



Overseas Findings: What does 'not available in Australia' mean?

Specific Issue Guidance

This guidance outlines AusIndustry's view on what is meant by 'not available in Australia'.

Introduction

One of the conditions for an overseas finding is that the relevant activity cannot be conducted solely in Australia or the external Territories.¹ Some of the allowable reasons require that the activity cannot be conducted in Australia because something essential for the activity is 'not available in Australia' (subsection 28D(4) of the *Industry Research and Development Act 1986*).

Where a company is conducting an R&D project mainly in Australia, it may be able to claim expenditure for activities conducted overseas if these meet certain conditions. These conditions are explained in the 'Guide to Findings'.

The legislation provides a list of allowable reasons² why an overseas activity cannot be conducted solely in Australia:

- a. Conducting it requires access to a facility, expertise or equipment not available in Australia; or
- b. Conducting it in Australia would contravene a law relating to quarantine; or
- c. Conducting it requires access to a population (of living things) not available in Australia; or
- d. Conducting it requires access to a geographical or geological feature not available in Australia; or
- e. It meets a condition (if any) specified in regulations made for the purpose of this subsection.

At the time of publication, no regulation has been issued in relation to paragraph (e) above.

This guidance document is designed to provide businesses with clarification on what AusIndustry considers 'not available in Australia' means in relation to paragraphs (a), (c) and (d) above.

Guidance

The activity "requires access to ... expertise ... not available in Australia"

AusIndustry considers that expertise 'not available' means that a company is unable to find or access the expertise required for the project in Australia.

To demonstrate that access to the required expertise is not available in Australia, in most circumstances a company must be able to show that it conducted a reasonable Australia-wide search and/or advertising campaign and can provide evidence that it was unable to obtain the necessary expertise in Australia.

AusIndustry considers examples of evidence may include independent advice from research organisations, industry associations or other relevant organisations or individuals addressing the lack of available expertise. Where an advertising campaign has been undertaken, records of the campaign would be another example of appropriate evidence.

If a company has not carried out its own thorough investigation of Australian-based expertise or experience, or attempted to recruit in Australia, a reasonable explanation substantiated with evidence must be provided. For example, if a company requires the expertise of the developer of a certain software program who is located overseas and no other individual but the developer has knowledge and expertise about the program, a domestic advertising campaign would be of no value.

In some cases a supplier may exist which appears to have the capability to conduct an activity but does not have any proven experience in conducting such activities. The risk of not gaining credible results may be a reason why expertise is not available in Australia. Companies relying upon this scenario will need to produce evidence that the level of expertise is insufficient such as an opinion from an independent expert in the field, or a statement from the entity offering the service in Australia that indicates the limitations in its expertise.

¹ Note that any further reference to 'Australia' in this guidance is considered to include the external Territories.

² A company only needs to satisfy one of the allowable reasons listed in the legislation.

The activity “requires access to ... facilities or equipment ... not available in Australia”

AusIndustry considers that 'not available' means:

- The facilities or equipment cannot be sourced in Australia;
- The facilities or equipment required, which are available in Australia, are fully booked and not available for use within a reasonable timeframe; or
- The company has made genuine attempts to access the existing facilities or equipment in Australia but has been actually or effectively denied access.

Examples of evidence to demonstrate the lack of availability of facilities or equipment may include a letter of advice from:

- Relevant research organisations, industry associations, or other independent organisations or individuals;
- Suppliers of the equipment or facilities (where the equipment or facilities are fully booked); or
- Suppliers of similar types of equipment or facilities (where the equipment or facilities available in Australia are insufficient for the specific activity being undertaken).

Where possible, advice obtained from suppliers should comment on the lack of availability or suitability of all relevant equipment or facilities in Australia, not just their own.

If Australian-based facilities, expertise or equipment are not available within a reasonable timeframe a company may be able to argue that they are 'not available in Australia'. What constitutes a 'reasonable timeframe' will be considered in the context of the overall size and/or timeline of the project and the relative urgency of the activity.

A higher cost of using Australian facilities, expertise or equipment is not regarded as an acceptable justification for claiming that they are 'not available in Australia'. However, where use of Australian facilities, expertise or equipment within a reasonable timeframe could only be secured by having to pay significantly above the normal Australian market rate, a company may be able to argue that they were 'not available in Australia'. In this instance, evidence or independent advice confirming the asking price, any normal Australian market rates and discussion as to why the asking price is prohibitively high should be provided.

Please note that this will likely satisfy the requirements in very limited circumstances such as where the controller of the relevant facility or equipment is not genuinely offering the facility or equipment for use. For example, all Australian facilities are owned by competitors for their own use, or where an exceptionally high fee would be payable for prioritisation to undertake the activity in Australian facilities in the reasonable required timeframe.

The activity “requires access to a population (of living things) not available in Australia”

AusIndustry considers that 'not available in Australia' means there are insufficient suitable human, plant or other animal subjects that would be necessary to conduct the activity in Australia.

For example, a company may require 1,000 adult males aged between 40–50 suffering from melanoma and cardiovascular disease for a specific trial and there may not be a sufficient population in Australia to accommodate this.

In cases where it is clearly not contentious that the relevant living things are not available in Australia, the company should explain that. However, companies may wish to consider providing expert confirmation in relation to less common or more obscure living things especially where the facts are not widely known.

In other scenarios, the company should demonstrate it has conducted a reasonable investigation within Australia to locate a suitable population and provide evidence of how the search was conducted. The company would need to provide specific details when describing the characteristic required of the population and why this population is essential in undertaking the activity.

The activity “requires access to a geographical or geological feature not available in Australia”

AusIndustry considers 'not available in Australia' means there is an absence of (for example) a particular rock or soil type, mountain or valley of a specific height, or environment of a particular type relevant to the conduct of the activities in Australia and this feature is unable to be appropriately and readily replicated by some other means.

AusIndustry expects that companies provide appropriate evidence to demonstrate their claims specifically that the feature is not available in Australia and why it cannot be replicated. Companies should also explain the reasons as to why the particular geographical or geological feature is necessary to the relevant activity.

In many cases where it is very obvious that the relevant feature does not exist in Australia, a basic amount of evidence will likely be sufficient to demonstrate that they meet the legislative definition of R&D activities.

Supporting documents and records

AusIndustry considers evidence provided in support of claims on a case-by-case basis, taking into account the specific facts of each situation. Decisions on the sufficiency of evidence are made on the basis of what is reasonable given the specific and relevant facts.

Statements provided in support of claims from independent experts or others should include:

- A brief statement of the expert's credentials, position and experience that make them qualified to give the opinion;
- Disclosure of the nature and extent of any relationship with the company or its employees or others that might give rise to a real, potential or perceived conflict of interest including details of the relationship and remuneration relating to providing the opinion;
- A statement of any enquiries they have made in providing the opinion;
- A statement of specific verifiable facts that support their opinion;
- A full description of the activity;
- Identification of the specific parts of the activities that cannot be conducted in Australia; and,
- A factual explanation of why the activities satisfy the appropriate allowable reason(s).

This document is intended to provide useful information for companies considering accessing the *R&D Tax Incentive*. However it is not exhaustive and it is not legal or financial advice. It is your responsibility, with the assistance of any advice you wish to seek, to satisfy yourself about the eligibility of your activities for the *R&D Tax Incentive*. The Commonwealth disclaims all liability for any loss or damage arising from you or anyone else relying on this document or any statement contained in it.