

THE LOWY MEDICAL RESEARCH INSTITUTE LIMITED

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26 August 2011

Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: NFPReform@treasury.gov.au

Exposure draft of Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No 1) – Restating the “in Australia” special conditions for tax concession entities

Dear Manager

We are writing to you with our comments on the above Exposure Draft.

The proposed changes to the law in the Exposure Draft have the potential to seriously and adversely impact medical research undertaken by this Institute and similar institutes. Restricting innovative worldwide medical research contradicts established Government initiatives for Australian and international medical research, and consequently impacts the capabilities of Australian researchers and the health of Australians.

1. The Lowy Medical Research Institute

The Lowy Medical Research Institute Limited (Institute) was established in 2004. The Institute carries out innovative research into human diseases. In particular, the Institute focuses on debilitating diseases for which its directors believe it can provide a significant contribution to the understanding of the causes, prevention or cure of that disease.

The Institute is dedicated to making a significant and valuable contribution in respect of diseases about which little is currently known or no treatment is currently available, by engaging in targeted and effective research utilising the best worldwide research facilities and techniques, and coordinating those research efforts to collaborate and share research results and data, furthering the research undertaken and its results for the Institute in Australia.

The Institute is an Australian public institution established, managed, controlled and operating in Australia, which utilises the best medical research facilities around the world in pursuit of its objects.

Board of Directors

The directors of the Institute actively manage its research activities, collation and analysis in Sydney, Australia. The directors meet monthly with a project Executive Committee comprised of each of the directors together with key medical and scientific research experts. The directors of the Institute are experienced company and not-for-profit directors, and expert, experienced medical researchers. They are:

Mr Frank Lowy AC

Frank Lowy is non-executive Chairman and co-founder of the Westfield Group. He is the founder and Chairman of the Lowy Institute for International Policy, a member of the Brookings Institute International Advisory Committee since 2005, and is Chairman of the Football of Federation Australia. From 1995 until 2005, Mr Lowy was a Member of the Board of the Reserve Bank of Australia.

Professor Robert Graham AO

Robert Graham is the Executive Director of the Victor Chang Cardiac Research Institute, Sydney. He is also the Des Renford Professor of Medicine, University of NSW.

Professor Frank Martin AM

Frank Martin is Clinical Professor, University of Sydney and is the Chairman of the Board of Children's Medical Research Institute. He is also a Visiting Ophthalmologist at the Sydney Children's Hospitals Network and at the Sydney Eye Hospital, President of the President of the Asia Pacific Academy of Ophthalmology and President of the International Strabismus Association.

Professor Ian Constable AO

Ian Constable is the Foundation Lions Professor of Ophthalmology, Centre for Ophthalmology and Visual Science, The University of Western Australia and Founding Managing Director of the Lions Eye Institute Limited. He is a member of Academia Ophthalmologica Internationalis and the State Health Research Advisory Council. He is also the Consultant Ophthalmic Surgeon, to the Sir Charles Gairdner Hospital, Western Australia and the past-president of the Asia Pacific Academy of Ophthalmology.

Mr Steven Lowy AM

Steven Lowy is the joint Chief Executive Officer and an Executive Director of the Westfield Group. Mr Lowy is Chairman of the Victor Chang Cardiac Research Institute; President of the Board of Trustees of the Art Gallery of New South Wales; a Member of the Prime Minister's Business-Government Advisory Group on National Security; Chairman of the Board of Management for the Associate Degree of Policing Practice NSW; a Member of The Australian Graduate School of Management Advisory Council; and a Director of The Lowy Institute for International Policy.

Mr David Lowy AM

David Lowy is Chief Executive of the LFG Group. Mr Lowy is Founder and President of the Temora Aviation Museum, Director of the Lowy Institute for International Policy, Patron of Wheelies with Wings (aviation training for the disabled) and a former member of The Children's Hospital Council Westmead, Sydney.

Mr Stephen Johns

Stephen Johns is a Director of the Westfield Group, Brambles Limited, Leighton Holdings Limited and John Holland Group Pty Ltd. He is also Chairman of Spark Infrastructure Group.

Management in Australia

The Institute is actively managed by its directors in Australia. The directors meet monthly, and actively engage in the management of the Institute's medical research projects with the project Executive Committee of experienced medical and scientific research experts.

The directors carry out their management in Australia with assistance and research coordination from key research partners and dedicated resources, such as Professor Mark Gillies – a member of the Executive Committee and Scientific Committee and a renowned Australian ophthalmologist who directs the Macular Research Group, Save Sight Institute at Sydney University and is a scientific advisor to the Macular Photocoagulation Study Group (the world's leading investigator initiated study group for retinal disease) and the US National Eye Institute funded Diabetic Retinopathy Collaborative Research Network.

Research coordination and oversight is also assisted by Dr Avner Ingerman – a highly experienced and well recognised ophthalmologist and expert clinical trial investigator in New York, USA.

Management support and administration is provided by an experienced team at the Institute's office in Sydney, Australia.

Objects

The object of the Institute is to be a public institution engaged solely in research into the causes, prevention or cure of diseases in human beings.

As noted above, the Institute carries out innovative research into debilitating diseases about which relatively little is known or no treatment is currently available and about which the Institute and its directors consider they can make a significant contribution to the understanding of the causes, prevention or cure of that disease.

ATO endorsement – deductible gift recipient and tax exempt charitable institution

In February 2005 the Australian Taxation Office confirmed the Institute was formally endorsed as a deductible gift recipient under item 1 of the table in section 30-15 of the Income Tax Assessment Act 1997, being a public institution engaged solely in research into the causes, prevention or cure of disease in human beings, animals or plants (item 1.1.5), and a charitable institution whose principal activity is to promote the prevention or control of diseases in human beings, animals or plants (item 1.1.6).

The Institute was also endorsed as an income tax exempt charitable institution under Division 50 of the Income Tax Assessment Act 1997, and endorsed to access GST concessions under Division 176 of the A New Tax System (Goods and Services Tax) Act 1999 and FBT exemption under section 123D of the Fringe Benefits Tax Assessment Act 1978.

The Institute has continued to be so endorsed.

Reporting and Financial Statements

The Institute is a public institution established as an Australian public company limited by guarantee under the Corporations Act 2001. It prepares financial reports, which are audited by Ernst and Young annually in accordance with the Australian Accounting Standards. The financial reports and all accounting and administrative records are prepared and maintained by the management team in Sydney. The audited financial report is lodged each year with the Australian Securities and Investments Commission.

2. The Lowy Medical Research Institute Limited – Research Activities

To utilise the world's best researchers, research facilities and research techniques in furtherance of the Institute's objects, research clinics and laboratories with particular specialist expertise and equipment are engaged by the Institute in Australia, the United States of America, the United Kingdom, Germany, France and others.

Dedicated researchers and research clinics with the capacity to conduct the research required are engaged to carry out specific and targeted clinical and laboratory research into the selected diseases and aspects of them. The research work is performed both in Australia and overseas, as well equipped, highly regarded research teams exist in Australia and in various other countries. The Institute seeks to obtain the best researchers in the fields of interest, in order to obtain the best results. The world's best expertise does not reside in only one place. Australia has excellent research clinics and abilities, but there simply does not exist in Australia the full complement of research capabilities and expertise. The research conducted in Australia is enhanced and improved by research done outside Australia by clinics and laboratories with unique expertise, capabilities or equipment not available in Australia.

The Institute's medical research is significantly furthered by collaboration with experts worldwide with additional focus, extra capabilities, techniques, abilities and equipment.

The Institute currently engages the following major research teams and clinics:

Australia

- Macular Research Group, Save Sight Institute, – University of Sydney
- Lions Eye Institute – University of Western Australia
- Centre for Eye Research Australia – University of Melbourne

The following key research teams and clinics are some of the research projects engaged outside Australia:

United States

- Columbia University, New York
- Boston Children's Hospital, Boston
- The John Moran Eye Centre, University of Utah
- The Scripps Research Institute, California
- Jules Stein Institute, University of California, Berkley
- Retina Associates, Cleveland

United Kingdom

- University College London – Medical Research Centre
- Moorfields Eye Hospital – National Institute for Health Research, Biomedical Research Centre

Germany

- University of Bonn, Vision Research
- St Franziskus Hospital, Research Centre

France

- Hospital Lariboisiere – Clinical Research Centre

Current Worldwide Research Activities – MacTel Project

The Institute is currently focused on research into the causes, prevention and cure of idiopathic juxtafoveal telangiectasia, an eye disease commonly referred to as “MacTel”.

MacTel is a significantly debilitating eye disease in which the blood vessels in the central retina begin to leak. The disease often results in the loss of vision in both eyes. Historically, very little has been known or understood about the cause of the disease, and there is no proven treatment. The clinical presentation of the disease, and the course of the affliction, are also not well understood.

The worldwide research projects conducted by the Institute, and the Institute’s coordination of those research teams to collaborate in their research efforts, has created “The Macular Telangiectasia Project” (MacTel Project) consisting of highly expert and internationally regarded specialists in retina research and in particular the underlying bases and treatment of macular disease. The MacTel Project comprises more than 30 research centres in Australia, America, Europe and the Middle East involving clinical, genetic, photograph reading and coordinating centres, and scientific laboratories, each chosen for their particular expertise relevant to the project.

The MacTel Project is a collaborative effort of those highly specialised clinics and laboratories with expertise in ocular genetic research, histopathology, and electron microscopy of the retina, specialised ocular imaging modalities, assessment techniques, eye tracking, ocular device implementation and therapy expertise, and other development aspect experience. The level of expertise coordinated is highly specialised and unique. Some of the clinics and research teams engaged by the Institute are the only clinics in the world that carry the particular expertise to conduct the research that they do. Ground breaking work is being done at the University of Utah’s John Moran Centre on macular antioxidants, which no Australian laboratories are equipped to do. The Institute in Sydney brings that research together in an attempt to reveal a major breakthrough in the treatment of macular degeneration.

The goal of the Institute’s dedicated MacTel research project is to produce a major breakthrough in the treatment of MacTel. Researchers of eye disorders now know that it is possible to generate specific and targeted research that may significantly increase the understanding of the causes, prevention and the treatment of MacTel. Until the MacTel Project, those researchers had not been given the opportunity or the resources to properly carry out that research. As a result of the MacTel Project significant advances are being made in recognising the causes, prevention and treatment of MacTel, to improve the health and hopefully save the sight of MacTel sufferers.

The Institute, through projects such as the MacTel Project, fosters research and innovation by engaging those specialised facilities around the world, and the best equipped experts. In doing so it facilitates the exchange of ideas and developments amongst leading researchers and research organisations around the world, improving Australian medical research.

Collaboration with specialists around the world has allowed the project to broaden its scope due to the relationships developed and the sharing of ideas, information and research results – which benefits the work of the Institute and furthers the knowledge of this disease in Australia, for the ultimate benefit of Australian sufferers.

3. **Exposure Draft**

The Exposure Draft of the Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No 1) restates the “in Australia” special condition by requiring that the Institute satisfy section 30-18 which include conditions that:

- (a) The Institute operates solely in Australia at all times; and
- (b) The Institute pursues its purpose solely in Australia at all times.

It is noted that the Exposure Draft provides that there is no breach of paragraphs (a) or (b) if the overseas activities are merely incidental to the Institute’s Australian activities or are minor in extent and importance when considered with reference to the Institute’s Australian activities.

With the high cost and complexity of world class medical research, significant expenditure and effort is incurred outside Australia which may not be ‘minor in extent and importance’, or ‘merely incidental’ to the Australian research carried out.

If that research outside Australia is not merely incidental or minor in extent and importance when compared to Australian activities, the Institute will cease to qualify as a charitable institution entitled to receive deductible donations – the Institute’s source of funds to carry out its medical research activities. The effect of the Exposure Draft, whilst it appears unintended, would thus be to severely restrict the medical research that could be carried out or engaged outside Australia, despite improving the research work done in Australia.

The concepts of “incidental” or “minor” overseas activities used in the Exposure Draft are not defined. Very difficult issues of interpretation will arise in order to determine the level and extent of research that could be engaged outside Australia relative to the research conducted in Australia. The collaboration of research clinics and laboratories will make this even more difficult. It is not clear how one can measure and compare the “importance” of different types of medical research shared in collaboration to further the research of other clinics and laboratories.

4. **Medical Diseases have no Geographical Boundaries**

Medical diseases whether cancer, heart disease, blindness or otherwise have no geographical boundaries. Disease is found in people of all races and on all continents.

Medical research into the prevention, causes or cure of human disease is conducted where sufferers of the disease are found, and specialist expertise, specialist equipment, or dedicated research personnel, are located.

If a cure for any of these, or a breakthrough in understanding the causes or the prevention of such a disease, is found in one country in the world, the rest of the world would expect to benefit from that. A breakthrough by a specialist research team in the USA, the UK, Germany or France would directly benefit Australian research teams, Australian sufferers of the disease, and the work of the Institute.

5. Medical Research has no Geographic Boundaries

Medical research breakthroughs and results in one place directly benefit research carried out in another place. The Australian Government strongly supports biomedical research, and specifically encourages collaboration of medical research organisations with researchers outside Australia. Various Australian Government medical research grant schemes in fact require collaboration with overseas research clinics, such as current grant schemes between Australia and the UK.

The MacTel Project is an excellent example of a coordinated research focus in which research results and findings assist and benefit the work and research carried out in Australia. Several hundred sufferers from all manner of backgrounds around the world are able to participate in the Project as part of a unique natural history study, which it is hoped will see real breakthroughs in understanding of the disease. This can only be achieved by global collaboration.

The MacTel Project allows specialist research conducted by Professor Mark Gillies at the University of Sydney to be used to enhance research and clinical trials being carried out by the Jules Stein Institute at the University of California and the research clinic of Retina Associates in Cleveland, to further the research of the Institute.

Similarly, the results of research conducted by Boston Children's Hospital researchers or the John Moran Eye Centre at the University of Utah, and unique genetic research done at Columbia University in New York, can be and is used as a basis for further research by the Save Sight Institute at the University of Sydney, the Lions Eye Institute research team at the University of Western Australia and the Centre for Eye Research Australia in Melbourne.

Scientific and medical research results and breakthroughs are published and shared in the scientific, medical and research communities. Scientific 'cross-pollination' improves medical research around the world, and allows Australian researchers to advance their research sooner and with better results, having the benefit of high quality specialist research results from overseas experts that in many cases simply cannot be conducted in Australia. Australia, research organisations like the Institute, and Australian sufferers of those debilitating diseases directly and indirectly benefit from that worldwide research and its results.

However, the changes proposed by the Exposure Draft appear to contradict the intention of those Government biomedical research initiatives, and will significantly impact the medical research that can be carried out by the Institute and by similar medical research institutions, which will directly and negatively impact the quality and abilities of medical research in Australia, and therefore impact the health of Australian disease sufferers.

6. No Tax Avoidance, Terrorist Funding or Money Laundering Involved

The research carried out on behalf of the Institute overseas does not involve any potential for tax avoidance, terrorist funding or money laundering. Each of the overseas research organisations are bona fide world recognised research organisations.

There is no question of this Institute paying funds to another charity that conducts its activities overseas. The funds are used to directly pay for and fund research in accordance with formal contracts with proper contractual performance requirements and commercial terms, and related costs to manage and coordinate that research. The research and the expenditure by this Institute is incurred in the normal course of operating or pursuing the purposes of which this Institute was established, and is carefully monitored by the Institute in Australia, and audited annually.

All of the overseas research is managed from Australia. Central management and control of the Institute is and has always been in Australia. All of the directors of the Institute are in Australia, all of the strategic oversight, the decision making, and effective management occurs in Australia. All the financial records of the Institute, legal documentation, and so on, are maintained in Australia. The research is closely monitored by the members of the Board, every one of which participates in the regular Project Executive Committee meetings.

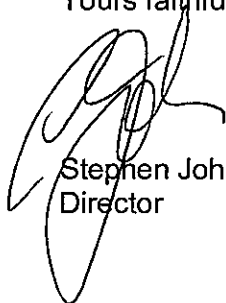
The problems created by reasoning of the High Court on the meaning of "in Australia" under the existing legislation in *FCT v Word Investments Ltd* (2008) 236 CLR 204 have no relevance to the Institute. However, the amendments proposed by the Exposure Draft go well beyond those concerns, and will significantly impact the ability of the Institute to continue its world leading research. Enacting the Exposure Draft in its current form would be a severe setback for medical research projects like the MacTel Project and may even cause the end of such projects.

7. Modification of Exposure Draft for Australian Medical Research Institutions

It is suggested that the Exposure Draft should be amended to make clear that Australian medical research institutions which have their management and control in Australia are not in breach of the Exposure Draft by reason of having research carried out overseas by bona fide research organisations.

We would appreciate if we could meet with you to elaborate on the above.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'S. Johns', written over a printed name and title.

Stephen Johns
Director