



**Government  
of South Australia**

# **INTELLECTUAL PROPERTY POLICY**

**1 July 2006**

## **FOREWORD**

The South Australian Government is committed to growing the State's prosperity, fostering creativity and expanding opportunities for all South Australians.

Future competitiveness and prosperity require innovation and effective knowledge management. In particular, intellectual property (IP) generated by or on behalf of Government in the normal course of its activities can have significant potential public good and operational and commercial value.

This Policy creates a supportive environment for the achievement of best practice management in the application and commercialisation of IP developed within the public sector for the benefit of the people of South Australia.

It establishes an enabling and overarching whole-of-government framework for the identification, protection and commercialisation of Government IP, including the establishment of agency-specific procedures and a system of rewards that will encourage innovation and creative effort and assist in the attraction and retention of valued staff.

This Policy provides the business operating framework to facilitate knowledge and technology transfer as well as confidence to both agencies and commercialisation partners that the Government and its agencies have established the necessary policies and effective timely approval procedures to enable effective commercialisation.

Improved knowledge transfer from Government and the effective use and commercialisation of IP, in addition to the utilisation of other non-commercialisation options such as open, conditional or free distribution, can create new opportunities for research and commercial collaborations between Government and local and international organisations and foster the emergence of new enterprises.

The expansion of business opportunities and the attraction of internationally skilled people to South Australia will enhance industry capabilities and the reputation of the State and stimulate economic growth, with the benefits flowing to the community.

A key aim of this Policy is to produce an internationally competitive advantage for South Australia so that Government IP and creativity will be manifested in better economic, social and environmental outcomes. The role of public sector employees in recognising, effectively managing and harnessing the value of creative efforts within Government will be critical to the attainment of these outcomes and will contribute to the prosperity of all South Australians.

**MIKE RANN**  
**Premier**

**KARLENE MAYWALD**  
**Minister for Science and  
Information Economy**

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## 1. PRINCIPLES

### 1.1. What is Intellectual Property?

**Intellectual Property (IP)** is any form of intellectual output that arises through human creative endeavour that has value in the industrial, scientific, literary or artistic fields and is protected by law. It can result in patents, trademarks, plant breeder's rights and other forms of registered protection under statutes and in unregistered protection, for example, copyright and moral rights.

IP is intangible property that is unique and novel and includes, among other things, ideas, inventions, technologies, concepts, procedures, protocols and systems, literary, artistic and creative works, business methods, industrial processes, chemical formulae, biotechnology and nanotechnology as well as their derived products, computer programs, presentations, names, symbols, confidential information, knowledge or know-how and trade secrets.

Appendix 1 contains an outline of different forms of IP, and the ways in which these specific forms of IP may be protected.

### 1.2. Policy Framework

The primary purpose of Government is to serve the South Australian community. Government, in the course of its ordinary business, can generate IP that is a potentially valuable and significant State strategic resource. Government IP may have commercial value, internal operational value for Government and value for the public good.

The community and industry have an expectation that certain publicly derived IP is transferred and applied. Whilst traditional extension continues to be used for public IP, transfer via commercial arrangements often results in wider application and greater uptake by the market.

This Policy provides an enabling and overarching framework to create a supportive environment to:

- achieve best practice in IP management in Government;
- where appropriate, to facilitate effectiveness of knowledge transfer by Government agencies to the public and private sectors; and
- achieve effective and timely protection of Government IP and, where appropriate, its commercialisation.

Each agency Chief Executive is responsible and accountable to his or her Minister, for the accomplishment of these aims and the implementation of this Policy. Each agency will ensure that its agency-specific guidelines and practices are within the framework of this Policy.

This Policy replaces all previous South Australian Government policies on Government IP.

### 1.3. Guiding Principles

The following Guiding Principles underpin the Policy and must inform all aspects of its implementation:

- (i) The Policy covers all public sector agencies and public sector employees.<sup>1</sup>
- (ii) It is recognised that IP is generated as part of the ordinary business of Government and that some, but not all, IP may have a public good, operational and/or commercial value.
- (iii) Creative activity whose sole purpose is to produce IP owned by Government for commercial exploitation will not be funded by Government, unless it has an associated public purpose.
- (iv) There will be times when the creative activity of public sector employees, primarily for Government or for a public purpose, produces IP that can be commercialised without detracting from the primary purpose.
- (v) To the greatest extent possible, the risks and costs of taking Government produced IP to the commercial market should be borne by the private sector.
- (vi) In most cases of commercialisation of Government IP, it will be appropriate for Government to share in the proceeds of commercialisation. The exceptions will be cases in which it is not in the public interest for the Government to take a share.
- (vii) If the Government has a legitimate need to compete for the services of high quality researchers, it should have the means to do so. Those means could include an appropriate framework for financial and non-financial rewards.
- (viii) A rewards framework for Government employees should not skew the creative effort to the production of commercialisable IP rather than the achievement of the primary Government or public purpose.

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1 "Public sector agency" and "public sector employee" have the meanings defined in the *Public Sector Management Act 1995*.

## 2. IDENTIFICATION, OWNERSHIP AND PROTECTION OF IP

### 2.1. IP Management

Each Chief Executive is responsible to his or her Minister<sup>2</sup> for best practice management of Government IP, which will ensure that:

- There is recognition of Government IP as a potentially valuable asset;
- IP assets are managed and used effectively, prudently and in a fully responsible, transparent and publicly accountable manner;
- The IP is accessible to industry, the community and Government in a way that maximises the overall benefits to the State;
- Benefits from protection, knowledge transfer and commercialisation are evaluated against resources applied to achieve these;
- Risks associated with knowledge transfer and the use and commercialisation of IP are appropriately managed;
- Potential conflicts of interest that may arise with respect to the use and commercialisation of IP are appropriately addressed;<sup>3</sup>
- Agency processes and procedures facilitate the making of judicious and timely decisions about IP;
- Expert advice on legal, contractual, financial and technical issues is sought as appropriate as an integral part of the management, use and commercialisation of IP.

Appendix 2 provides a diagrammatic representation of the IP management process including identification, ownership, protection, knowledge transfer and commercialisation.

### 2.2. Identification of IP

Chief Executives must foster a culture in which public sector employees are aware of the IP Policy, recognise IP and promptly notify the agency of IP created. Systems, business processes and procedures must be established to identify IP created, having regard to the skill base and size of the agency.

### 2.3. Ownership of IP

It is important to determine and recognise the ownership of IP.

Ownership of IP confers certain exclusive privileges. The owner of IP has the right to distribute and/or exploit the IP and in most cases, if desired, to prevent its exploitation by others without the owner's consent. The right to exploit the IP includes the right to control and direct its development, to sell or assign it to third parties or to license to third parties the rights to exploit it.

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2 Note Section 17 of the Public Sector Management Act, 1995, which provides that Chief Executives may delegate their powers and functions under that Act to certain persons.

3 Refer to the *Code of Conduct for South Australian Public Sector Employees*, Commissioner for Public Employment, October 2001 and the conflict of interest provisions of the *Government Boards and Committees, Guidelines for Agencies and Board Directors*, Department of the Premier and Cabinet, July 2000.

IP owners also are responsible, in certain circumstances, for ensuring that the IP rights of other parties are not infringed and that no harm, loss or damage is caused to third parties or to the environment as a result of the use of the IP.

Generally, IP is owned by the creator or author or, in some cases, by the employer of that person. In the normal course of Government activities, IP may be generated by Government employees, by contracted developers or by grant recipients. IP also may be generated jointly through collaboration between Government and other parties from industry, research and higher education institutes or other governments.

Under this Policy the Government owns all IP created by public sector employees, irrespective of when or how the IP was created if:

- Government resources were used to create or develop the IP; or
- the IP was a reasonably foreseeable outcome of:
  - the work being undertaken by the relevant agency; or
  - the employee's responsibilities within the agency.

This does not diminish any fiduciary duty<sup>4</sup> owed by the employee to the Government.

IP may be created and owned by persons or organisations not engaged by Government in an employment relationship, for example:

- contractors and consultants;
- committee and board members;
- students on voluntary placements within agencies, or who receive a nominal payment, scholarship or sponsorship; and
- visitors and volunteers.

Whenever Government enters into an arrangement with any of the above,<sup>5</sup> or agrees to provide government services to another party that may result in the creation of IP, there must be a written contract that deals with the relationship and addresses the ownership of any IP created and imported background IP.<sup>6</sup> Otherwise the other party might claim sole ownership of the IP, notwithstanding that Government paid for its development.<sup>7</sup>

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4 Including but not limited to a duty to act with integrity and in good faith. For further information, see the Public Sector Management Act, Part 2, and the Code of Conduct for South Australian Public Sector Employees issued by the Commissioner for Public Employment.

5 Before entering into IP agreements, students, visitors and volunteers should be advised to obtain independent advice as to their rights and obligations. If appropriate or necessary, the Chief Executive may consider making funding available for this purpose.

6 'Background IP' means IP that is already in existence at the time of entering into a contractual arrangement involving that IP and is made available by a party prior to the development of new IP or during the course of the contractual arrangement.

7 Under the Copyright Act Government owns copyright in works "made by, or under the direction or control of " Government. This applies to works of a contractor or consultant who provides services to Government. Refer Appendix 1.

Where the development of new IP (for example, a new software system) relies on the use of existing IP or builds on existing IP (for example, to create an improvement, modification, enhancement, addition or subtraction to existing material owned by Government or by a third party), ownership of and rights to use the pre-existing background IP also must be addressed.

Failure to address IP ownership, its use or exploitation rights for Government in contractual arrangements with third parties (including arrangements for placement of students, visitors and volunteers) may result in the other party owning the IP, and may hinder Government in delivering its service obligations to the community or give rise to liabilities for Government flowing from the unauthorised use of IP.

Where Government agencies wish to use IP developed by another agency, or where IP is developed jointly with another agency, the arrangements between agencies also should be documented, to avoid any inadvertent conflict or overlap with respect to the use or commercialisation of that IP.

As a starting point, Government should seek to own or share in the joint ownership of IP where Government has participated in the creation or development of that IP (e.g. by cash or in-kind input including the creative efforts of its employees).

However there will be situations where Government ownership is not necessary or desirable and it will be more useful or valuable to Government to allow third parties to own IP under negotiated arrangements.<sup>8</sup> Ensuring that the Government has the right to use the IP for its own internal purposes may be sufficient.

In asserting and negotiating Government ownership or rights to use particular IP, agencies should consider:

- the purpose of the ownership (i.e. whether it is necessary or desirable for the Government to own the IP having regard to its internal use, knowledge transfer and commercialisation requirements);<sup>9</sup>
- in the case of contractors, the nature of the services, the other terms and conditions of the contract, how the IP arrangements may impact on the project cost, and ongoing cost to Government;
- in the case of joint ventures and cooperative projects, any background IP and other resources brought to the project by the participating parties, any further developments to be made or funded by each party and their respective capacities and opportunities to leverage the developed IP for broader application;
- the cost of protecting and maintaining the IP; and

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8 For example, in the normal course of knowledge transfer and commercialisation, Government may choose to not assert ownership of the IP in return for a broad licence (perpetual, worldwide, royalty-free) enabling Government to use the IP, or it may assess that outright assignment of IP to a commercialisation vehicle established for this purpose would deliver the best outcomes.

9 Refer section 3.2 with respect to strategies for assessment and use of IP through knowledge transfer and commercialisation.

- in the case of students, joint appointments or secondments, whether joint or a negotiated proportional ownership with the relevant university, research institution or other third party is indicated.

In the implementation of this Policy, agencies should respect and acknowledge the cultural knowledge and interests of Australian Indigenous communities.<sup>10</sup> The South Australian Government is cognisant of, and sensitive to, the protection, management and commercialisation of indigenous IP or Traditional Knowledge.

## **2.4. Protection of IP**

The decision as to whether and how IP should be protected is important. Appropriate protection can establish and confirm the owner's exclusive rights over the IP and significantly increase its value.

Protecting IP may involve keeping information confidential, seeking registration of patents, designs or trademarks, or enforcing copyright.

Premature disclosure, exploitation or commercial use of information that is comprised in IP may disqualify the Government from obtaining some types of IP protection. For example, confidential information loses its status and commercial value if it is made public, and a patent application may not be valid if the IP on which it is based was previously placed in the public domain by any means (e.g., disclosure through published papers, conference and seminar presentations).

Agencies must have systems and processes in place to review IP, assess whether protection is required, record and monitor the ownership and protection arrangements on an ongoing basis (including relevant patent renewal and expiry dates) and act on any potential infringement. The decision to protect IP should be predicated primarily on its intended use and its potential benefit for the South Australian community, as well as its potential for successful commercialisation.

IP ownership and protection arrangements must be documented in written agreements, recorded in the IP Register<sup>11</sup> and monitored on an ongoing basis. Effective documentation and agreements will assist ongoing and future protection, strengthen the Government's ability to enforce its IP rights in the event of infringement by third parties and enhance commercial attractiveness of the IP.

## **2.5. Education of Agency Employees**

Agency employees must be educated in the recognition of IP generated as part of the ordinary business of Government. This education will include awareness of the public good, operational and commercial value of the IP.

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10 Indigenous cultural knowledge encompasses the cultural, spiritual and other aspects of community heritage and includes traditional use of native flora and fauna, objects, sites of significance and knowledge transmitted from generation to generation of Indigenous Australians. It is noted that Indigenous cultural knowledge may not necessarily be classified as a form of IP with enforceable legal ownership rights. For further information about Indigenous cultural knowledge, see the principles in article 8(j) of the Convention on Biological Diversity <http://www.biodiv.org/convention/articles.asp>.

11 Refer section 2.6 of this Policy.

Chief Executives are responsible for the implementation of ongoing employee education and awareness programs on IP identification and management, according to agency employee need and the nature of the agency's business.

## **2.6. IP Register**

Agencies must establish an IP Register that is kept up to date on an ongoing basis. The appropriate levels of information that ought to be maintained in the Register will be determined by the Chief Executive, having regard to the agency's activities and the nature of the IP it generates. The Register must, at a minimum, record:

- adequate description of IP of a material nature generated in or on behalf of the agency (for example, by third party contractors) or acquired by the agency, as determined by the Chief Executive;
- employee contributors to the IP's creation and development;
- any potential third party rights;
- ownership of the IP, its protection (e.g. patent and plant breeder's rights registration) and commercialisation status; and
- the results of any commercial and non-commercial applications of, and dealings with, the IP (such as distribution, licensing or assignment of the IP) and the performance of any commercialisation model.

In addition, financial information relating to the IP, including reward payments, liabilities, income, expenses and profit/loss where applicable must be recorded, either in the Register or provided in the agency's auditable accounts.

The above information will provide the basis for reporting of IP activities under Section 5.2 of this Policy.

## **2.7. Publication**

It is the responsibility of each Chief Executive to determine whether there will be public disclosure of IP. There must be no publication of Government-owned IP, including at seminars and in academic or research papers, which might tend to disclose or compromise the IP, without the permission of the Chief Executive.

The Chief Executive will establish processes for timely decisions about protection and publication of IP. In those cases where publication will not compromise protection and commercialisation of the IP, or there is no reason to keep the IP confidential, and on balance it is in the public interest to publish the IP, permission to do so will not be unduly delayed.<sup>12</sup>

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<sup>12</sup> Publication (e.g. in academic journals, conference and seminar presentations) is one of the ways in which employees may be acknowledged or rewarded for their contributions to IP - see Section 3.5 of this Policy.

### 3. APPLICATION OF GOVERNMENT IP

#### 3.1. Optimisation of Benefits from Application of Government IP

Government IP is a potentially valuable State asset and its effective use can generate a broad range of benefits to Government and the community.

Appropriate application of Government IP can result in monetary benefits such as net financial gains to Government without detracting from its ordinary business, or net operational gains through defrayment of costs and application of the IP within Government.

Non-monetary benefits also can flow to the community through:

- overall economic growth through the activities of companies that successfully use the IP, conferring direct benefits to the State through the expansion of business opportunities;
- establishment of new industry standards and assistance provided to industry or target user groups;
- creation of additional opportunities for research and commercial collaborations between Government and industry;
- stimulating the emergence of new enterprises and improvements to the IP;
- enhancement of the reputation of the State as an innovator, improvement of its industrial capabilities and attraction of internationally skilled people to the State.

To optimise benefits to the community, Government IP should be actively applied by appropriate commercialisation or by knowledge transfer.

**Knowledge transfer** is the process of taking new knowledge, technology, or knowledge products or services to society without direct monetary reward. This may occur through training and exchange of personnel, tender processes, open distribution, co-development and collaborative arrangements, open licences and other suitable mechanisms.

**Commercialisation** is the process of taking new knowledge, technologies, products or processes beyond research and development and exploiting them into the market place. Commercialisation covers a broad range of arrangements which may result in financial returns.

Appendix 2 includes a diagrammatic summary of the knowledge transfer and commercialisation processes.

In some cases, optimisation of the public benefits may be to allow others to use and exploit Government IP on a non-commercial basis. In other cases promotion of the Government's purpose and the public interest may be to regulate its use and exploitation by others on a commercial basis that results in monetary gains to Government or other benefits flowing to the community.

Where Government does not wish to commercialise or otherwise deal with the IP, and there is no third party that is willing to obtain the IP for some return to Government, the public sector employee(s) who invented or significantly contributed to its creation or development may be offered an assignment or licence of that IP. Such arrangements should be made in a fully transparent and accountable manner.<sup>13</sup>

### **3.2. Operational Strategies for Assessment and Use of Government IP**

Assessment of Government IP and options for its use should take into account the achievement of maximum public benefit as the primary consideration. This benefit may be maximised by knowledge transfer or by commercialisation, without detracting from the agency's primary purpose.

The appropriate IP strategy shall be:

- determined using a structured assessment process; and
- undertaken in accordance with related Government policies and directives.

Prior to undertaking any public dissemination or embarking upon commercialisation of IP and related knowledge and expertise, in specific cases agencies are encouraged to consult and seek advice from other Government agencies and external sources with relevant expertise.<sup>14</sup>

Contractual arrangements for knowledge transfer and commercialisation of IP should be entered into only if the agency has the legal capacity or administrative delegation to do so.

An agency should consider:

- whether it has the power and capacity to undertake the proposed transaction; and
- whether it must first obtain any internal Government approvals, e.g. from Cabinet, the Treasurer or the responsible Minister.

If there is any doubt in this regard, appropriate advice should first be obtained.

Note that the processes to be undertaken by agencies when entering into contractual arrangements may differ according to the legislation and established practices applicable to the agency concerned. Some of these are outlined in Appendix 4.

There is a range of possible IP strategies; all entail a number of assessment steps, decisions and inputs from various sources.

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13 In compliance with the Code of Conduct for South Australian Public Sector Employees, Commissioner for Public Employment, October 2001, and community expectations as outlined in the aims and standards in the Public Sector Management Act 1995 (Part 2) and with the Conflict of Interest provisions of the Government Boards and Committees, Guidelines for Agencies and Board Directors, Department of the Premier and Cabinet, July 2000.

14 Refer list of useful resources, references and links at Appendix 5 to this Policy.

There is no single best approach and informed decisions are made on a case-by-case basis as to whether an opportunity for knowledge transfer or commercialisation exists, whether to pursue it, and if so the most effective manner in which this ought to be done in order to maximise benefits and minimise risks, having regard to:

- the nature and scope of the IP, its scientific and technical validity and stage of development;
- its potential uses, the public good and commercial significance;
- analysis of the market;
- the potential risks, costs, revenues and benefits of the proposed strategy; and
- legal, financial or technical advice.

There may be cases where the proposed knowledge transfer or commercialisation entails significant and inappropriate risk and cost, where it may not succeed in delivering the anticipated financial returns or other beneficial outcomes, or where the benefits may not justify the requisite resources, and the assessment process must address and balance these considerations.

Any proposal should aim to optimise public benefits whilst insulating the Government from unnecessary or disproportionate risk or adverse effects.<sup>15</sup> To the extent possible, risks and costs of taking Government IP to the commercial market should be borne by the private sector.

In some cases, where an agency routinely deals with certain classes of IP (for example, targeted dissemination of IP in training materials) detailed assessment may not be necessary for each instance of knowledge transfer or commercialisation. In other cases (for example, a significant new drug discovery with potential multiple applications, or where a start-up company is proposed) the preparation of an early-stage business case and a subsequent substantive detailed business plan may be indicated.

Government is supportive of active knowledge transfer and commercialisation of its IP and requires that these strategies be pursued where:

- there is no detracting from the agency's primary purpose;
- risks can be managed<sup>15</sup>;
- the value of the IP is maximised;

and there is likely to be:

- a good prospect of the IP earning a net financial return or accruing other benefits for Government or the community;
- increased knowledge transfer to an industry sector; or

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<sup>15</sup> In accordance with Government risk management policies and specifically, *Risk Management Policy Statement, September 2003*. Insulating the Government from unnecessary risk may involve ensuring that warranties given in legal agreements are appropriate and that liability caps or indemnities from liability are included to the extent possible.

- wider public good benefit (such as economic development or international recognition).

### **3.2.1. Knowledge Transfer**

Generally, knowledge transfer is undertaken through open distribution, co-development and collaborative arrangements, training and exchange of personnel, tender processes, licences and other suitable mechanisms.

Prior to entering into such arrangements and depending on the nature and value of the knowledge transferred, it may be prudent to seek legal or other expert advice.

### **3.2.2. Commercialisation**

Commercialisation of IP is most commonly undertaken through assignment or licence to a third party (for example, to a start-up company or other commercial enterprise) however agency-managed commercialisation, partnership and joint venture commercialisation models may be appropriate in some cases.<sup>16</sup>

#### ***3.2.2.1. Assignment or Licence of IP***

Government may:

- assign ownership of its IP outright to a third party under appropriate negotiated arrangements; or
- license the right to exploit IP under certain conditions for a set term.

The assignment or licence may be part of a suite of commercial and non-commercial arrangements with respect to the IP and may involve elements of knowledge transfer and ongoing cooperative projects with universities, research institutes and third party organisations.

Government remuneration for the assignment or licence may include up-front or deferred payments and periodic royalties. The assignment or licence may be in return for other benefits such as information and materials exchanges or payments, equity participation in a commercialisation vehicle, collaborative agreements and other forms of remuneration appropriate to the specific case.

The third party assignee or licensee may be a collaborating partner from the private sector, the research or tertiary education sectors, a start-up company, another Government or Government agency, the end user of the IP, or a combination of these.

Any assignment or license of the IP must be legally documented and, if appropriate, should provide that Government can continue to use the IP for its own purposes.

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16 Approval processes relating to the various commercialisation models will vary. Refer to Section 3.3 of this Policy.

### **3.2.2.2. Start-up Company**

Government may participate in, or otherwise facilitate the establishment of, a start-up company (established under the Corporations Act 2001) which has as its aim the commercialisation of the IP, and to which the IP generally is licensed or assigned.

A start-up company is appropriate when it represents the best option for delivering the Government's objectives in commercialising the IP.<sup>17</sup>

If Government takes shares (equity) in the company in recognition of its IP, the Government may benefit from the increased growth and value of the company, and also may receive revenue through dividends.

Further, the Government may establish or participate in a company limited by guarantee, thereby ensuring that all net commercialisation revenue is applied towards the objectives for which the company was established.<sup>18</sup>

In addition to a membership interest in the company, the Government may license or assign its IP to the company under negotiated contractual arrangements.

Legal and other professional advice should be sought in considering the most appropriate company structure and any arrangements for assignment or licence of the IP to the company.

Where equity is held in a company, the agency Chief Executive must ensure that the Minister is regularly briefed on progress and issues with respect to the company, and that appropriate arrangements are in place for reporting and disclosure of the company's activities to Government in compliance with the Corporations Act 2001.<sup>19</sup>

### **3.2.2.3. Agency-Managed Commercialisation**

When there is no appropriate third party to undertake commercialisation of the IP, and there is public benefit in doing so, the Government itself may take and apply the IP directly to the end user for financial returns.<sup>20</sup>

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17 Some Commonwealth funding programs (eg, the Cooperative Research Centres (CRC) Program) encourage or mandate that IP generated under the program be held in an incorporated entity. Specifically, note the *Guidelines for State Government Participation in CRCs*, approved by Cabinet June 2004, with respect to commercialisation of IP generated within a CRC Program.

18 Companies limited by guarantee generally are established with research, educational, developmental or charitable objectives for the benefit of the wider public or specific community or industry groups. Their members do not receive any dividend distribution or other financial gains from the company by virtue of their participation.

19 The provisions of the Corporations Act 2001, with respect to shareholder rights to receive company information should be noted.

20 The principles of competitive neutrality must be observed in any commercial dealings by Government. Refer to *Competitive Neutrality Statement*, May 2000 and the *Government Business Enterprises (Competition) Act, 1996*

#### **3.2.2.4. Partnership or Joint Venture**

It is open to the Government to enter into a partnership or joint venture arrangement with a third party to mutually develop or commercialise the IP. However such arrangements are rarely used in Government.

### **3.3. Approval Processes**

The Chief Executive must streamline the agency's approval processes for the effective application of IP, and efficient and prompt commercialisation, including appropriate mechanisms to deal with third parties and to make timely and informed decisions at all stages of the IP life cycle.

Decisions to approve the protection and use of IP, knowledge transfer and commercialisation activities must be undertaken in accordance with the legislation, ministerial directions, administrative and financial delegations and approval and reporting processes applicable within the agency concerned.<sup>21</sup>

These requirements may vary according to the precise nature of the activity (notably in the case of equity participation in companies or certain joint ventures), common practices and the provisions of the enabling legislation that governs the agency concerned. Appendix 4 outlines some of these specific approval and reporting processes.

Cabinet approval should be sought also in all cases when:

- the total amount of expenditure or the total cash equivalent value to be provided by an agency exceeds a Minister's financial delegation; or
- funding for the proposed activity requires an additional budget appropriation.

### **3.4. Financial Returns from Commercialisation**

All financial returns from commercialisation are to be used in the first instance to meet the costs associated with seeking and maintaining IP protection, commercialisation of the IP, and any payments due to external organisations.

These associated costs will vary, but generally will include the costs of legal and other expert advice, patents and other forms of IP protection, plant and equipment expenditure, valuations and business planning costs, as appropriate in each case.

**Net Returns** means the balance of revenue (not savings) received (not anticipated or accrued) by Government from commercialisation of the relevant IP, after deducting the associated costs.

Where an agency has adopted a monetary rewards framework<sup>22</sup>, rewards to eligible employees may be provided out of Net Returns in accordance with Appendix 3.

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21 These include any approval processes that are mandated under the *Public Sector Management Act 1995*, *Public Finance & Audit Act 1987*, *Public Corporations Act 1993*, *Treasurer's Instructions* and any specific legislation under which the agency operates (e.g. in the case of hospitals, the *South Australia Health Commission Act*). Refer to Appendix 4 to this Policy.

22 See Section 4 and Appendix 3 to this Policy.

Application of any surplus revenue should be in accordance with negotiated arrangements between the agency and the Department of Treasury and Finance under normal Government financial management practices.

#### **4. RECOGNITION AND REWARD FOR EMPLOYEE CONTRIBUTIONS**

Through the generation, development and application of IP, public sector employees can make significant contributions to the State's international competitiveness and prosperity. The Government wishes to encourage creativity and innovation in the public sector, and to attract and retain high quality employees by equitably acknowledging and rewarding them.

When a public sector employee has made contributions to the creation, development or commercialisation of IP above and beyond the employee's normal duties and responsibilities, the employee may be appropriately recognised and rewarded for that contribution. Where contributing employees are part of a team, provision may be made to appropriately recognise and reward the team members.

Employees should be treated fairly and consistently with respect to recognition of their contributions and allocation of rewards. The provision and nature of the recognition or reward in each case will be as determined at the discretion of the Chief Executive, having regard to the principles in this Policy.

The Chief Executive should establish processes and obtain such advice and information as necessary to make an informed evaluation of the employee's contribution.

The evaluation of whether an employee contribution was above and beyond normal duties, generally will take into consideration whether the idea or creative activity giving rise to the IP was:

- above and beyond the scope of the employee's normal responsibilities or exceeding those required for the conduct of his or her duties; or
- external activity outside of normal working hours, above and beyond assigned employment duties, and for which Government has provided no compensation.

There a number of ways that employees can be rewarded.

Rewards may be non-monetary, such as public acknowledgment of work outcomes, special announcements, awards and staff development opportunities.

In addition, monetary rewards may be provided where Chief Executives have, with the approval of the responsible Minister, adopted and implemented the monetary rewards framework outlined in Appendix 3 to this Policy.

Under this framework, where the Government receives revenues from successful commercialisation of IP, eligible employees may receive rewards in the form of a share of Net Returns or, in certain circumstances, may be given the option to

receive equity in the commercialisation vehicle, in accordance with this Policy and the principles and processes specified in Appendix 3.

## **5. EXPERT ADVICE**

The identification, protection and commercialisation of IP can be complex and agencies should have mechanisms to facilitate access to appropriate, early, expert advice on IP issues. These may include consultations with legal, financial and technical advisers, patent attorneys, commercial consultants and specialised public sector agencies with relevant expertise. This advice is particularly important when negotiating and developing appropriate contractual arrangements, and prior to undertaking legal obligations.

## **6. RECORDS, REPORTING AND REVIEW**

### **6.1. Records**

In addition to the IP Register<sup>23</sup>, agencies are encouraged to record information which will enable a review of the efficacy of the IP management processes, for example:

- a general assessment of the economic or wider public good benefits to the State (such as employment, capital investment, social, environmental) of the application of the IP; and
- information which will improve future knowledge transfer and commercialisation, by analysing lessons learnt through the process.

### **6.2. Reporting**

Chief Executives will report on the agency's IP management, knowledge transfer and commercialisation activities to the Minister annually as part of the agency's normal reporting arrangements.

The records maintained in the IP Register and the overview information set out in Section 5.1 will provide the basis for reporting to the Minister, unless the Minister otherwise determines, for example by reference to a particular class of activities or the value of the transaction.

In addition, specific reporting obligations may apply in certain cases. Where the Minister enters into a joint venture or holds equity in a company as part of a commercialisation strategy, the Chief Executive must, in accordance with statutory reporting obligations and as directed by the Minister, brief the Treasurer with respect to the performance of the joint venture, contractual arrangement or equity holding.

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23 Refer to Section 2.6 of this Policy.

### **6.3. Review of the Policy**

The Department of the Premier and Cabinet will initiate the review of this Policy and its application across Government. It is envisaged that the initial review will occur two years after the commencement of the Policy and thereafter every five years.

## **7. IP GUIDELINES, FURTHER INFORMATION AND USEFUL REFERENCES**

Each agency will review its existing practices, or develop agency-specific guidelines and procedures as deemed appropriate by the Chief Executive, to cater for the agency's particular mission, business and circumstances, within the framework of this Policy.

This may include making specific exceptions of certain categories of IP (e.g. IP comprised in certain copyright materials) that would not be considered for inventor rewards under the monetary rewards framework.

The Chief Executive, Department of the Premier and Cabinet may review the agency- specific guidelines, and provide assistance to agencies as required to ensure across-Government consistency in the implementation of this Policy. Appendix 5 lists other Government agencies and external resources that may assist agencies in developing agency-specific guidelines and procedures, and provides useful references to other Government policies and directives, legislation and web links relevant to IP.

## **8. EFFECTIVE DATE**

This Policy shall commence operation on the 1<sup>st</sup> of July, 2006.

## Forms of Intellectual Property

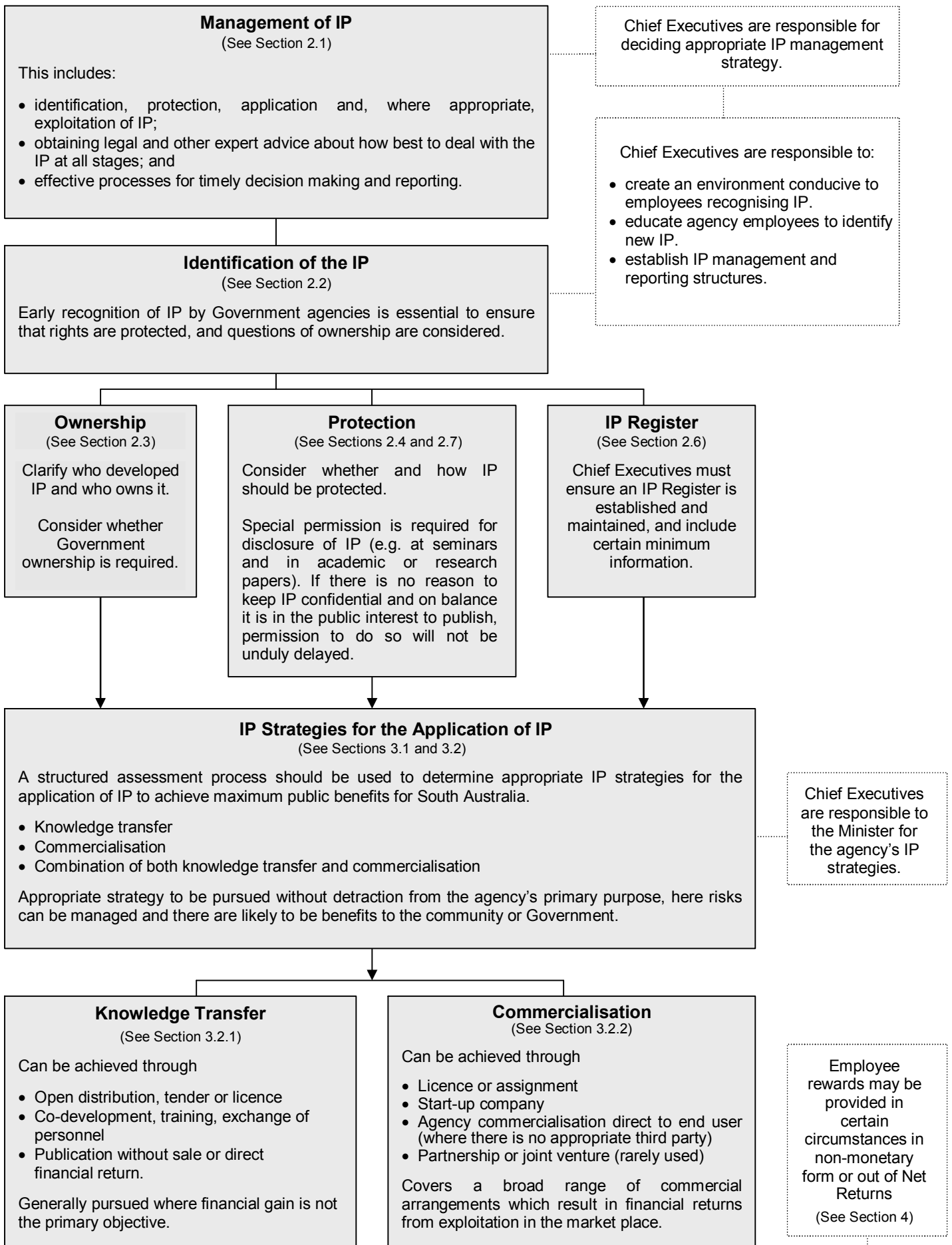
Form of IP	Description	Relevant Laws
<b>Patents</b>	Deal with inventions entailing new or improved products, processes or technology.  Rights arise on formal registration.	Patents Act 1990 (C'th)
<b>Trade marks</b>	Cover words, symbols, sounds, smells or a combination of these that are used to distinguish the goods and services of one trader from those of another.  Rights arise on formal registration.	Trade Marks Act 1995 (C'th)
<b>Designs</b>	Designs for the configuration, ornamentation, pattern, shape or appearance of manufactured goods.  Rights arise on formal registration.	Designs Act 2003 (C'th)
<b>Copyright*</b>	Copyright for original material in literary, artistic, dramatic or musical works, films, broadcasts, multimedia, computer programs and databases.  Rights arise automatically upon creation of the material, without any need for registration or other formal steps.	Copyright Act 1968 (C'th)
<b>Crown Copyright</b>	The State is the owner of the Copyright in certain original works made by, or first published by, or under the direction or control of, the State.	Copyright Act 1968 (C'th)
<b>Moral right</b>	A right of attribution of authorship, a right not to have authorship falsely attributed or a right of integrity of authorship.  A moral right applies to copyright works, with the exclusion of sound recordings, TV/sound broadcasts and published editions.  Is personal to the creator, unassignable, cannot be bought, sold or licensed, is non-economic and cannot be directly exploited for financial gain. It is a right conferred only on individuals not on the State, corporation or other entities.	Copyright Act 1968 (C'th)
<b>Plant breeder's rights</b>	A particular form of patent for new plant varieties. Rights arise on formal registration.	Plant Breeder's Rights Act 1994 (C'th)
<b>Circuit layout rights</b>	Circuit layout rights for the configuration of electronic circuits in integrated circuit products or layout designs.  The Act provides automatic protection. Rights arise automatically on creation when the work is reduced to a 'material form'; thus, circuits do not have to be registered.	Circuit Layouts Act 1989 (C'th)
<b>Confidential Information</b>	Secret information in whatever form may include trade secrets, in-house "know-how", financial and market information, customer lists.	No relevant statute: general law applies.

## Copyright

- Copyright is the most common form of IP owned or used by public sector agencies.
- Copyright may be held in Literary Works (eg journal articles, novels, screenplays, poems, song lyrics, published reports, anthologies, directories and databases), Artistic Works (eg, paintings drawings, sculpture, craft works, photographs, maps and plans) and any embodiment of Dramatic Works, Musical Works, Films, Broadcasts, Multimedia and Computer Programs.
- Copyright protection for most works exists for 70 years (50 years prior to 1 January 2005) from the end of the year of the date of first publication. The type and extent of the rights may differ according to the nature of the copyright material and the circumstances of its creation and use.
- Copyright owners have exclusive rights to deal with their works in certain ways and (subject to some exceptions) to prevent others from doing so. Copyright owners generally have the exclusive right to:
  - reproduce, publish, publicly perform or communicate (including via electronic transmission) and adapt literary dramatic and musical works;
  - reproduce, publish and publicly communicate artistic works;
  - copy cinematographic films and sound recordings and to publicly communicate and cause these to be seen or heard in public; and
  - make a film of a television broadcast, make a sound recording of a sound broadcast, and re-broadcast or communicate to the public by means other than broadcast
- Copyright protects the form or way in which an original idea or information is expressed, not the idea or information itself. Therefore a copyright owner cannot prevent the independent creation by another person of a similar work.
- Special considerations apply to Government works and Government use of copyright material owned by others:
  - **Crown Copyright:** Under section 176 of the Copyright Act, 1968 (C'th), subject to agreement to the contrary, the Government owns copyright in certain original works made by, or first published by, or under the direction or control of Government.
  - Section 176 may apply to works made by a contractor or consultant who provides services to Government may be. It is important to note however that whilst Government ownership of a report, computer program or other deliverable provided by a contractor/consultant in which information is expressed, may be protected under the Act, Government will not necessarily own the IP that is described within that report, program or deliverable, unless there is an agreement with the contractor/consultant that addresses ownership.

- Where IP is created by a Crown employee while performing his/her official duties (i.e. in the course of performing his/her duties of employment), the IP is owned by the Crown as the employer (for example, section 35 Copyright Act 1968). There are limited exceptions to this (e.g. by prior agreement between the employer and employee). Noted that moral rights may still apply to the copyright material created by an employee.
- In certain cases, Government may reproduce copyright material without prior authority of the owners of the material. However Government must pay the owners for reproducing their copyright works.
- Agencies should seek legal advice where required with respect to copyright issues and the application of the Copyright Act, 1968 (C'th) in specific cases.
- **Copyright Notice:** There is no need to put a copyright notice on a work for it to be protected in Australia. However it is good practice to do so as a reminder of the copyright. For works owned by Government, the notice may be in the form - © Government of South Australia, through [name of agency], [Year of creation or first publication]. Additional information advising of restrictions on or permitted uses of the material or contact details to obtain copyright permissions may also be appropriate.

## Managing IP - Process Chart



## Monetary Rewards Framework

### Part 1: Application of the Monetary Rewards Framework

- 1.1. The IP Policy recognises that it is important to the business and effectiveness of Government, particularly agencies in the field of scientific and medical research and development, that they have the means to compete internationally for the services of high quality employees, to foster innovative activity and, where appropriate in the public interest, successful commercialisation of innovations.
- 1.2. In support of these objectives, a Chief Executive may, at his or her discretion and with the approval of the responsible Minister, adopt the monetary rewards framework provided in this Appendix.
- 1.3. Under the agency-specific guidelines the Chief Executive may exclude defined categories of IP (e.g. certain copyright materials) from consideration for inventor rewards in accordance with the specific needs and nature of the agency's business.
- 1.4. This Appendix will apply from the date of approval by the Minister for the agency concerned, or such other date as may be designated by the Minister in approving its adoption in that agency.

### Part 2: Principles and Eligibility Criteria for Rewards

#### 2.1. Where:

- IP has been successfully commercialised (including IP created, developed or commercialised prior to the commencement of the Policy) and Net Returns from commercialisation of that IP are received by the Government; and
- an employee has contributed to the creation, development or commercialisation of that IP above and beyond the employee's normal expected duties and responsibilities;

the employee may be rewarded out of the Net Returns from commercialisation.

- 2.2. Payment of employee rewards resulting from commercialisation of IP can be made only from Net Returns to Government, received by Government from 1 July 2006 onwards.
- 2.3. In order to be eligible for reward from Net Returns received by the Government after 1 July 2006 with respect to IP created, developed or commercialised prior to that date, the contributing employee must be a public sector employee at the time such Net Returns are received by Government. Upon leaving, retirement or death of the employee the provision of rewards from Net Returns ceases,
- 2.4. For IP generated after 1 July 2006, and subject to Part 3, rewards may continue beyond cessation of public sector employment or death of the contributing eligible employee. If appropriate in the event of death of the employee, reward payments may be forwarded to the estate of the deceased employee.

- 2.5. *Net Returns* means the balance of revenue (not savings) received (not anticipated or accrued) by Government from commercialisation of the relevant IP, after deducting the costs associated with seeking and maintaining IP protection, commercialisation of the IP, and any payments due to external organisations. These associated costs will vary, but generally will include the costs of legal and other expert advice, patents and other forms of IP protection, plant and equipment expenditure, valuations and business planning costs, as appropriate in each case.
- 2.6. The provision and nature of the reward will be at the discretion of the Chief Executive, having regard to the principles in the Policy and this Appendix, and on such conditions as the Chief Executive determines, having regard to all relevant considerations in each case, including:
- the scope of the employee's normal duties;
  - the nature and significance of the IP;
  - the employee's contribution and the joint efforts of team members;
  - the existence and ownership of any pre-existing knowledge or background IP;
  - the extent of benefits to the State;
  - the commercialisation timeframe; and
  - any other issues relevant to the IP and the specific case.
- 2.7. In determining the manner in which rewards may be provided and the period over which they may be allocated, the Chief Executive should give due regard to all relevant considerations in each case.
- 2.8. Where several employees are involved in the creation and commercialisation of IP, the Chief Executive will determine the scope of the team effort and the appropriate basis for sharing of rewards among the team members.
- 2.9. Where a start-up company is the commercialisation model it may, in certain circumstances, be appropriate to offer equity in the company to an eligible employee. Cabinet approval must be obtained before any equity in the company may be assigned to the employee.

### **Part 3: Monetary Rewards from Net Commercialisation Returns**

- 3.1. Where the eligibility criteria for the provision of monetary rewards have been met, a contributing employee may be allocated a reward out of Net Returns from each item of IP according to the formula set out in Section 3.2, provided that monetary rewards from that item of IP shall cease 15 years after the initial payment is made to the employee.
- 3.2. For each item of IP, up to 1/3 of Net Returns per annum, or a maximum limit of \$100,000 per annum (CPI adjusted) whichever is the lesser, may be allocated to the eligible employee (or shared among the group in the case of multiple contributors).
- 3.3. If the Chief Executive considers a higher reward is appropriate in any specific case, the responsible Minister may seek Cabinet approval.

**Part 4: Administration and Reporting**

- 4.1. The adoption of this Appendix by an agency must be notified to the Chief Executive, Department of Premier and Cabinet.
- 4.2. Details of the application of commercialisation proceeds, including reward arrangements, must be recorded by the agency, and reported in accordance with Section 5 of the Policy.

## Outline of Approval Processes for Commercialisation Models Specified under Legislation and Common Practices

Government Entity	Legal Issues	Company Model	Contract-based Models: Joint Venture, Assignment, Licensing, Distribution & Tender Arrangements
<b>Administrative Unit</b>	Legal Capacity	The Minister responsible for an administrative unit may undertake any of these models in connection with the Minister's portfolio responsibilities.	
	Approvals	Whilst it is not a legal requirement to do so, it is established practice for a Minister to seek Cabinet approval to form a company or take shares in a company.	The requirements of Treasurer's Instruction 8 to obtain approvals before entering into contracts will apply in relation to these models.
<b>Minister</b>	Legal Capacity	The Premier may undertake any of these models. A Minister may undertake any of these models for the commercialisation of IP in connection with the Minister's portfolio responsibilities.	
	Approvals	Whilst it is not a legal requirement to do so, it is established practice for a Minister to seek Cabinet approval to form a company or take shares in a company.	The requirements of Treasurer's Instruction 8 to obtain approvals before entering into contracts will apply in relation to these models.
<b>Statutory Authority</b>	Legal Capacity	A statutory authority may only undertake any of these models for the commercialisation of IP if it has the power to do so under its incorporating Act.	
	Approvals	Any requirement in the statutory authority's incorporating Act to obtain approvals to participate in these models must be complied with.	
	Approvals	Whilst it is not a legal requirement to do so, it is established practice for a statutory body to seek Cabinet approval to form a company or take shares in a company.	The requirements of Treasurer's Instruction 8 to obtain approvals before entering into contracts will apply in relation to these models.
<b>Public Corporation</b>	Legal Capacity	A public corporation may only undertake any of these models for the commercialisation of IP if it has the power to do so under its incorporating Act.	
	Approvals	Any requirement in the Corporation's incorporating Act to obtain approvals to participate in this model must be complied with. In addition:	A public corporation must not enter into a joint venture arrangement without first obtaining the approval of the Treasurer (Section 27 Public Corporations Act).
	Approvals	<ul style="list-style-type: none"> <li>○ a public corporation must obtain the Treasurer's approval before forming a subsidiary company or holding shares in a subsidiary company (Section 23 Public Corporations Act); and</li> <li>○ Whilst there is no legal requirement to do so, it is established practice for a public corporation to seek Cabinet approval to form a company or take shares in a company.</li> </ul>	The requirements of Treasurer's Instruction 8 to obtain approvals before entering into contracts will apply in relation to these models.

Government Entity	Legal Issues	Company Model	Contract-based Models: Joint Venture, Assignment, Licensing, Distribution & Tender Arrangements
Incorporated Hospital	Legal Capacity	A hospital incorporated under the South Australian Health Commission Act does not have the power to form a company or hold shares in a company.	An incorporated hospital can only enter into any of these models if: <ul style="list-style-type: none"> <li>○ this is for the purpose of performing its statutory function of providing health services as defined in the South Australian Health Commission Act; and</li> <li>○ this is permitted under its constitution.</li> </ul>
	Approvals	Not applicable.	An incorporated hospital should obtain any approvals provided for in its constitution before entering into any of these models. The requirements of Treasurer's Instruction 8 to obtain approvals before entering into contracts will apply in relation to these models.

### Explanatory Notes

1. **Administrative Unit:** With the exception of administrative units classed as statutory authorities, public corporations or incorporated hospitals, an administrative unit is not a legal entity, so cannot itself participate in any of these models.
2. **Company Model:** The formation by Government of a Corporations Act company as the entity for undertaking the commercialisation of intellectual property or the holding by Government of shares in such a company.
3. **Joint Venture Model:** Where a Government entity enters into a joint venture arrangement with a third party (private or public sector) entity with a view to knowledge transfer or commercialisation of intellectual property.
4. **Assignment/Licensing:** The assignment of intellectual property or the licensing of intellectual property by a Government entity to a third party (private or public sector entity) for the purpose of knowledge transfer or commercialisation.
5. **Legal Capacity:** Where a Government entity does not have the legal capacity to participate in the proposed model for knowledge transfer or commercialisation of Government intellectual property, it is open to the relevant responsible Minister to do so where this would be done in connection with the discharge of the Minister's portfolio responsibilities.
6. **Treasurer's Instructions:** Treasurer's Instruction 8 imposes certain requirements upon public authorities (as defined in the Public Finance and Audit Act) to obtain the authority of the relevant Minister or Cabinet before the public authority enters into a contract where the contract value will exceed a specified monetary amount.

## Further Information, Useful References and Links

Key Agencies	Legislation	Related Policies and Guidelines	External Resources
<p>Key agencies or groups that may be consulted in relation to IP, knowledge transfer and commercialisation include:</p> <p>On legal aspects</p> <ul style="list-style-type: none"> <li>• Crown Solicitor's Office</li> </ul> <p>On financial aspects</p> <ul style="list-style-type: none"> <li>• Department of Treasury and Finance</li> </ul> <p>On processes and risk management</p> <ul style="list-style-type: none"> <li>• Prudential Management Group</li> </ul> <p>On initiatives involving economic development</p> <ul style="list-style-type: none"> <li>• Department of Trade and Economic Development</li> </ul> <p>On risk insurance</p> <ul style="list-style-type: none"> <li>• SAICORP</li> </ul> <p>For assistance in accessing commercial advice and evaluating IP</p> <ul style="list-style-type: none"> <li>• Bio Innovation SA</li> </ul>	<ul style="list-style-type: none"> <li>• Circuit Layouts Act, 1989 (C'th)..</li> <li>• Copyright Act, 1968 (C'th).</li> <li>• Corporations Act, 2001(C'th).</li> <li>• Designs Act, 2003.</li> <li>• Freedom of Information Act, 1991.</li> <li>• Government Business Enterprises Competition) Act 1996.</li> <li>• Partnership Act, 1891.</li> <li>• Patents Act, 1990 (C'th).</li> <li>• Plant Breeders Rights Act, 1994 (C'th)</li> <li>• Public Corporations Act, 1993.</li> <li>• Public Finance and Audit Act, 1987.</li> <li>• Public Sector Management Act, 1995.</li> <li>• State Procurement Act, 2004.</li> <li>• Trade Marks Act, 1995 (C'th).</li> <li>• Volunteer Protection Act, 2001.</li> <li>• Various enabling statutes under which specific agencies may be created.</li> </ul>	<p>Code of Conduct for South Australian Public Sector Employees, Commissioner for Public Employment, October 2001.</p> <p>Commissioner for Public Employment Circular 27, Volunteers in Government Agencies.</p> <p>Competitive Neutrality Policy Statement, May 2000.</p> <p>Government Boards &amp; Committees, Guidelines for Agencies and Board Directors, Department of Premier &amp; Cabinet, July 2000.</p> <p>Guidelines for the South Australian Public Service (Protection of Merit and Equity, March 2001).</p> <p>PSMA Determinations. Treasurer's Instructions, No.8 and No. 17.</p> <p><a href="http://www.treasury.sa.gov.au/financial">www.treasury.sa.gov.au/financial</a></p> <p>Risk Management and Audit:</p> <ul style="list-style-type: none"> <li>• Financial Management Policies and Financial Management Framework.</li> <li>• Government Risk Management Policy Statement, September 2003.</li> <li>• Prudential Management Framework.</li> <li>• <a href="http://www.audit.sa.gov.au">www.audit.sa.gov.au</a></li> </ul>	<p>IP Management, Protection and Commercialisation:</p> <ul style="list-style-type: none"> <li>• IP Australia - <a href="http://www.ipaustralia.gov.au">www.ipaustralia.gov.au</a></li> </ul> <p>For further information about copyright and moral rights:</p> <ul style="list-style-type: none"> <li>• <a href="http://www.copyright.org.au">www.copyright.org.au</a></li> <li>• Australian Copyright Council</li> </ul> <p>Patent Attorneys and Legal Advisors:</p> <ul style="list-style-type: none"> <li>• University technology commercialisation groups and private sector organisations specialising in IP asset management, technology transfer and commercialisation services.</li> <li>• Convention establishing the World Intellectual Property Organisation, July 1967.</li> <li>• Intellectual Property Commercialisation - A Business Manager's Companion, Paul McGuiness, Sydney, LexisNexis Butterworths, 2003 ISBN 0 409 31900 7.</li> <li>• Australian Valuation Handbook, Leadenhall Australia Limited.</li> </ul> <p>For further information about Indigenous cultural knowledge:</p> <ul style="list-style-type: none"> <li>• Article 8(j) of the Convention on Biological Diversity. <a href="http://www.biodiv.org/convention/articles.asp">http://www.biodiv.org/convention/articles.asp</a></li> <li>• <i>Principles and Guidelines for the Protection of Heritage of Indigenous Peoples</i>, by Erica Irene Daes.</li> </ul>