

SUBMISSION TO HIGHER EDUCATION RESEARCH COMMERCIALISATION INTELLECTUAL PROPERTY FRAMEWORK DRAFT AGREEMENTS

23 February 2022

Universities Australia (UA) welcomes the opportunity to make this submission to the consultation released by the Department of Education, Skills and Employment (the Department) regarding the Higher Education Research Commercialisation Intellectual Property Framework (the Framework) draft agreements.

UA is the peak body for Australia's 39 comprehensive universities. Our members are spread across Australia, in both regional and metropolitan areas. They educate more than a million students each year and undertake all of the university research in Australia that adds to the country's stock of knowledge, and to its economic and social wellbeing.

UA understands and strongly supports the Government's drive to lift economic prosperity and strengthen society through research commercialisation. UA has a strong interest in ensuring that there are appropriate mechanisms in place to properly support the collaboration of universities and industry and to commercialise research that is of great public benefit, in a research landscape that supports the pipeline of ideas and across disciplines.

Concerns have arisen throughout the process of this consultation, and others related to the Framework. Many of these were included in UA's response to the consultation in October 2021, found online [here](#). The speed at which this process is moving may lead to adverse outcomes and could result in a failure of the Framework to meet its desired goals. UA is pleased to see the Department seek comment on the proposed draft agreements, but the timeline within which interested parties are required to provide feedback is following that speedy and worrisome trajectory. Fifteen working days to review multiple complex and technical IP agreements, as well as their plain English equivalents and associated practical guide does not lend itself to thorough review of the terms and their potential impact upon the sector.

UA understands that the Government intends to convene a Framework Advisory Committee to assist with the development and implementation of the Framework. UA strongly supports the formation of this group and considers that it will be an important step in ensuring that the Framework is appropriately developed and fit for purpose.

One issue we continue to face is the proposed mandatory nature of parts of the Framework. As detailed in our attached submission, requiring universities to use these boilerplates to collaborate with industry and commercialise publicly beneficial research, may have a number of adverse impacts. By way of example, requiring universities to use many of these templates may result in less industry collaboration, rather than more, in the event that industry partners are not agreeable to the terms. UA understands that industry partners may suggest the use of different agreement terms, but

the university would not be privy to make the same request if the commercialised research relied on funding from either the Trailblazer Universities Program or Australia's Economic Accelerator Program. This means universities are in a suboptimal negotiating position when it comes to commercialisation, with their required terms mandated, while industry partners have the ability to propose their own, which may be more favourable to them. This immediately puts universities in the position of junior partners in any commercialisation negotiation.

The mandatory nature of these agreements also implies that all IP should be treated equally. This is simply not the case and the drafts lend themselves in favour of negotiations regarding patents, but may fall short in appropriately considering adjacent rights such as trade marks and copyright. If the agreements were instead guidelines or non-mandatory boilerplates, they could be adjusted accordingly to best support the type of IP in question.

Furthermore, as the US National Science Foundation states: ¹

“...it should be noted that most patented inventions are never commercialised by business. They are neither representative of all inventions nor are they measures of innovation. Many valuable inventions that are commercialized [sic] are not patented. Companies choose a variety of strategies to protect their inventions and intellectual property. For example, U.S. companies rate trade secrets higher than patents in their importance for protecting intellectual property, which is true even for R&D-performing firms.

Care should therefore be taken to allow universities the flexibility to interact with industry in the manner that works for both industry and universities on the path of achieving commercial impact from the research.

As noted in UA's previous submission, we are unaware of any jurisdiction that requires its universities to use mandatory IP commercialisation agreements. The Lambert Toolkit in the UK, by way of example, is voluntary and serves a very useful purpose to guide collaboration and commercialisation rather than to mandate it.

The potential impact on existing and new international business partnerships in implementing a mandatory Framework should be considered, given the barriers experienced in forming international industry/university partnerships with model agreements that were not obligatory.

UA also notes that the agreements fail to address matters related to Indigenous intellectual property and importance of such not just as a matter of ethics, but as a matter of law.

UA had the opportunity to read the proposed agreement drafts in late 2021 by way of a non-disclosure agreement with the Department. We will not at this time be providing a detailed response to the drafting of those agreements because it is our view that before attention be turned to terms and conditions, the Government should consider the feedback already provided through the previous consultation and work with stakeholders to understand concerns and improve outcomes.

It is UA's strong view that the agreements should, at the very least in the first instance, be voluntary in all circumstances, to allow universities and their research collaborators time to determine if they are fit for purpose. This is the most appropriate way to determine if the terms of the agreements, and the intention behind them, will meet the goal of supporting, rather than hindering, research commercialisation.

UA would be grateful if the Department would make the submissions made by both universities and industry to the October 2021 consultation public, as well as submissions to this consultation. It is valuable in this kind of consultative process for all interested parties to have a clear understanding of the position across the sectors concerned.

¹ US National Science Foundation, National Science Board. Science and Engineering Innovation Indicators 2018, [Chapter 8](#).