



UNIVERSITY OF SOUTHERN QUEENSLAND

SUBMISSION

HIGHER EDUCATION RESEARCH COMMERCIALISATION IP FRAMEWORK

Introduction

USQ appreciates the opportunity to comment on the Higher Education Research Commercialisation Intellectual Property (IP) Framework.

We welcome the definition of Commercialisation used in the consultation paper, which appears to include commercial and collaborative research and consultancies. In many sectors, and for SMEs in particular, these pathways are more prevalent forms of university-industry collaboration and knowledge transfer than the patenting, licensing or spin out pathways.

We agree that a Commercialisation IP Framework resource with comprehensive education materials and well drafted, fair, and equitable contract templates could **facilitate** universities and industry in reaching agreement on commercialisation activities.

Templates as an incentive for collaboration?

We are concerned however, that a framework for commercialisation agreement templates is promoted in the consultation paper as a key **incentive** for collaboration. We question the assumption that industry would be incentivised to approach universities for collaboration by the existence of template agreements. Research collaborations typically start out from informal discussions of shared interests or technical challenges. They are based in a meeting of minds between researchers and their industry contacts and driven by the desire to work together to provide solutions to technical, economic, environmental or social challenges. Collaboration is not driven by agreements.

Incentivising collaboration

If the rate of collaboration between industry and universities is perceived as being too low, we would call on the government to provide additional incentives to industry and universities. These could consist of:

- Financial incentives for industry, such as increased R&D Tax incentives for companies who collaborate with universities;
- Financial support for SMEs who wish to collaborate with universities; SMEs often don't have the means to co-fund research projects as required by most grant schemes in the area of applied research;
- Industry access to all Commonwealth research funding could be made conditional on collaboration with universities or publicly funded research organisations¹; and
- Allowing financial support for university researcher salaries as part of government funded university-industry collaborative funding or ensuring university-industry collaboration is fully funded (including reasonable indirect costs).

Templates as a tool to facilitate negotiations

Although template agreements can facilitate the negotiation of legal arrangements for a collaboration, they are **only one of many tools that are needed**. Ensuring that universities' costs of undertaking research are fully funded by the Commonwealth or the industry partner would go a long way to simplifying commercialisation negotiations. The perceived opportunity to recover (unfunded) research costs via commercialisation income complicates negotiations.

¹ E.g., the rules for the recent Modern Manufacturing Initiative (MMI) Translation Stream Projects could have provided that research activities are only funded if they are carried out by universities or publicly funded research organisations; the use of CRC or CRC-P funds for research activities could be limited to research expenditure incurred by universities and publicly funded research organisations

Raising industry awareness of the funding realities for universities would also help negotiations. Anecdotal evidence suggests that the issue of indirect costs of research and the fact that these are generally not covered by Commonwealth grant funding is not well understood in industry.

Care needs to be taken to avoid disincentives to collaboration and commercialisation in Commonwealth Funding Agreements. The university receiving funding needs to pass these conditions on to industry in their collaboration agreements. Some recent Commonwealth Funding Agreements required universities to grant to the Commonwealth unlimited rights to use or even exploit the Project IP. Although the actual intention may not be for the Commonwealth to commercialise the Project IP, the language in these clauses is a dis-incentive to industry partners who are investing to obtain commercialisation rights.

Model agreements as a resource not a compulsory framework

We caution **against making the framework and adoption of template agreements mandatory** as it could deter collaborators from working with universities. Many large industry organisations and international partners prefer to start negotiations using their own agreement templates. Issues of IP ownership, commercialisation, liability and price are of significant economic importance for industry and there will be hesitance to having these issues pre-determined by a mandatory template agreement that has been developed without any reference to the individual partners and projects.

The use of the IP Australia Toolkit and the two international model agreement schemes that the consultation paper references – the UK’s Lambert IP toolkit and the Knowledge Transfer Ireland’s Model Agreements – is not compulsory. These templates are drafted as a resource that parties can use if they wish and can modify to suit their specific circumstances. A review of the use of the Lambert toolkit was conducted in 2013 (eight years after its introduction) and it revealed that the toolkit was being used in exactly this way – as a resource. There was wide awareness of the toolkit in industry and amongst universities and 70% of those aware of the toolkit had used it in some form, but only 3% of the parties using it used it unmodified². This also corresponds with the practical experience of one of USQ’s research leaders who worked in the UK during the first years after introduction of the toolkit. He reported that universities and industry would use individual toolkit templates but heavily modify them especially around issues of IP and Commercialisation or would use the toolkit as a source for compromise clauses that would be inserted in either party’s preferred agreement.

We have no insight at this stage into the details of the proposed framework and the drafting of individual agreements. Neither industry nor universities has had an opportunity to provide feedback on drafts. Any decision on making the use of templates mandatory should be deferred until templates are drafted and universities and industry have been consulted on them and had an opportunity to test them in practice. In preparing draft agreements the government could consult with research and industry sector bodies such as the Australasian Research Management Society (ARMS), Knowledge Commercialisation Australia (KCA), Universities Australia (UA), the Business Council of Australia (BCA) or the Australian Industry Group (AIGroup).

Noting that it is difficult to answer the specific questions in the consultation paper without visibility of the proposed draft agreements, we provide some preliminary comments in the Appendix.

² Intellectual Property Office (2013): Collaborative Research between Business and Universities: The Lambert toolkit 8 years on. Accessed through <file:///C:/Users/U8014982/AppData/Local/Temp/ipresearch-lambert.pdf> on 10.10.2021.

Appendix

Theme	Question	USQ Response
What will the HERC IP Framework do?	1. What would ensure the HERC IP Framework is applied consistently across universities (research institutes/centres, colleges, faculties, departments and researchers) and industry?	<ul style="list-style-type: none">• Well drafted and fair contract templates using plain English;• Seek feedback from the university sector;• Consult with large industry stakeholders to ensure that they would even contemplate using such templates;• Obtain wide university and industry support and aim for Industry Peak bodies such as Business Council of Australia and the Australian Industry Group to advocate for use with their members; and• Provision of informative education material.
	2. What parts of standard agreements must allow changes to accommodate variation? Why? How?	<ul style="list-style-type: none">• This question can realistically only be fully answered once draft agreements are available.• If the use of certain templates were to be prescribed, the following aspects would, as an absolute minimum, have to stay open to changes by the contract partners as they are dictated by business and financial drivers for industry and universities:<ul style="list-style-type: none">○ models of Project IP ownership – look at IP Australia Tool kit or UK Lambert IP Toolkit to replicate this.○ Different models of Project IP use rights (sector, geographic area, exclusivity etc).○ Commercialisation pathways and commercialisation rights.○ Indemnity and liability models (e.g. IP Australia Toolkit).○ Price.○ Publication models.○ Student participation.○ As an absolute minimum the options provided in the IP Australia Toolkit Collaboration Checklist and the IP Australia model agreements need to stay open.

Framework scope

3. What should be in and out of scope for the HERC IP Framework to be useful, reasonable and practical?
- Universities already have collaboration agreements for grant funded projects that are fairly standard, especially for university-to-university collaboration – these could be included (examples are the widely used Multi Institutional Agreements for Australian Research Council funded research developed by the Group of Eight or the Australasian Research Management Society).
 - Variations, Material Transfer Agreements, Confidentiality Agreements – these are largely standardised across universities and the industry sector. There is little negotiation occurring over these agreements and we would argue they do not need to be included in this framework.
 - Agreements for the formation of new companies, incorporated and unincorporated joint ventures are arguably too complex to be prescribed by templates.
 - Include Commonwealth Funding Agreements into the suite of templates and implement uniform agreements across all Commonwealth Departments that act as funding agencies:
 - Keep reporting requirements in Commonwealth Funding Agreements to a realistic level; consult with universities and industry on these issues – there are high opportunity costs linked to reporting; data collection should not be onerous and should either serve to meet audit requirements or add value to the funding body.
 - Use liability and indemnity clauses that can be accommodated by business – high opportunity costs are incurred negotiating these clauses where universities need to pass on requirements of grant agreements to collaborators.

4. What are the strengths and limitations in the current Australian IP Toolkit that could be addressed in HERC IP Framework?

The template agreements in the IP Australia Toolkit could be included in the new set of template agreements.

5. How could the demarcation between the HERC IP Framework and the Australian IP Toolkit be best set out to avoid confusion about applicability for different transactions?

Instead of attempting to create a demarcation we suggest integrating the Australian IP Toolkit agreements into the one framework. These templates essentially provide model agreements for commercial research projects which are one of the mechanisms used to commercialise research.

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| 6. What information should be in the process maps, guidance, and educational material? What formats are best? | <ul style="list-style-type: none">• Information that is:<ul style="list-style-type: none">○ relevant for business and addresses the main drivers from an industry perspective;○ Explains drivers behind different IP models (e.g. why is joint IP not a good option).• In our opinion the drafting of educational material requires extensive consultation with universities, large companies who currently collaborate with universities and industry peak bodies such as the Business Council of Australia and the Australian Industry Group. |
| 7. What other processes and agreements should be included in the HERC IP Framework? | Commonwealth Funding Agreements across all Departments; see comments above. |
| 8. Should the HERC IP Framework apply to (a) only ARC or DESE research programs; or (b) also extend to publicly funded research at federal level through departments, Rural Research and Development Corporations, the NHMRC and PFRAs? | A framework drafted for (voluntary) use by universities and industry should be suitable for use in all publicly funded research (and ideally beyond as a model also for privately funded research – similar to the IP Australia Toolkit and the UK Lambert toolkit). If a mandated framework were to be introduced, it is even more important that this is applicable for all publicly funded research as there would be a risk otherwise that grant schemes and funding sources that fall under the framework are less attractive as those where the parties can choose their own agreement terms. |
| 9. What specific issues in different fields of research should the HERC IP Framework include? | <ul style="list-style-type: none">• The framework should include specific templates for agreements in certain disciplines or areas of collaboration:<ul style="list-style-type: none">○ Medical, biomedical, pharmaceutical science – to address specific issues such as medical trials, biosecurity, need to rapidly develop products e.g. in a pandemic.○ Social science – IP frameworks that make it easy to distribute knowledge via publications – be these academic or non-academic. This would be facilitated if the framework suggested an IP model where the university owns the IP and partners have appropriate use licences.○ Defence Projects.○ Projects that include the use of Indigenous Knowledge.• It would also be worthwhile to consider template agreements for: |
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- Projects that involve Higher Degree by Research Students; and
- international collaborations with researchers or industry in jurisdictions that Australian universities and industry collaborate regularly with such as the UK, US or China.

Target audiences	10. What unique aspects of specific sectors and commercial situations should be accommodated in the HERC IP Framework? Why? How?	<i>See response to question 9</i>
	11. What would make the HERC IP Framework attractive to collaborating and investment partners?	<i>See response to question 1</i>
Key parameters guiding development and implementation	12. What specific activities in your organisation would not be amenable to a standardised agreement?	We strongly argue for a framework that is not mandatory and allows universities and industry partners to use and change agreement components as they see fit – this approach reflects the UK Lambert IP toolkit ³ model.
	13. What design aspects – such as a \$100,000 investment, or significant background IP – should define the threshold for more complex agreements?	It seems sensible to include templates that partners can select for less complex arrangements. The IP Australia Toolkit provides an example on how this can be done.
	14. What elements must be flexible to prevent barriers in complex, high value agreements? How would these work in practice?	<i>See response to question 2</i>

³ Intellectual Property Office (2013): Collaborative Research between Business and Universities: The Lambert toolkit 8 years on. Accessed through <file:///C:/Users/U8014982/AppData/Local/Temp/ipresearch-lambert.pdf> accessed on 10.10.2021.

Trust and culture	15. Would pre-negotiation tools (such as term sheets or non-binding agreements) help your organisation build trust and confidence in a partnership? What tools would help?	Yes, term sheets are generally working well and are already used on a regular basis. We would strongly advise against a mandatory term sheet. Term sheets need to genuinely allow partners to design the contractual arrangements that provide mutual benefit.
Implementation	16. What communication and educational subject material would help your organisation in implementing the Framework?	Information written for an industry audience which increases the industry understanding of the restrictions and funding realities facing universities (e.g. real costs of research; university research business model; restrictions flowing from Commonwealth Funding Agreements).
Governance	17. How can performance of the HERC IP Framework be monitored without an undue administrative burden on users?	<ul style="list-style-type: none"> • Use of a survey tool that asks partners to report if they used the templates and if and how often they modify them – could be an additional two questions in final grant reporting. • UK Intellectual Property Office is monitoring the use of the Lambert IP toolkit⁴ – explore how this is done to see if this could be replicated in Australia.

⁴ See e.g. Intellectual Property Office (2013): Collaborative research between Business and Universities: The Lambert toolkit 8 years on. Accessed through [ipresearch-lambert.pdf](https://www.ipresearch-lambert.pdf) on 30.9.2021.