



Innovation Australia

Information Paper

Venture Capital Act 2002
Issued September 2015

Interpretation of 'Associate' in section 9-3(1)(e) of the Venture Capital Act 2002

Operative provisions:

- Section 9-3(1)(e) of the *Venture Capital Act 2002* (VCA 2002)
- Section 318(e) of the *Income Tax Assessment Act 1936* (ITAA36)

Purpose

This information paper explains Innovation Australia's (the Board) approach to the operation of section 9-3(1)(e) of the VCA 2002 and section 318(e) of the ITAA36.

This paper is not financial services, tax or legal advice. Readers should seek such advice from qualified professionals for their particular circumstances.

Background

Section 9-3(1)(e) of the VCA 2002 specifies that one of the requirements for registration of an Early Stage Venture Capital Limited Partnership (ESVCLP), in relation to a limited partnership, is that:

‘none of the partners has committed capital in the partnership, that, taken together with the sum of the amounts of committed capital in the partnership of any of that partner’s associates (other than associates to whom subsection (5) applies to an ADI, or a life insurance company or a widely held superannuation fund), exceeds 30 per cent of the partnership’s committed capital’.

Section 1-10 of the VCA 2002 provides that expressions in the VCA 2002 have the same meaning as in the *Income Tax Assessment Act 1997* (ITAA97). The ITAA97 defines ‘associate’ as having the meaning given by section 318 of the ITAA36.

Section 318(e) of the ITAA36 defines ‘associate’ of a company (the ‘*primary entity*’) to include:

‘a partner of the primary entity or a partnership in which the primary entity is a partner.’

Issue

Under the definition in section 318(e) of the ITAA36, every partner in an ESVCLP is potentially an ‘associate’ of each of the other partners in that ESVCLP, because each entity is a partner in that ESVCLP.

If correct, this would mean that no partnership could ever satisfy the 30 per cent cap on committed capital of individual partners. The interpretation of the term ‘associates’ in this context required for registration as an ESVCLP is as follows.

Interpretation

The meaning of ‘associates’ in section 9-3(1)(e) should be read down to exclude entities that are an associate of the partner only because the entity is also a partner in the same limited partnership for which registration is sought as an ESVCLP.

This decision was reached on the basis that:

- a) the modern approach of Australian Courts to statutory interpretation is to prefer a construction promoting the context and purpose of a provision, even where there is no ambiguity or doubt as to the literal or grammatical meaning of the words; and
- b) applying the purposive approach to section 9-3(1)(e):
 - i) the written context of section 9-3(1)(e) supports a narrowed meaning of ‘associate’ to avoid absurd results and achieve greater consistency with other provisions of the VCA 2002;and
 - ii) the legislative purpose of the VCA 2002 also supports a narrowed definition of ‘associate’ to avoid inconsistency with the definitions and broader purpose of the tax concessions in the ITAA97.

Conclusion

In conclusion, the Board’s view is that both the written and broader legislative context of section 9-3(1)(e) suggest that it was intended for the definition of ‘associate’ to be read down to exclude other partners of the ESVCLP.