannot provide value adding support (mentorship, training, education and networks) to the accepted companies or have had no successful companies coming through the programme are unlikely to be effective accelerator programmes.

A Third Party Has Previously Invested \$50,000

A company will be awarded 50 points if it has previously (at least one day before) issued shares to a third party provided that the third party has:

- paid at least \$50,000 for those shares;
- was not an associated (within the meaning of s.31A of the ITAA 1936) with the company immediately before the time those shares were issued; and
- did not acquire those shares primarily to assist another entity to become entitled to the TIFESI (Tax Incentives for Early Stage Investors);

Hold Certain Enforceable Intellectual Property Rights

- .1 A company will be awarded 50 points if it has one or more enforceable rights on an innovation through a standard patent or plant breeders' right that has been granted in Australia or an equivalent intellectual property right granted in another country. The property right must have been granted in the last five years.
- .2 A company will be awarded 25 points if it has one or more enforceable rights on an innovation through an innovation patent or design right or an equivalent intellectual property right granted in another country. Where the property right relates to an innovation patent or foreign equivalent, the right must have been granted and certified within the last five years. Where the property right relates to a design or foreign equivalent, it must have been registered within the last five years.

A company cannot rely on this section if it has been able to claim 50 points through holding a standard patent or plant breeders' right.

Collaborative Agreement With Research Organisations Or University To Commercialise An Innovation

The company will be awarded 25 points if it:

- .1 has a written agreement to co-develop and commercialise an innovation with either an institution or body listed in Schedule 1 to the Higher Education Funding Act 1988; or
- .2 is an entity registered under s.29A of The Industry Research and Development Act 1986 to co-develop and commercialise a new or significantly improved product, process, service or marketing or organisational method.

6. Principles Based Test

The Principles Based Test applies if:

- .1 the company is generally focused on developing for commercialisation one or more new or significantly improved products, processes, services or marketing or organisational methods; and

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- .2 the business relating to those products, processes, services or methods have a high growth potential; and
 - .3 the company can demonstrate that it has the potential to be able to successfully scale that business; and
 - .4 the company can demonstrate that it has the potential to be able to address a broader than local market including global markets through that business; and
 - .5 the company can demonstrate that it has the potential to be able to have competitive advantages for that business.

The Principles Based Test provides guidance to help determine if a company will be an Early Stage Innovation Company through self-assessment of whether it is genuinely focused on developing for commercialisation one or more new or significantly improved products, processes, services or marketing or organisational methods.

Prescriptive rules and tests can only accommodate the types of activities and ideas that are foreseen, however, innovation is also about the creation, disruption or improvement that has not been foreseen or achieved by others.

Principles that could be used to define innovation could for example include the following:

- the company would need to be the developer of a new idea or significantly improved upon an existing idea that:
 - changes the way an organisation, service, delivery or process operates;
 - creates a new product or service that other organisations or consumers could use;
 - creates a new platform for the delivery of products and services;
 - changes the way an organisation, service, delivery or process operates and creates a new organisational or marketing method.

The innovation company would need to have the capability to commercialise or bring to market and generate value from the ideas that it has developed.

The innovation company will also need to pursue global or broader opportunities rather than have a focus on only local markets.

The definition of an “innovation company” requires it to exhibit high growth potential through a management team being able to successfully scale the business as it grows and maintain competitive advantages over incumbents or new competitors.

A qualifying Early Stage Innovation Company will need to be genuinely focused on developing its new or significantly improved innovation for the purpose of commercialisation and show that the business relating to that innovation:

- has the potential for high growth;
- has scalability;
- can address a broader than local market; and
- has competitive advantages.

Further comments on these elements are as follows:

- a qualifying ESIC could demonstrate how it satisfies the different elements of this test through the use of its existing documentation such as Business Plans, Commercialisation Strategies, Competition Analysis or other company documents;
- in addition the company must show that tangible steps have been or will be undertaken in relation to that focus or capability.

(a) New Or Significantly Improved

The innovation that is being developed by a qualifying ESIC must either be new or significantly improved for the applicable addressable market. A company's addressable market refers to the available revenue opportunity or market demand arising from the innovation, or the business relating to that innovation. The addressable market identified by

the ESIC must be objective and realistic. For example, if the addressable market for the innovation was the Australian market then the innovation must be new or significantly improved for that market.

(b) Not New Or Significantly Improved

Improvements resulting from the customisation of existing products, minor extensions such as updates to existing equipment or software, changes to pricing strategies, changes to goods resulting from cyclical or seasonal change and the trading of new products for a wholesaler, retail outlet or distribution business where activities are similar to the approach of competitors are unlikely to satisfy the significantly improved threshold. Further ceasing to utilise a process or method will not satisfy the new or significantly improved thresholds.

Example 1

PAM One Co is a start-up clothing company that has developed a new organisational method where the company utilises an integrated cross-functional structure resulting in reduced response times to shifting customer styles. PAM One Co has also identified that the company's addressable market is the Australian market.

As existing clothing companies in PAM One Co's addressable market are typically organised around individual functions, the integrated cross-functional structure is new to that addressable market. As a result, PAM One Co has developed a new or significantly improved organisation method.

Example 2

JM Technology Co is a new wholesale distribution company which specialises in personal technology products. If JM Technology Co begins to sell a new personal technology product which was released by one of their offshore suppliers, JM Technology Co has not developed a new or significantly improved service or innovation.

(c) Commercialisation

The company must be focussed on developing its innovation for a commercial purpose, or in other words, for the purpose of generating economic value and revenue for the ESIC. This requirement draws the distinction between simply having an idea and generating economic value from that idea. Commercialisation encompasses a spectrum of activities including those leading to the sale of new or significantly improved product, process or service as well as activities involving the implementation of a new, or significantly improved, process or method, where the process or method directly leads to the generation of economic value for the company.

Example 3

JS & RD Co is a small start-up company in the pharmaceutical industry seeking funding to develop a new process to manufacture a known pain relief medication. If the company can successfully scale up its process, the new process promises to be more efficient and more environmentally friendly than the conventional manufacturing process used by incumbents.

Even though JS & RD Co does not intend to licence the innovation to another company, the innovation has the potential to provide the company with a direct competitive advantage over its rivals and generate significant economic value. As a result, JS & RD Co has developed the innovation for a commercial purpose.

(d) High Growth Potential

The TIFESI (The Incentives For Early Stage Inventors) is specifically designed to encourage capital investment into innovative companies with high growth potential, as distinct from typical small to medium enterprises such as cafes, local trade stores, local service providers that service a single local market. Specifically, a qualifying ESIC would need to show that it has the potential for high growth within a broad addressable market.

Example 4

Sheng Da Co is a company developing a new mobile application which provides specialised on demand concierge services for the convenience of its users. While the company initially aims to test the service in Melbourne, it shows its high growth potential through its ability to expand the use of its mobile platform and the location of the services to include all major cities in Australia and beyond. The company has outlined this expansion strategy in its Business Plan and has started to contact service providers in other major cities. As a result, Sheng Da Co has high growth potential.

(e) Scalability

A qualifying ESIC must have the potential to successfully scale its business. As the company increased its share of the market or enters into new markets, the company needs to have operating leverage, where existing revenues can be multiplied through incurring or reducing a minimal increase in operating costs.

Example 5

R Ting Co, a start-up manufacturing company is developing a new formula for a perishable consumer goods product which allows the product to have an extended shelf life.

The company has outlined its strategy to acquire its own manufacturing plant as the demand for the product grows. If production of the product is increased, the company has further indicated that the cost per unit can be reduced by leveraging the existing operating costs of the plant as it sells the product into new markets. As a result, R Ting Co has the potential to successfully scale its business.

Example 6

Yien-Yih Co is a new local service provider of dental care. The company's strategy for high growth is to expand the number of clinics to increase its revenue. However, the company's operating costs (new premises, staff, etc.) increase by the same amount as the additional revenue generated for each clinic and so Yien-Yih Co does not possess the potential to successfully scale the business.

(f) Broader Than Local Market

A qualifying ESIC would need to demonstrate that it has the potential to address a market that is broader than a local city, area or region. While the company does not need to have a serviceable market at a national, multinational or global scale at the test time, it does need to show the capability to address a market that is broader than a local market and also show that this business can be adapted to a national, multinational or global scale in the future.

Example 7

Further to Example 5, R Ting Co plans to initially test and sell its new product to the Victorian market and has an expansion strategy to sell to the broader Australian market and if successful, eventually adapt its product for the Asia-Pacific market. As a result R Ting Co has the potential to service a broader than local market and adapt to a global scale.

(g) Competitive Advantages

A qualifying ESIC will need to demonstrate that it has the potential to have competitive advantages, such as a cost or differential advantage over its competitors which are sustainable for the business. A method of evaluating a competitive advantage can be through the measures of the level of value for customers, rarity, imitability and substitutability of the advantage.

Example 8

SLIS Tech Co is developing a new peer to peer service providing websites for the Australian market. After conducting a competition analysis of the marketplace, a differentiating competitive advantage identified was the website's use of a marketplace platform.

SLIS Tech Co has identified that this attribute will allow the company to outperform its competition. In addition, the company has taken initial steps in developing the platform and has also started to engage with the service providers to be part of the websites network. As a result, SLIS Tech Co has the potential to have competitive advantages.

7. Not Listed On A Stock Exchange

The company must not be listed on any stock exchange either in Australia or overseas. These tax incentives target companies experiencing difficulty accessing equity finance and without access to fundraising via listed securities.

8. Taxation Returns

The Australian Taxation Office's company tax return requires companies to report "total expenses" at item six as part of the total profit or loss calculation. A company that has submitted a company tax return in the previous income year must rely on the amount reported in item six for the purposes of this test. Alternatively, if the company was not required to submit a company tax return, it may use the amount corresponding to this item.

Total Expenses Of \$1M Or Less

The company and any of its wholly-owned subsidiaries must have not incurred "total expenses" of more than \$1M in the previous income year.

Assessable Income of \$200,000 Or Less

The company and any of its wholly-owned subsidiaries must have derived assessable income of no more than \$200,000 in the previous income year.

Companies that had no assessable income in the previous income year will satisfy this test.

In determining the company's assessable income, the company may disregard the value of an Accelerating Commercialisation Grant it received in that year.

9. Determination Of Status

If the company is unable to satisfy itself as to whether it meets the requirements of the ESIC legislation under the Principles Based Test or the Gateways Test, the company may seek advice from the Australian Taxation Office (who could liaise with AusIndustry) on whether it qualifies.

There are explicit exclusions for certain investment activities. Exclusions include:

- dealing in land; in commodities or futures in shares, securities or other financial instruments;
- banking, insurance, money-lending, debt-factoring, hire-purchase financing or other financial activities;
- leasing (including letting ships on charter or other assets on hire);
- receiving royalties or licence fees;
- providing legal or accounting services;
- property development;
- holding, managing or occupying woodlands, any other forestry activities or timber production;
- producing coal;
- producing steel;
- operating or managing hotels or comparable establishments;

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- operating or managing nursing homes or residential care homes;
 - subsidised generation or export of electricity;
 - provision of services or facilities for another business;
 - dealing in goods otherwise than in the course of an ordinary trade or wholesale or retail distribution;
 - farming or market gardening; and\
 - shipbuilding.

However, the intention is not to exclude the high-growth potential industries like financial technology.

10. Investors Tax Treatment

.1 Tax Offset

A taxpayer may be entitled to a tax offset under the Early Stage Innovation Company if the taxpayer is, or a trust or a partnership of which the taxpayer is a member is issued with certain kinds of equity interest in a small Australian company with high growth potential that is engaging in innovative activities.

The Early Stage Innovation Company legislation provides eligible investors with a 20% non-refundable tax offset for the amount paid for newly issued shares in an innovation company where the amount is paid either directly to the innovation company or indirectly through a qualifying innovation fund. An investor can invest in innovation companies, innovation funds or into both. Where an investor cannot use the tax offset in the relevant income year, the investor may carry the tax offset forward to use in a future year. The tax offset is available to both resident and non-residents of Australia.

Where the tax offset is carried forward and further eligible investments are made by the taxpayer, the offset that may be claimed in any one year is capped at \$200,000.

Investment amounts greater than \$1M in an income year, do not increase the amount of the tax offset available.

.2 Capital Gains Tax

A modified Capital Gains Tax treatment may also apply to those equity interests.

An investor may disregard any "capital gain" it makes from an investment in an Early Stage Innovation Company if the CGT event happens on or after the first anniversary of the investment but before the tenth anniversary.

Investments over \$1M still benefit from exempt capital gains. The cap applies on an affiliate-inclusive basis in order to prevent entities entering into arrangements to circumvent the cap.

The investor must disregard any "capital loss" makes from any CGT event that occurs before the tenth anniversary of the issue of the share.

11. Investors

(a) Retail Investor

A retail investor can only invest up to \$50,000 per annum per company. This means that the maximum tax offset is \$10,000 for a retail investor. A retail investor who invests more than \$50,000 is not entitled to any tax offsets. Nor will a retail investor investing more than \$50,000 be eligible for the modified CGT treatment.

(b) Sophisticated Investors

There is no restriction on the amount an entity may invest if the entity meets the requirements of the Sophisticated Investor Test in s.708 of the *Corporations Act 2001* in relation to a relevant offer of shares at any time in the income year.

In the *Corporations Act 2001* the Sophisticated Investor Test is used for investment opportunities that has reduced disclosure requirements on the basis that investors that meet this criteria are more likely to be able to evaluate offers of securities and other financial products without needing the protection of disclosure documents.

There are no restrictions on the amount a sophisticated investor may invest subject to only being able to access \$200,000 cap on the value of the tax offset.

s.708(8)(c) states:

"It appears from a certificate given to by a qualified accountant, no more than six months before the offer is made that the person to whom the offer is made: then

- (i) has net assets of at least \$2.5M; or*
- (ii) has a gross income for each of the last two financial years of at least \$250,000 a year.*

This person is deemed to be a sophisticated investor.

(c) Thirty Percentage Equity Restriction

In order to qualify for the tax offset, the investor entity must not hold more than 30% of the equity interests of an ESIC, including any entities connected with the ESIC, tested immediately after the time relevant equity interests are issued.

This restriction encourages investors to spread their investments across more than one ESIC.

An ESIC is connected with another entity if the ESIC controls the other entity (or vice versa) or both are controlled by the same third entity. The connected with test is used in this context to ensure that the policy intentions behind the 30% cap is not circumvented by an investor that invests in multiple related ESICs, holding less than 30% of the issued capital in each, but has not, in reality, spread their investments, as there is a control relationship between the EDICs.

(d) Widely Held Shares

The tax incentives are not available in a widely held company or a wholly owned subsidiary of a widely held company. A widely held company is either a company on a stock exchange or a company with more than 50 shareholders.

12. Summary Of Offer

An Early Stage Innovation Company should disclose information in its capital raising document.

The information to be disclosed could include:

- identify the company and the nature of the security;
- describe the company's business;
- describe what the funds raised by this offer are to be used for;
- state the nature of the risks involved in investing in the security;
- give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge);

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- state that the statement is not a Prospectus and that it has a lower level of disclosure requirements than a Prospectus;
 - state that investors should obtain professional investment advice before accepting the offer;
 - include a copy of the Financial Report for the company;
 - include any other information that the regulations require to be included in any such statement;
 - the Financial Report included as part of the disclosure should be a report for a twelve month period and have a balance date that occurred within the last six months before the securities are first offered
 - be prepared in accordance with accounting standards.

13. Professional Advice

Before acquiring a company or purchasing shares in a company, it is recommended that you obtain appropriate professional accounting and legal advice.

AN IMPORTANT MESSAGE

The forms and commentaries contained in this paper are provided as a guide only and should not form the sole basis for any advice in relation to the particular situation of any person without first obtaining proper professional advice.

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