

HERC IP Submission

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We are university researchers and leaders with decades of experience in intellectual property law, and leadership in research, university management, Australian Indigenous research and law reform.¹ We currently comprise a research team conducting a publicly funded research project investigating ownership of research produced in Australian universities, and how to facilitate access broader access to the research conducted in the university sector: *Producing, Managing and Owning Knowledge in the 21st Century University* (Australian Research Council DP200110578). In that project we have reviewed IP policies and questions of ownership across five institutions, conducted legal analysis of the intersections between university policies, law, and employment contracts and enterprise bargaining, and undertaken interviews with research leadership in the sector.

We welcome initiatives that support unlocking the value of Australian research and maximise benefits for taxpayers and engage with the Chief Scientist's project on open access, which shares these common themes. **Access to University research outputs, and university research, are closely interrelated, both as a practical matter and in terms of how ownership arises in law, and cannot be treated as separate.**

We appreciate the need to reduce transaction costs for businesses in dealing with university bureaucracy and agree barriers to negotiation on IP include lack of money, time and expertise on both sides and lack of understanding of each other's needs and objectives. We welcome a more harmonised approach, including around questions of IP ownership, which will facilitate access research outputs including publications, and to research as discussed in the consultation paper.

However, our research indicates that, as a result of intersections between law, contract, and sector university policies, the question of who owns IP generated in Australian universities is less straightforward than the Consultation Paper assumes. Confronting these questions, and harmonising IP policies across the sector is a necessary prior step *before* the framework envisaged by the Consultation Paper could have utility in practice.

¹ Professor Jill McKeough was a key member of two major intellectual property reviews: The Intellectual Property Competition Review Committee (IPCRC), *Review of Intellectual Property under the Competition Principles Agreement*, September 2000, (Ergas Review) and was Commissioner in charge of the Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122, November 2013.

DISCUSSION QUESTION 1. What would ensure the HERC IP Framework is applied consistently across universities (research institutes/centres, colleges, faculties, departments and researchers) and industry?

To achieve the objectives set out in the Consultation Paper there needs to be a deeper consideration of IP law and its operation in practice in universities, in relation to:

- **First ownership of University IP**
- **Understanding University Needs in IP Management**
- **Ownership and authorship in relation to Indigenous Knowledge**
- **Managing cultural change in research communities**

None of the issues raised below are insurmountable. As part of our research we have formulated more detailed recommendations about addressing these problems to unlock the value of Australian research and create better value for money for the tax-payer from our universities. We are happy to discuss these in more detail.

First ownership of University IP

The Consultation paper assumes that first ownership of knowledge and intellectual property generated within Australian universities lies with the University as employer. The legal position however is not straightforward.

Universities reformed IP Policy in the wake of *University of Western Australia v Gray* [2009] to strengthen employer claims to employee IP. Our analysis suggests that these reforms are not as effective as has been assumed. First, IP policies at Universities are not always clearly incorporated into employment contracts, which can complicate their legal efficacy.

Second, the position in relation to ownership of **copyright** requires particular attention. This is relevant to the proposed HERC framework, which will, to be effective, need to cover copyright licensing, including for creative works. University IP policies vary in relation to ownership of employee-generated copyright (research outputs and creative works). For example, some university policies claim ownership of copyright in research outputs and creative works; others say that authors are the first owners of copyright, but retain a non-exclusive licence for certain university purposes. Many policies may not be effective to address the status of works created by researchers in non-research or other non-standard positions.

There are good reasons behind these complex arrangements: Universities do not want to manage publication decisions, but do wish to avoid paying to use their own academics' work (via statutory licences for educational copying), and to enable the storage of research in institutional repositories. These arrangements **impact the legality of commercialisation agreements and publishing agreements that would facilitate open access (OA) to research, and could undermine the effectiveness of the kinds of standard agreements contemplated in this process.**

With the right leadership, **these problems can be fixed by adopting a harmonised approach to University IP Policy.** This is an a priori issue that needs addressing to underpin any of the Model agreement examples suggested in the Consultation paper.

Understanding University Needs in IP Management

Addressing the copyright ownership questions to make the proposed HERC system work, will impact other areas of university activity.

Well-executed OA can assist in freeing up university funds to support the true cost of research. OA research and open repositories are desirable not only to help unlock research translation but also to reduce the cost of education and facilitate life-long learning in the 21st century. If poorly implemented, OA does not prevent the tax-payer double and triple paying for material via different forms of copyright licence that apply to the educational activities of universities, meaning that the internal funding situation will continue to deteriorate impeding research translation.

Government could work more closely with Universities Australia and help align university interests in IP management across portfolios to support more effective research translation in Australia. **A ‘whole of the university’ copyright approach is required within universities, including linking IP licensing and database costs with statutory licences in education, to support university engagement with the public interest agenda of the Consultation Paper and the Chief Scientist’s initiative.**

We welcome the Chief Scientist’s leadership in advancing research translation and uptake through championing OA. We also note the efforts of NHMRC and ARC to improve industry and public access to research publications. It is not clear from the Consultation Paper whether these efforts are being linked to the research translation and commercialisation agenda set out and who is to provide strategic management to establish the guiding principles to support it. **We would encourage greater clarity around leadership so that stakeholders are not tasked with multiple consultations and initiatives that ‘talk past’ each other.**

Poor address to Indigenous Knowledge

The Preamble to the *National Agreement on Closing the Gap 2019* notes ‘an unprecedented shift in the way governments work, by encompassing shared decision-making on the design, implementation, monitoring and evaluation of policies and programs to improve life outcomes for Aboriginal and Torres Strait Islander people’. This shift is not reflected in the way Indigenous research is discussed in the Consultation Paper. There are a number of sector research policies that reflect self-determination and create **mandatory obligations** on researchers including the Australian Code for the Responsible Conduct of Research (2018); NHMRC Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities: Guidelines for researchers and stakeholders (2018) and AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research (2020). **Compliance entails much more than obtaining free, prior and informed consent. The Consultation Paper does not go far enough; Aboriginal-led research agendas need to be engaged. There is a need to fully align the treatment of commercialisation agendas with the mandatory codes governing research.**

Without this, there is no possibility of collaboration with university-based researchers and Aboriginal communities.

Managing cultural change in research communities

The Consultation Paper is primarily engaged with research that is most connected to, or directed towards, industry and application, including research conducted under the various Linkage programs, and commissioned research or research that *could* be commissioned. This targeted approach recognises that not all university research is suitable for immediate commercialisation or uptake. This is a realistic approach. The key is providing the necessary support to University researchers so they know when and how to use any HERC framework. Our research to date suggests that there are problems with researchers being faced with inconsistent demands, and left to try to understand and follow policies as best they can. University researchers need institutional support and consistency to help realise the public good goals that the research funder and government is seeking. **This requires better IP information that is tailored to the workplace context and interacts with the university policy frameworks that affect the whole of life of the researcher, beyond an institutional IP policy.**

We are producing best practice guides for researchers in 2022. We would welcome the opportunity to discuss how this information could support the agenda set out in the Consultation Paper. We can be reached via email at k.bowrey@unsw.edu.au.

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