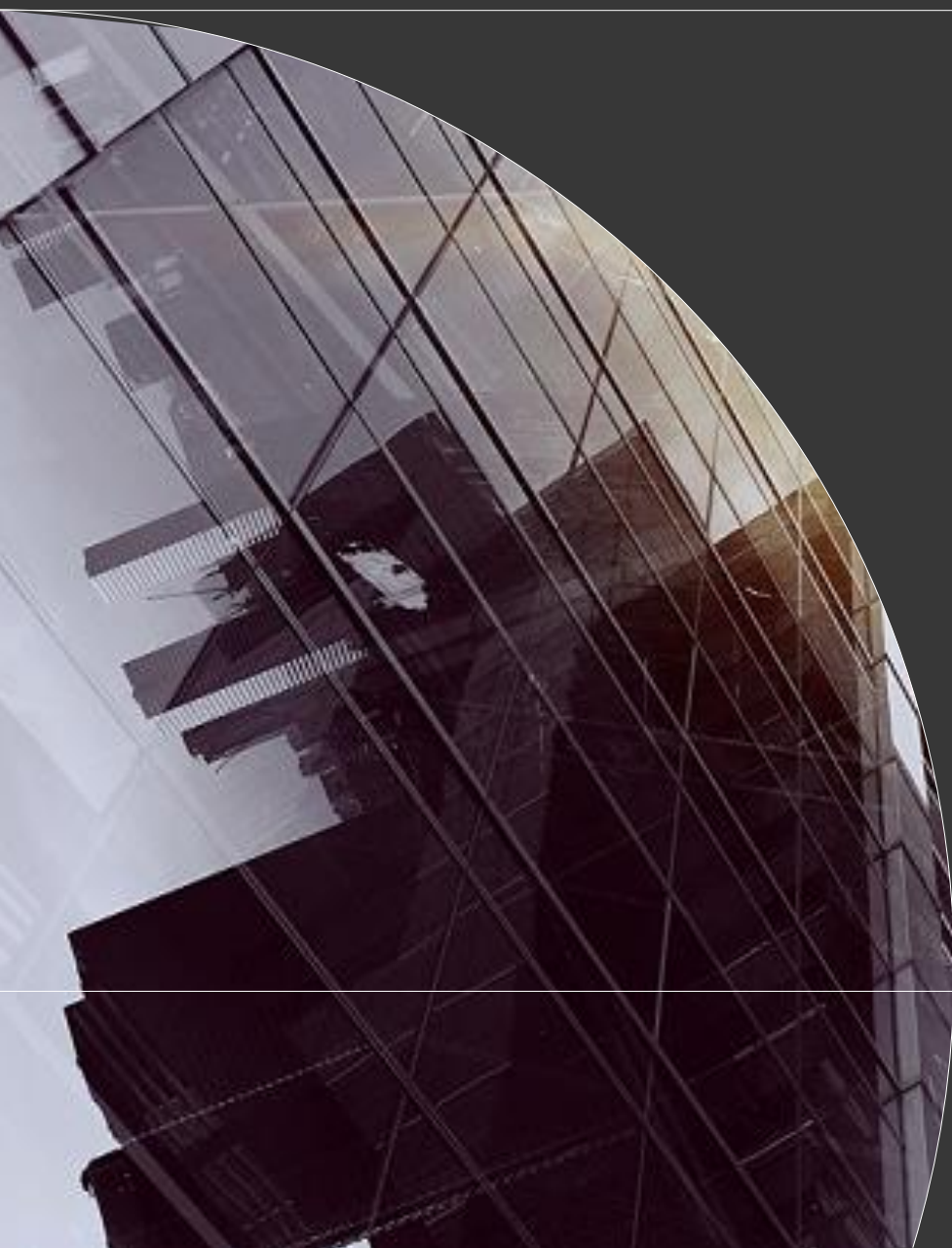


Higher Education Research Commercialisation – IP Framework

Submission responding to the
Department of Education, Skills and
Employment's consultation paper

November 2021



BCA

Business Council of Australia

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1. About this submission

This is the Business Council of Australia’s submission on an Intellectual Property (IP) Framework to support higher education research commercialisation. It responds to a consultation paper released by the Department of Education, Skills and Employment in September 2021. This submission builds on and complements the Business Council’s April 2021 submission on the Commonwealth Government’s proposed University Research Commercialisation Scheme.

2. Key recommendations

The Business Council recommends:

1. The proposed Higher Education IP Framework (‘the IP Framework’) should be phased in, with use of standardised agreements to be voluntary (not mandated), at least until they have been tested for suitability and ease of use.
2. Thresholds for determining the application of ‘simple’ or ‘complex’ standardised agreements should be based on guidance materials and discretion regarding contract value, complexity and risk, rather than through strict adherence to a \$100,000 contract value threshold.
3. If the IP Framework’s standardised agreements are to be mandated, then this requirement should be limited to an onus on universities to offer a suitable standardised agreement as an option at the commencement of negotiations with a collaborating partner, rather than mandating use by all parties.
4. Guidance materials should outline, where possible, standard timeframes for the negotiation of collaborative IP agreements, to provide benchmarks that encourage participating parties to speed up the process.
5. The IP Framework’s standardised agreements, term banks and educational materials should be refined as necessary following a review around 12 months from introduction, and then reviewed again periodically to ensure they remain best practice and are not resulting in unintended consequences.
6. The IP Framework should be promoted via a one-stop-shop portal for Australian research and innovation.

3. The need for a Higher Education IP Framework

The Business Council strongly supports the Commonwealth Government’s aim to boost the translation and commercialisation of Australian research through collaboration between universities and industry. The Government is considering options to advance this goal, including the establishment of a new university research commercialisation scheme. Additional investment in priority research is critical, but a new funding scheme on its own will not sufficiently shift Australia’s commercialisation performance. The Government is right to consider a suite of complementary measures, including the proposed IP Framework that this submission relates to.

In consultations held in 2020 and 2021, the Business Council’s members stressed that Australia’s research capacity is world class, but participants noted that it can sometimes be a “battle” to align the interests of researchers and business partners. Project time horizons can differ (typically being shorter for industry) and so can objectives and incentives (e.g. to publish research results). IP agreements are a formal means to support research partnerships by outlining areas of alignment and managing differences where necessary. These agreements create a common basis for collaboration by setting out terms of access and ownership, contributions of effort and cost, and the distribution of rewards.

The stated aim of the proposed IP Framework is to “guide the efficient and effective management of the IP commercialisation process” by standardising research agreements and providing process maps and educational materials to aid in the negotiation and management of such agreements. The intention is to “cut complexity and transaction times/costs; provide an easier entry point for negotiations; ... and promote best practice”.¹

¹ Department of Education, Skills and Employment. 2021. *Higher Education Research Commercialisation – IP Framework Consultation Paper*. Canberra. Accessed at: <https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/higher-education-research-commercialisation-intellectual-property-framework>

4. Implementation of an IP Framework

The overall aim of the IP Framework is good, but as the standardised agreements are entirely untested, it makes sense to introduce them initially for use on a voluntary basis, rather than mandating them from the outset. Businesses seeking to collaborate may be wary of entering into negotiations using standardised agreements until their value and flexibility has been proven, and some research agreements may prove too complex to work within the standardised templates. The last thing we want is to deter collaboration and investment in research at a time when we are looking to ramp it up.

An IP Framework with standardised agreements that are promoted but not mandated would be consistent with the approach taken in the UK and Ireland. The UK's Lambert Toolkit and Knowledge Transfer Ireland's guidance material were models used to develop the proposed IP Framework, and it would be unusual and risky to mandate this model without first gauging its usefulness and applicability in the Australian context.

Recommendation 1

The proposed IP Framework should be phased in, with use of standardised agreements to be voluntary (not mandated), at least until they have been tested for suitability and ease of use.

Research agreements vary considerably in their purpose and complexity. The consultation paper on the IP Framework conceives of two broad streams of agreements – those that are 'simple', and those that are 'complex'. Simple, or 'fast-track', agreements will have shorter-form templates and terms that can streamline the negotiation process, while complex agreements will allow more room for deviation.

This division is a good idea, as in many cases a streamlined 'boiler-plate' agreement may be all that is necessary. Where possible, it would be good to encourage greater use of these standardised, fast-track agreements, to reduce complexity, transaction costs and negotiation times. This is particularly true for SMEs and start-ups that may have less experience in collaborating with research partners, and may be less equipped to negotiate bespoke terms.

However, the use of these short-form agreements becomes potentially problematic when they are mandated for use by both parties with little scope for deviation, and this restriction is based on an arbitrary contract value threshold of \$100,000. In many cases, contract value will be a reasonable proxy for the complexity and risk associated with a research agreement, but this will not always be the case. By mandating the rigid use of simple agreements with a value below this threshold, some collaborations may be ruled out altogether.

Consistent with our recommendation that the IP Framework be phased in on a voluntary basis initially, it would be prudent to allow greater discretion about the use of simple or complex agreements. Process maps and educational materials should guide collaborating parties towards one stream or the other, with contract value as one marker, balanced against other considerations about complexity and risk.

Recommendation 2

Thresholds for determining the application of 'simple' or 'complex' standardised agreements should be informed by guidance materials, but based on discretion regarding contract value, complexity and risk, rather than through strict adherence to a \$100,000 contract value threshold.

The Government's proposal to mandate the use of standardised agreements under the IP Framework seems to be based in part on an understanding that government research funding supports universities to develop both background and foreground IP that can have significant commercial value. In many cases this is true, though university research can have several funding sources, and government contributions are not always straightforward to identify.

To the extent that government funding can be readily identified as the primary contributor to universities' IP, there may be grounds for government to prescribe the form of agreements offered by universities that capitalise on the value of that IP. This prescription may be justified if it is determined that universities are unnecessarily complicating IP negotiations with industry partners through the use of non-standardised, complex agreements (provided a regulatory approach doesn't just protract negotiations further).

In the first instance, it would be preferable to encourage greater consistency through propagation of an IP Framework with voluntary standardised agreements, but if agreements are to be mandated, this requirement could be limited to universities as an offering party at the outset of negotiations. Essentially, a suitable standardised agreement would need to be 'on-the-menu' for a collaborating party to choose, but with no obligation to take that option. This approach would increase the choice of options available for industry, rather than restricting it.

Recommendation 3

If the IP Framework's standardised agreements are to be mandated, then this requirement should be limited to an onus on universities to offer a suitable standardised agreement as an option at the commencement of negotiations with a collaborating partner, rather than mandating use by all parties.

In addition to providing standardised agreements, process maps and clause banks, the IP Framework's guidance materials should also indicate standard timeframes for the conclusion of IP contracts, with the aim of promoting best practice and reducing protracted negotiations.

One of the key points of frustration for those developing collaborative agreements can be unnecessary delays as an agreement is cleared through multiple parts of an organisation (be it a university or a business) and the lack of urgency applied in some cases. These delays can deter industry from engaging with Australian research institutions, particularly in the case of multinational or globally mobile businesses that can find other opportunities offshore. Guidance on standard timeframes for concluding agreements would be a helpful nudge in the right direction.

Recommendation 4

Guidance materials should outline, where possible, standard timeframes for the negotiation of collaborative IP agreements, to provide benchmarks that encourage participating parties to speed up the process.

5. Review and promotion of an IP Framework

Regardless of whether the IP Framework is introduced with voluntary or mandated use of standardised agreements, it is critical that it be reviewed and refined at an appropriate juncture following its introduction, and then updated on an ongoing basis to ensure it remains up-to-date and is serving its purpose. The IP Framework may take time for universities and industry partners to adapt to and embed, so a review after 12 months may be a suitable formal checkpoint. Any review should consider the usefulness and reach of educational and guidance materials as well as the flexibility and value of the agreements themselves. The need to mandate could be re-considered at this time.

Recommendation 5

The IP Framework's standardised agreements, term banks and educational materials should be refined as necessary following a review around 12 months from introduction, and then reviewed again periodically to ensure they remain best practice and are not resulting in unintended consequences.

Governments should also consider how best to promote the IP Framework (and research collaboration opportunities more broadly) to businesses in Australia and overseas, including through a single agency and/or one-stop-shop portal for research and innovation. There are good examples of this overseas, including UK Research and Innovation (UKRI) and Innovation Canada. It needs to be easy for businesses to find information on who to collaborate with, and how. This could include targeted 'concierge' or advisory services that guide businesses towards collaboration opportunities and associated resources.

Recommendation 6

The IP Framework should be promoted via a one-stop-shop portal for Australian research and innovation.

6. Summary

The Government's focus on improving Australia's performance in research commercialisation and collaboration is strongly supported, and a robust IP Framework can be an important way to support this. Increased consistency and streamlining of IP and other research agreements can make it easier and quicker for universities and industry to partner together, and make Australia a more attractive destination for research collaboration and commercialisation. That's why it is critical that we get the balance right in promoting standardisation without enforcing rigid mandates that come with additional regulatory and compliance burden. Standardised agreements and accompanying guidance materials should be road-tested on a voluntary basis before they are considered for mandated use and enforcement. With the right set of guiding materials, and clear direction from government, the IP Framework should encourage widespread use on its merits alone.

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