

INTELLECTUAL PROPERTY POLICY

1 PURPOSE

The purpose of this policy is to:

- provide a framework for the use, generation, acquisition and management of intellectual property (IP) in government, and
- ensure that government-owned intellectual property is used to generate public value, knowledge transfer and innovation to the fullest extent possible.

2 POLICY RATIONALE

IP is routinely generated in the course of government business and includes written material, websites, software, infrastructure design and various types of research and analysis.

In many cases government-owned IP may have significant commercial or public value which must be recognised, protected and optimised.

The commercial exploitation of IP is not the primary concern of government. Rather, the focus is to make sure the ideas, creative works, inventions and discoveries generated are used to maximise public value.

Government is often not best placed to further develop IP. Instead, where there are opportunities for innovation, government should allow staff or third parties to further develop and commercially benefit from IP—provided this can be done on a fair, equitable and transparent basis and clearly generates public benefit, knowledge transfer or innovation, and does not erode the state's IP.

In some cases information held by government is subject to public disclosure, whether or not IP subsists in that information. This does not mean government forgoes its IP rights in that information.

3 SCOPE AND APPLICATION

This policy applies to IP generated, acquired or held by agencies on behalf of government. It applies to all public sector agencies and public sector employees (as defined in the *Public Sector Act 2009*). The principal types of IP are contained in Appendix 1.

Each type of IP gives its owner exclusive rights, for a defined period, to use, exploit and commercially benefit from the invention, discovery, idea or creative work to which the right applies as a reward for the effort they have invested.

Most types of IP are created by federal legislation (and are often subject to international treaties). Some rights arise automatically upon creation, while others are exercisable only upon registration.

4 GUIDING PRINCIPLES AND OBLIGATIONS

Agencies must adopt appropriate policies, procedures and practices to give effect to this policy addressing the following requirements:

Ownership of assets	1	Generally, IP generated or acquired in the course of government business, or otherwise held by agencies, is to be owned by the government.
	2	In some cases where IP is generated by third parties under government contracts a broad licence for government to use IP will be legally sufficient without the need to own the IP (e.g. State Procurement Board standard goods and/or services agreements)
	3	To facilitate collaborative work with third parties, joint ownership or negotiated rights to access or use work may be considered.
Asset identification, registration and review	4	Agencies must adopt procedures to identify and register government-owned IP.
	5	Agencies must adopt procedures that identify IP rights within physical works.
	6	Agencies must maintain a register of IP assets with significant commercial or operational value, detailing ownership, licensing, protection and value. Copyright material is not required to be captured on the register.
	7	Agencies must have processes for periodic review of IP registration and evaluation of each asset's ongoing use and value.
Training and awareness	8	Agencies must ensure staff, statutory office-holders, board/committee members, contractors and volunteers are aware of and trained in relevant procedures.
Contracts	9	Agencies must ensure all contracts and other legal documents with third parties effectively address IP.
	10	Ownership of IP should be specifically addressed whenever it may be generated or acquired (e.g. under terms of employment or other contractual arrangements).
	11	If the agency will not hold ownership of the IP, access and reuse of that IP should be specifically addressed to maximise public value.
Open access	12	Agencies must comply with all relevant laws and policies in relation to open access to government information and other IP assets.
	13	Where appropriate, agencies should provide open access to non-sensitive government information or other IP assets on a proactive basis, particularly if this may generate public value, knowledge transfer or innovation. Where possible, information should be made available free of charge.
	14	Non-sensitive government information, particularly research publications, should be made available to the public subject to Creative Commons 4.0 international licensing.
	15	Agencies must consider whether open access to IP assets compromises its commercial or operational value.
Use within government	16	Agencies must seek to share non-sensitive IP within government wherever possible, subject only to other policies and procedures (including data sharing policies).

	17	Sharing and use of government data between government agencies is governed by the <i>Public Sector (Data Sharing) Act 2016</i> .
	18	Agencies must provide information to Ministers, Cabinet, the Premier's department and the Treasury in relation to IP held by them upon request.
Use for commercial benefit	19	Agencies may commercialise government-owned IP if the benefit of commercialisation outweighs the benefit to the public of open access to the government-owned IP. Consideration must be given to government strategic priorities, policies and procedures in determining this.
	20	Agencies may, for valuable consideration (such as a regular royalty, equity or other in-kind contribution), assign or license government-owned IP on either an exclusive or non-exclusive basis to third parties for commercial exploitation, where to do so would optimise public value or foster innovation.
	21	Licensing of government-owned IP to third parties must be done through a fair, transparent and accountable process and documented in legally binding agreements.
	22	Where a decision is taken to assign or license government-owned IP to a third party for commercial exploitation, agencies must ensure that associated risks and costs are borne by that third party to the fullest practicable extent.
	23	Commercial return to agencies from IP may come in the form of upfront or deferred payments, periodic royalties or other consideration. The costs of commercial exploitation must be met from its net commercial returns.
	24	Current or former staff may also be granted an assignment of IP or a licence to commercially exploit IP, where to do so would optimise public value or foster innovation, subject to no less than 5 per cent net return to government. Current staff should only be granted an assignment of IP or a licence to commercially exploit IP if conflicts of interest can be avoided.
	Staff incentives and rewards	25
26		Agencies are to ensure staff are entitled to acknowledgment and protection of their moral rights in copyright works (particularly recognition of the author(s) of research work).
27		The responsible portfolio Minister may adopt a monetary rewards framework, allowing for monetary rewards to be awarded to agency staff responsible for generating, developing and applying IP. This would allow monetary rewards at the discretion of the relevant agency Chief Executive, provided: <ul style="list-style-type: none"> • Expert input is obtained (see 34-36 below) • Rewards do not exceed a third of any net financial returns • Rewards comply with the financial thresholds set out in Treasurer's Instruction 8.
28		Staff incentives and rewards should be managed in ways that are fair and equitable and maintain the integrity of government decision-making and administration.
29		Staff incentives and rewards may continue after the eligible employee has left government employ and may also accrue to the estate of a deceased staff member.

Asset protection	30	Appropriate action must be taken to protect commercial or operational value of IP and to optimise public value (including through registration, and renewal of patents, designs, trademarks and other registrable IP).
	31	Agencies must adopt procedures for protection and enforcement of IP with commercial or operational value.
	32	Agencies must adopt procedures to avoid premature disclosure where that may result in a diminution in the value of the IP.
Expert input	33	Agencies must seek and document appropriate legal, commercial and technical advice in relation to their policies, procedures and practices and significant decisions relating to IP.
	34	Expert input may include advice from the Crown Solicitor, patent attorneys, commercial advisers or consultants, technical advisers or consultants or other agencies with specialised knowledge or expertise.
	35	Agencies must not make a decision to assign or license IP to a third party under commercial arrangements, or offer staff incentives or rewards, without input from an expert panel including representation from the Crown Solicitor's Office and a commercial expert. If the decision involves monetary rewards or assigning or licensing IP to a current or former public sector employee, the panel must include a commercial expert from a separate agency. The advice of an expert panel is not required for licensing of data to use in aggregated national datasets
Classes of intellectual property	36	It is open to agencies to adopt general policies, procedures and practices for specific types of IP routinely arising as part of that agency's business.

Agencies must take care to consider the risks commercialisation may expose government to in choosing the most appropriate vehicle for commercialisation. Agencies must not engage in direct equity investment in start-up businesses unless undertaken through the SA Venture Capital Fund, as part of a cooperative research centre or with Cabinet approval.

The application of any surplus revenue from commercial exploitation of IP must be negotiated between the agency and the Department of Treasury and Finance under normal government financial management practices.

5 RELATED POLICIES AND LEGISLATION

The use of IP remains subject to other government policies, procedures and practices as well as relevant legislation, which include:

- the Open Data Framework
- the Public Value Framework
- the Joined-Up Policy Framework
- the Better Together engagement principles
- relevant Premier and Cabinet circulars
- relevant Treasurer's instructions
- *Freedom of Information Act 1991* (SA)
- *Public Sector (Data Sharing) Act 2016* (SA)
- *State Records Act 1997* (SA)
- *Circuit Layouts Act 1989* (Cth)
- *Copyright Act 1968* (Cth)
- *Designs 2003 Act* (Cth)
- *Patents Act 1995* (Cth)
- *Plant Breeder's Rights Act 1994* (Cth)
- *Trademarks Act 1995* (Cth)

6 RESPONSIBILITIES

The following parties are responsible for compliance with this policy:

Ministers	<ul style="list-style-type: none">responsible to Cabinet for implementation of this policy within their portfolios
agency chief executives	<ul style="list-style-type: none">responsible to Ministers for implementing this policymust maintain agency policies and procedures consistent with this policy
agency staff	<ul style="list-style-type: none">must comply with relevant agency policiesshould be aware of ethical obligations as public servants
statutory office-holders, board/committee members	<ul style="list-style-type: none">must comply with relevant agency policies, terms of appointment and relevant legislation
contractors	<ul style="list-style-type: none">must comply with relevant contractual requirements
volunteers	<ul style="list-style-type: none">must comply with relevant volunteer requirements

7 IMPLEMENTATION AND REVIEW

This policy is effective from 28 September 2017.

Agencies are responsible for reviewing their existing policies, procedures and practices upon commencement of this policy.

The Chief Executive of the Department of the Premier and Cabinet (DPC) may issue guidelines to assist agencies in interpreting and applying this policy and may review any agency policies, procedures or practices to ensure consistency with this policy.

DPC is responsible for reviewing this policy within 5 years of its implementation.

APPENDIX—FORMS OF INTELLECTUAL PROPERTY

Copyright, circuit layouts	<ul style="list-style-type: none">• applies to original artistic, literary, dramatic and musical works; films, sound recordings, broadcasts and multimedia outputs; software and databases• creates exclusive rights to use and exploit for a defined term• rights arise automatically on creation and are generally owned by the Crown when created by its employees or in certain limited circumstances where the work or subject matter other than a work is made or first published under the direction or control of the State under the <i>Copyright Act 1968</i> (Cth)• a particular form of copyright for circuit layouts arises automatically on creation under the <i>Circuit Layouts Act 1989</i> (Cth)• rights are assignable as property and licensable
Copyright—associated moral rights	<ul style="list-style-type: none">• a right to attribution of authorship, a right not to have authorship falsely attributed and a right of integrity of authorship• applies to copyright works and cinematograph films• rights arise automatically on creation under the <i>Copyright Act 1968</i> (Cth), are personal, unassignable and unable to be exploited for commercial benefit
Patents	<ul style="list-style-type: none">• applies to original inventions or discoveries entailing new or improved products, processes or technology• creates exclusive right to use and exploit for a defined term• rights arise on registration under <i>Patents Act 1990</i> (Cth)• a particular form of patent is plant breeder's rights which arise on registration under the <i>Plant Breeder's Rights Act 1994</i> (Cth)• rights are assignable as property and licensable
Designs	<ul style="list-style-type: none">• applies to original designs for the configuration, ornamentation, pattern, shape or appearance of manufactured goods• creates exclusive rights to use and exploit for a defined term• rights arise on registration under <i>Designs Act 2003</i> (Cth)• rights are assignable as property and licensable
Trademarks	<ul style="list-style-type: none">• applies to words, symbols, sounds, smells or a combination thereof used to distinguish a trader's goods and services• creates exclusive right to use and exploit for a defined term• rights arise on registration under <i>Trademarks Act 1995</i> (Cth)• rights are assignable as property and licensable
Confidential information	<ul style="list-style-type: none">• confidential secret information such as trade secrets, in-house know-how, financial and market information and customer lists• governed by general law principles including contractual law