

SUBMISSION TO THE CONSULTATION ON A HIGHER EDUCATION RESEARCH COMMERCIALISATION IP FRAMEWORK

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Edith Cowan University (ECU) is a public university with a growing reputation for research focused on solving real-world problems. ECU seeks to grow its industry partnerships for research and is strongly committed to meeting the needs of all its stakeholders, including business and community, by providing research outcomes with relevance and reach.

ECU welcomes the opportunity to make a submission on the Higher Education Commercialisation IP Framework.

Definitions and scope - IP, commercialisation, and patents

The HERC IP Framework should recognise that patents are just one of the many forms of IP that can arise in the course of research. Whilst they are often apt deliverables for research in certain fields, such as medical science and pharmacology, new IP arising from research in other fields may never result in patentable material. However, such IP will often fall within other IP regimes, such as copyright or designs, and is still readily able to be commercialised or provide impactful translation outcomes. Because of the significant expense and extended time frames associated with obtaining patents (in addition to the time and expense required as part of any research which may give rise to patentable material), any framework which prioritises patentable material as a research outcome will likely stifle research in the higher education sector more generally. Accordingly, we consider that the HERC IP Framework should not prioritise the development of patentable material, and must be sufficiently flexible to incorporate the various forms of IP which can be generated by research and non-monetised translation impacts.

The HERC IP Framework should also acknowledge that commercialisation is just one way to measure the value of research outcomes, and further that commercialisation is not solely reliant on private investment. Whilst there can be many benefits that flow from the involvement of private entities as part of commercialisation (particularly where the end result is a saleable product), it is just one of the many ways to realise the value of a research outcome. The success of 'creative commons' and other licencing arrangements (such as those used on many large social media platforms) demonstrate that IP can be made widely available, at little to no cost, and with huge benefit to society generally. Similarly, some publicly funded research, such as that funded by the Department of Defence, may result in the widespread implementation of research outcomes under terms that specifically prohibit commercialisation. It is also important to recognise that universities commercialise a lot of the IP generated in research through their teaching activities. Staff will often draw on their own fields of endeavour to ensure that students are receiving relevant, practical, and cutting-edge instruction. The ultimate beneficiaries of this commercialisation are not just universities, but in fact private industry, who go on to employ and otherwise receive the benefit of work produced by well-educated graduates. Accordingly, we consider that the HERC IP Framework should not uniformly be structured around facilitating private investment as part of commercialisation, but rather should focus on ensuring research outcomes are used, or otherwise made publicly available.

Whole-of-government approach

Many funding bodies already mandate the use of standard form agreements, and the proposed limited initial roll-out of the HERC IP Framework for ARC and DESE-funded projects, with the possible inclusion of other

funding bodies such as the NHMRC, at a later stage, will create a confused and piece-meal approach. Instead, the Department should lead a whole-of-government approach, aimed at improving consistency and efficiency in contract arrangements for IP derived from publicly funded research, and which supports and facilitates the potential for commercialisation of outcomes from research. A whole-of-government approach would also assist in better identifying those areas where specific exemptions from the HERC IP Framework may be required, such as in the Department of Defence example given above.

We also consider that there is little, if any, benefit in seeking to legislatively mandate the adoption of the HERC IP Framework. Such an approach is likely to give rise to significant compliance burdens and is unnecessary in the context of the vast majority of publicly funded research (ie where it is possible for the funder to simply require the project to be undertaken in accordance with the HERC IP Framework or utilising HERC IP Framework agreements). Allowing funders the flexibility to select which projects they would like to be undertaken in accordance with the HERC IP Framework is also more consistent with contemporary research funding arrangements both at a national and international level. Accordingly, we recommend that the HERC IP Framework is not legislatively mandated, but is provided as a best practice framework.

A fit-for-purpose and best-practice framework

The HERC IP Framework needs sufficient flexibility to cater for the following common elements of many research agreements:

- Research outcomes often involve several different grants to reach the point of being able to be commercialised and may involve several different funding bodies, industry partners, researchers, students, and universities. Any framework agreements need to take into consideration these earlier stages of research development to ensure that the outcomes are clear of title and are ultimately legally able to be commercialised.
- Private industry collaborators will often insist on utilising their own standard form agreements, particularly in the context of research which is likely to produce outcomes which may be commercialised, often directly by the industry collaborator.
- International partners will often be required to adhere to, and in many instances incorporate their own domestic legislative obligations, or commercial requirements for investment.

Any Framework which does not adequately facilitate the above elements will likely see research redirected elsewhere (potentially overseas or to private institutions who are not subject to restraints imposed by a mandated regime).

Rather than mandating a series of larger, more complex agreements (or a tiered series of agreements) which seek to address every aspect of a research project, including the potential for commercialisation at the outset of the research, we consider that a better approach would be to have a suite of agreements which deal with discrete but common aspects of research projects. These could include material transfer agreements, NDA/confidentiality deeds, deeds of assignment, and licencing templates. Such materials could be coupled with guidelines on contracting with commercial partners, describing core elements of typical research agreements (such as default positions for ownership of IP) with a view to streamlining and focussing any negotiations which may be required.

Indigenous knowledge

All consultation and discussion with Aboriginal and Torres Strait Islander Elders and communities on research and knowledge sharing must be respectfully conducted, culturally informed, and demonstrate benefit for Indigenous and non-Indigenous communities. Whilst FPIC is a useful touchstone for best practice when dealing with such groups, obtaining such consent or some form of community consensus from Aboriginal and Torres Strait Islander Elders and communities is in reality hard to achieve. Beyond the issue of consent, consideration needs to be given to broader concerns about how universities can best consult and collaborate with Aboriginal and Torres Strait Islander Elders and communities on research that is understood by, supported by, and delivers benefits to, those communities.

We consider it would be useful for the HERC IP Framework to include guidance and best practice recommendations for engaging with Aboriginal and Torres Strait Islander Elders and communities in the context of research and knowledge sharing.

Governance and reporting obligations

Whilst there is some force to the argument that standard form agreements give rise to efficiency, it must also be acknowledged that where such agreements are mandated there is also a burden born by one of the parties (usually the university party) who will be tasked with administering these agreements, ensuring they are adopted and implemented uniformly, and dealing with performance monitoring and reporting requirements. There is a very real cost to universities in absorbing this burden many of which already struggle with a significant volume of reporting and compliance work as a result of existing legislative requirements (for example under the Sanctions and Defence Trade Controls regime). Such obligations can also have a significant detrimental impact on research, for example international investment in research has recently been hampered by the introduction of the Foreign Influence Transparency Scheme and Foreign Arrangement Scheme reporting obligations. We consider that this is a further point which strongly supports not legislatively mandating the HERC IP Framework.

Further consultation on documentation

It will be fundamental to the success of the HERC IP Framework to ensure that adequate consultation is undertaken regarding the documentation that supports the framework. We understand that draft copies of the proposed agreements and other documentation that will make up the framework has just commenced. Unless these agreements are prepared with input from both universities and industry, truly reflect best practice, are reasonable, and easy to use they will be treated similarly to most of the other freely available material that already exists (ie they will be ignored in favour of negotiated solutions).

Further information

Queries relating to the content of this submission may be addressed to Claire Corbould, Manager, Research Strategy and Policy, via c.corbould@ecu.edu.au or (08) 6304 7111.

We consent to this submission being made publicly available on the Department's website.