

Your Ref: ACIP Review - Collaborations between the Public and Private Sectors: The Role of Intellectual Property

Quote in reply: TIPS Committee

22 June 2011

Mr Allen
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Dear Mr Allen

COLLABORATIONS BETWEEN THE PUBLIC AND PRIVATE SECTORS: THE ROLE OF INTELLECTUAL PROPERTY

Thank you for providing the Queensland Law Society Technology and Intellectual Property Subcommittee (TIPS) an extension of time to prepare comments on the ACIP Review on the collaborations between public and private sectors.

The submission ***attached*** has been prepared by the Queensland Law Society TIPS Committee.

If you have any queries regarding this submission, please do not hesitate to contact our Policy Solicitor, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au

Yours faithfully

Bruce Doyle
President



Queensland **Law Society**

Technology & Intellectual Property Sub-Committee

**Submission in response into the Review of
Collaborations between the Public and Private
Sectors: The Role of Intellectual property**

June 2011

QLS TIPS SUBMISSION IN RESPONSE INTO THE REVIEW OF COLLABORATIONS BETWEEN THE PUBLIC AND PRIVATE SECTORS: THE ROLE OF INTELLECTUAL PROPERTY

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This Submission

This submission has as a fundamental premise, that intellectual property rights (IPR), encourage and promote public and private collaborations rather than representing a by-product or 'afterthought' of such collaborations.

A factor upon which this premise is based is that IPR provide a competitive free zone in which to recover the costs of research and development and profit from the commercialisation of the IPR. Conversely, without IPR, the incentive to collaborate is diminished where there is limited scope to protect the results of the collaboration from other legitimate competitors.

The submission therefore focuses upon matters which might hinder the incentive to collaborate, such as:

- an inequality of bargaining positions despite prima facie positions in IP legislation;
- a failure to recognise the moral rights of the inventor or designer.¹

A substantial body of case law evidences that the failure to recognise and address the collaborators' interests in the IPR at the beginning of the collaboration, results in the attempted reconstruction of often inadequate arrangements to secure the IPR.ⁱⁱ

The following matters are considered necessary, to achieve the 'mutual benefit' referred to in the definition of the term 'collaboration' contained in the 'Call for Submissions'ⁱⁱⁱ:

- A code of conduct, particularly on the part of the public sector, in relation to certain collaborations resulting in IPR;
- A discernable recognition of the 'starting position' policy (variable by agreement) as reflected in the IPR regimes, as to ownership and use rights of any intellectual property which is the product of the collaboration;
- Mechanisms for the reasonable remuneration of the parties to the collaboration unless these are clarified in any contract between the Parties.

This submission concentrates on two principal interactions between Government and the Private Sector regarding Intellectual Property, namely:-

- Research and development funded by the Public Sector;
- Supply Chain provision of Goods & Services to the Public Sector, and a discrete issue;
- The remuneration under Chapter 17 of the *Patents Act* 1990 for patentees exploiting the invention at the time of the exercise of the rights of the Crown under that chapter.

Introduction

Collaborative research is the result of a realisation that one researcher or a team of researchers might achieve less in a particular area of research, than if they collaborated with another researcher, or team/s of researchers, whereby their combined accumulated knowledge and resources would produce greater research than one sole researcher.

The Australian Government has recognised the important role of collaborative research and the necessity to implement strategies to pursue and encourage this research methodology.^{iv}

Universities, the repositories of numerous research projects, seek to nurture an environment where potential inventors interact, collaborate and contribute to a project or a number of projects. These involve interacting with others in a myriad of research activities.^v

Collaborative research is utilised and encouraged in industry and academics are encouraged to seek positions within industry as collaborative researchers.^{vi}

One patent involved in litigation, concerned a collaboration between an Australian group and an overseas team - the Australian team itself being a collaboration for the purpose of realising innovation.^{vii}

The Intellectual Property experience

Collaborations involve complex funding relationships generally involving certain research KPI's and are almost certain in research projects to involve rights in relation to intellectual property. The collaborations may take many forms. Some examples:

1. A and B wish to collaborate with a view to conducting research, which if discovered, would lead to patentable subject matter. It is a usual venture that A might have the technical expertise while B provides the funding;
2. A owns a patent, a design or has conducted research the results of which are contained in a report (copyright), which likely to be a copyright work. B wishes to collaborate with A to conduct research in a related field;
3. A owns a patent, a design or the copyright in a relevant report, which is required for the collaborative research programme of B and C to proceed.

One thing is clear: collaborations are likely to give rise to:

- Ownership and licensing of rights issues;
- Entitlements to remuneration from the exploitation of the intellectual property rights by one or more of the collaborators.

A clear definition of what is a ‘collaboration’

In many cases, the decision to combine the respective resources to specified objectives to an end, is collaboration. However, take an example where officers in the public sector encourage an SME, to create a solution to a particular problem in the field.

The SME is briefed on the indicia of the solution (the object), but given no specifications. The SME fulfils the requirements of the object, which happens to be patentable subject matter. Is that collaboration?

A code of conduct, particularly on the part of the public sector, in relation to collaboration

This is necessary where the prime research and development is undertaken by the private sector participant at the expense and without any direction from the Government body that the latter expects to own the Intellectual Property inevitably arising from the R & D. The position was stated by a member of the sub-committee, that the consideration of a code should be mindful of implications for government, such as fiscal accountability the subject of positive obligations preserved in statute. In addition, the member expressed the view that rigid codes may give rise to a disincentive to collaborate.

A discernable recognition of the ‘starting position’ policy (variable by agreement) as reflected in the IPR regimes, as to ownership and use rights of any intellectual property which is the product of the collaboration.

The intended outcomes regarding the ownership of IPR should be stated in both contract and guidelines well in advance of the R & D commencing. This clarification will avoid latter disputatious debate about who does, or should, own the resultant rights.

Mechanisms for the reasonable remuneration of the parties to the collaboration

The Commonwealth and States, have a right under Chapter 17 of the *Patents Act*, to exploit an invention, whether that invention is in relation to a granted patent or the subject of a patent application. Such exploitation is not an infringement.^{viii} Although, this right might be seen to be separate and distinct from the collaborations envisaged by the review, it respectfully cannot be ignored, as it is preserved in the statutes creating the IPR and has the ability to override any collaborative arrangement.^{ix}

In the case of a patent, the Commonwealth or State may exploit the invention themselves or through authorised persons, such authority being able to be given before or after the act/s of exploitation.^x

The Commonwealth or State is however, required to pay remuneration for the exploitation to the nominated person or patentee.^{xi}

The relevant provisions as to remuneration are as follows:

S 165:

Remuneration and terms for exploitation

(1) ...

(2) *The terms for the exploitation of the invention (including terms concerning the remuneration payable to the nominated person or the patentee) are such terms as are agreed, or determined by a method agreed, between the relevant authority and the nominated person or the patentee or, in the absence of agreement, as are determined by a prescribed court on the application of either party.*

(3) *For the purposes of subsection (2), the terms, or the method, may be agreed before, during or after the exploitation.*

(4) *When fixing the terms, the court may take into account any compensation that a person interested in the invention or the patent has received, directly or indirectly, for the invention from the relevant authority.*

Chapter 17 and specifically s 165, do not stipulate any methodology for the calculation of the remuneration, but simply provide that it be on agreed terms or failing agreement, by assessment through the courts.

There are not many cases in this area for clarification of the methodology, however, in *Stack*, a matter which settled during the hearing of the claim for assessment of remuneration, the primary judge considered that the exercise of the Commonwealth or State's right, might be in the nature of a compulsory licence.^{xii} The following exchange took place during the hearing of the matter:

Queen's Counsel for the applicant/patentee: Well, your Honour, one doesn't have to be confined to a mere licence fee, with respect, if the remuneration, which the court finds just and reasonable...

His Honour: But isn't that though in general the way in which a patent would be exploited by a licence? I mean it is in effect, I suppose, arguably a compulsory licence, so might it not be the right approach to say what we're doing, what we are to be compensated for is the use of our invention, not on the basis that we manufactured all of the products, but that we have hired the intellectual property?

In *Stack*, the corporate applicant had filed expert evidence, for remuneration based on damages for lost profit, as it was exploiting the invention, having won the first tender of the Council, to supply the patented water meters to the Council.

Immediately prior to this exchange, Senior Counsel for the BCC addressed his Honour, in relation to the applicant's claim for lost profit:

Queen's Counsel for the BCC: Your Honour will see what they're setting out is a lost opportunity, a conventional damages claim.

His Honour: Well, why isn't that right?

Queen's Counsel for the BCC: Well, in our respectful submission, it presupposes that there was effectively an enforceable right to deal with the council and that they would have had the benefit to build a business based upon dealing in these water meters with the council – and the short answer in law is, 163 says it's not right.

It should be noted that, his Honour's comments could in no way be elevated to the status of a 'preliminary view' on the matter. Several times through the hearing, his Honour stated the appropriate method to deal with the issue was for the parties to make submissions on the point referring to the relevant authorities for their propositions.^{xiii}

However, the exchanges indicated the diverse views which are arguable. The licence fee/royalty approach presents no problem for an inventor who does not have the means or the inclination to manufacture the invention. It then becomes a question of industry equivalents and comparable royalty rates. For a nominated person or patentee who is preparing to manufacture or has been in the process of exploiting the invention, the royalty approach represents a drastic reduction in the remuneration, it would receive by the exploitation. In addition, the licence fee approach takes little or no account of a redundant factory site or equipment, which might have been acquired for the sole purpose of the exploitation.

In support for the licence fee approach, the BCC referred generally to a UK decision *Re Patchett's Patent*.^{xiv} In *Patchett*, the invention was a novel machine gun, which *Patchett* developed whilst employed by Sterling. Between 1944 and 1953, Sterling, an existing gun manufacturer, manufactured machine guns in accordance with the patent. In 1953, the War Office decided that their Sterling gun would replace the existing Sten gun.^{xv} The Crown manufactured the machine guns between 1956 and 1964 in Royal Ordnance factories in accordance with the patent.

The primary judge had considered that the patentee should be compensated for a factory standing idle, by reason of the exercise of the Crown use right. Lord Diplock, in the Court of Appeal did not agree. Relevantly his Lordship said:

The sum payable by the Government department is not compensation for an infringement by the Crown of the patentee's monopoly rights, for no infringement is involved. It is erroneous to regard a patentee as having an exclusive right to manufacture or permit the manufacture of the patented invention, for that is a right which is shared by the Crown. The sum payable under section 46(3) is in the nature of remuneration payable to the inventor or his successor in title for the use made by the Crown of his invention pursuant to that concurrent right.

The public policy which underlies the Statute of Monopolies and the successive Patents Act, is and has always been to promote the trade and prosperity of the realm by encouraging the invention of any manner of new manufacture. This it does by affording the inventor an opportunity to obtain reasonable or adequate remuneration for the skill and ingenuity devoted to devising the invention and any expense incurred upon developing it. The references to reasonable or adequate remuneration I take from sections 39(1)(b) and 23(1) of the Patents Act, 1949. The trade and prosperity of the realm is not promoted by the mere existence of the invention but by its being put to use. Its value to the realm, which is the consideration for the rights granted to the inventor of the patent depends upon the use which is in fact made of the invention and not upon the identity of the person by whom that use is made. That value is neither enhanced nor diminished by the invention's being manufactured by the patentee instead of by some other person.

If the patentee happens to be in business as a manufacturer and chooses to manufacture the invention himself, he will no doubt hope to make a profit on its manufacture, as he would upon the manufacture of any other commodity. Whether he can manufacture it more or less economically than any other manufacturer will reflect his efficiency as a manufacturer and not his skill as an inventor. That his efficiency as a manufacturer would enable him to make a higher profit on its manufacture than other manufacturers, or his inefficiency would involve him in a loss, cannot affect the value of the invention to the Crown which has a concurrent right to manufacture the invention or to authorise other manufacturers to do so for its use.

On principle, therefore, the remuneration payable to the patentee for the use made by the Crown of the invention pursuant to its concurrent right of user is not, in my opinion, affected by the fact that the patentee himself carries on business as a manufacturer for profit or that he would have been capable of fulfilling an order by the Crown for the goods which the Crown has in fact chosen to manufacture for itself, or to authorise other manufacturers to make for it. These are irrelevant considerations in the assessment to be made by the court under sections 46(3) and 48 of the Act. (Underline added)^{xvi}

Diplock LJ considered this was the appropriate method finding support in the treatment in the Crown use situation, of the exclusive licensee's rights.

Confirmation for this view is to be found in section 47 of the Act, which deals with the rights of persons other than the patentee to receive or to participate in payments made by the Crown under section 46(3). Sub-section (4) is of particular relevance. It deals with the cases where an exclusive licence has been granted by the patentee in consideration of royalties.

In rejecting the 'loss of profit' approach, His Lordship concluded:

This provision seems to me to make it clear that it was not the intention of Parliament that payments made by the Crown in respect of the exercise of its right of user of an invention under section 46 should include any sum to compensate a person who would otherwise have had an exclusive right to manufacture the invention for his loss of manufacturing profit due to the failure of the Crown to buy the goods from him. It would be unjust and arbitrary if patentee and exclusive licensee were treated differently in this respect.

It follows that I reject the "loss of profit" basis on which the appellant's claim was based. So did the learned judge. He did, however, express the view that the fact that the patentee was also a manufacturer would have been a relevant factor in determining the amount of the award if it had been established as a fact that the patentee would have been able to fulfill an order by the Crown for the purchase of the goods which in the event it procured by exercising its powers under section 46. As he reached the conclusion of fact that the appellants could not have fulfilled such an order he took no account of the fact that the appellants were manufacturers so that the views which he expressed upon this aspect of the case did not affect the amount which he in fact awarded to the appellants. But whether in the result they were obiter dicta or part of his ratio decidendi, I think that they were wrong.

In recognition of the exception, where a patentee is exploiting or preparing to exploit the invention, when the Crown Use rights are exercised, the UK parliament specifically introduced legislation, effectively rejecting *Patchett's Patent*.

The relevant provision in the *Patents Act 1977* (UK) is s 57A which provides generally for compensation to be paid on a loss of profit basis. There are sub-sections of refinement and qualification but the main aspects are as follows:

Compensation for loss of profit

57A.-

(1) *Where use is made of an invention for the services of the Crown, the Government department concerned shall pay -*

(a) to the proprietor of the patent, or

(b) if there is an exclusive licence in force in respect of the patent, to the exclusive licensee, compensation for any loss resulting from his not being awarded a contract to supply the patented product or, as the case may be, to perform the patented process or supply a thing made by means of the patented process.

(2) Compensation is payable only to the extent that such a contract could have been fulfilled from his existing manufacturing or other capacity; but is payable notwithstanding the existence of circumstances rendering him ineligible for the award of such a contract.

(3) – (7).....

The provision was added as part of the 1988 amendments under the *Copyright, Designs and Patents Bill 1987* (UK). Relevant pages of the Second Reading speech in the House of Commons are attached. Attention is directed at Column 1 on page 87, to the comments of Mr Butcher and following. References are made in the parliamentary speeches to registered designs, as the parallel provision in Crown use cases, was made in relation to registered designs.

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As said above, in *Stack*, the patentee had fulfilled the first tender to supply the water meters. The second and subsequent tenders went to parties who the patentee had sub-contracted to make parts to fulfil the first BCC tender.

Recommendation:

Chapter 17 be amended to provide a 'loss of profit' approach to remuneration in circumstances set out in s 58A of the *Patents Act 1977* (UK) (as amended), namely where a patentee is exploiting or preparing to exploit the invention.

Supply Chain Management

The private sector regularly engages with Government in a series of supply transactions regarding goods and services where Intellectual Property is in play. For example, when Government acquires goods or services from the private sector through the formation of a supply chain, complex Intellectual Property issues can arise. Generally the rights will adhere to the author, that is members of the supply chain, unless this default position is amended at the outset of the relationship.

Where Government is sourcing complex or innovative goods or services from the private sector, an element of Intellectual Property will:

- travel with the deliverables sourced with the private sector; and
- be provided to the Government as part of the Contract.

Unless there are either or both of:

- clear guidelines, or
- contractual clarification

between the parties, then there can be confusion regarding the appropriate good root of title in the Intellectual Property Rights inevitably or automatically created by the supply chain and in order to meet the specifications of the goods or services ordered by the Government. The Government might intend that they should acquire, not just the goods and services but the consequential rights of Intellectual Property inherent in them. That acquisition should impede the supply chain's capacity to ultimately supply other customers.

Some industry sectors have an elevated capacity and history in dealing with the Government over issues of Intellectual Property supplied as part of goods or services delivered in response to Government orders. As well the Government has had stated preferences to own Intellectual Property sources with good or services delivered to them by the private sector, especially in the IT sector. Government could reasonably argue that the need to protect public information within IT systems warrants their IP ownership in IT systems developed for them. Despite the complexity of Government Enterprise Architecture and the need to securely protect public information from criminal activity or exploitation, the demand to own IP in many government IP systems highlights that government itself has limited comprehension of the differentiation between IT systems development, customisation, and configuration. A more realistic understanding of the characteristics and nature of the IPR associated with these stages of IT system implementation should enable government to achieve its objectives of information security, while the commercial interests are better able to commercially exploit the IPR where it is appropriate to do so.

Difficulties arise however when industry sectors supplying the Government with less experience and sophistication in the identification and management of Intellectual Property issues. This is often the case

in the manufacturing sector which itself is still coming to grips with the role that IPR play in their own market dynamics. Without a facility to clarify critical issues of IPR ownership there is a considerable spectrum of opportunity of unforeseen difficulties to arise. These complex issues require guideline transparency. These issues are as follows:

- The differentiation between New IPR developed by the supply chain and Existing IPR which might historically be owned by the Government after – clarity of which party owns what existing IPR and who owns new IPR.
- The application of Moral Rights in favour of the Supply Chain. – There seems no process other than subsequent recourse to law if Moral Rights are breached by the Government after acquisition. Even more so that the ‘government’ as a non-homogeneous body is comprised of individuals who might misuse Moral Rights, creating layers of roadblocks and extreme cost of litigation where Moral Rights may be claimed to have been breached.
- The application of Moral Rights as they might apply to the design of Physical Objects need clarification. The association of Moral Rights with copyright is generally clear; but it is unclear in application to physical objects, and similarly unclear as to the rights of transformation of a physical object or the embedded intellect in the physical object. This requires guideline clarification.
- In registration of certain elements of IPR, namely designs, patents and trademarks, there is little rigour to verify or validate the current IPR and their ownership, and/or Moral Rights. The right to make these applications requires clarification.
- With Government, the commercialisation of IPR should be ancillary to the Government and agency core business. While the issues of information security are significant to the public interest as stated above, Government should be in the business of the community service delivery, not necessarily in the ownership of commercial IPR ownership. The clear statement on the Government’s entitlement and intentions on the IPR delivered by Supply Chains is critical.
- With Government, it should commercialise only IPR which itself develops in its own right using its own funds and resources, not those developed by private sector supply chains. Government should not own IP which is developed in any JV with the private sector and should only commercialise its interests with the JV partner.^{xvii} Government should be subject to probity responsibilities in any purchase transaction.
- With Government, if any supply chain(s) develop IP, it should be clear and unequivocal what the IP actually is, and with whom such IP ownership rests. There should be no automatic assumption that the Government, Agency, or local Government authority has ownership by virtue of supply contract(s), and their related clauses and conditions. A responsibility to act in good faith also should apply to dealings in IP. More definitive guidelines should facilitate fair dealing without the vagaries of what may be implied in a supply transaction.
- Many Government Agencies may not have the legal right to IPR ownership, but may have the right to ‘control’ or use IPR ownership. This definition of the authority is very unclear. Different kinds of Government agencies appear to adopt different approaches. A whole of Government approach, clearly stated in advance is necessary.
- The power or right to enter into agreements over IPR or make IPR undertakings should be clarified. The respective corporate Authorisations and Delegations provisions would be clearly

stated with respect to Intellectual Property. For example, individuals in Government or local Government do not normally have the right to agree to IPR arrangements where those are substantive to the transaction. It must be by specific written delegation of the Authorised Officer, or of the Council, or of the Minister.

- No pre-emptive insistence on Government or local Government IPR ownership should occur without a Business Case which is subject to requirements for accountability and transparency. Such a Business Case must clearly identify the IPR and all related parties across the matter; and their proposed justification for ownership and the objectives which the Government has in dealing with them.
- Once IPR guidelines are settled and adopted, misuse of IPR in contravention of the guidelines in Government and Local Government should be misconduct under the CMC Act, or similar legislation on misconduct in other jurisdictions. It is unclear at present whether such misuse would, in fact, apply, and the confidentiality matters under the Act do not extend to the extent of IPR delivered by supply chains.
- IP relationships with Government and the private sector or individuals should be formal agreements, the form of which needs collaborative settlement, if not public debate. The implied term for the Government to act in good faith has too much uncertainty, particularly when the litigation to seek a court judgment is costly and protracted, and is inconsistent with the inherent commercial value of IPR, and the protection of any such IPR from other party exploitation.
- The evolving principles of probity in purchasing should especially be actively embraced by public agencies. Then pre-eminence in the market place affords Government a superior, if not, intimidating presence and influence in dealing with self funded supply chains. Probity guidelines need to be settled and their application reinforced by training given to all levels of Government personnel dealing with private supply chains.

Endnotes

ⁱ 'Moral rights' are a statutory creation identified in Part IX of the *Copyright Act* 1990 (Cth). The term is used in this submission in the sense reflective of those protections.

ⁱⁱ For example: *University of Western Australia v Gray* (No 20) (includes corrigendum dated 29 April 2008 and 22 April 2008) [2008] FCA 498 (17 April 2008)

ⁱⁱⁱ Call for Submissions at p14.

^{iv} The Australian Government introduced in the 2004/2005 budget, the National Collaborative Research Infrastructure Strategy (NCRIS), whose focus was to co-ordinate and identify strategies promoting collaborative research as an essential tool for innovation:

The Australian Government has recognised the need to bring more strategic direction to Australia's investment in research infrastructure. In the 2004-05 Budget, the Government announced that the National Collaborative Research Infrastructure Strategy (NCRIS) would be implemented to provide the greater focus and coordination required. Funding of \$542 million to 2010-11 was allocated to fund the Strategy in the *Backing Australia's Ability: Building Our Future through Science and Innovation* package...The Advisory Committee submitted its recommendations to the Minister in July 2005 following a public call for submissions and extensive consultations with stakeholders. The Minister has accepted the recommendations as the basis for the implementation of NCRIS. The key principles underpinning NCRIS, reflecting the Advisory Committee's advice, are that:

- Australia's investment in research infrastructure should be planned and developed with the aim of maximising the contributions of the R&D system to economic development, national security, social wellbeing and environmental sustainability.
- Infrastructure resources should be focussed in areas where Australia is, or has the potential to be, world-class (in both discovery and application driven research) and provide international leadership.
- Major infrastructures should be developed on a collaborative, national, non-exclusive basis. Infrastructure funded through NCRIS should serve the research and innovation system broadly, not just the host/funded institutions. Funding and eligibility rules should encourage collaboration and co-investment. It should not be the function of NCRIS to support institutional level (or even small-scale collaborative) infrastructure.

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- Access is a critical issue in the drive to optimise Australia's research infrastructure. In terms of NCRIS funding there should be as few barriers as possible to accessing major infrastructures for those undertaking meritorious research.
 - Due regard be given to the whole-of-life costs of major infrastructure, with funding available for operational costs were appropriate.
 - The Strategy should seek to enable the fuller participation of Australian researchers in the international research system.

National Collaborative Research Infrastructure Strategy Committee, *Strategic Roadmap (Exposure Draft)* (2005) Parliament of Australia

<<http://www.dest.gov.au/NR/rdonlyres/97ACCF02-0860-484F-B200-278EB609FA20/10385/ExposureDraftforWebSiteApril06.pdf>> at 24 July 2006;

The need to promote collaboration between State Government agencies and between those agencies and external research providers with the view to greater innovation was recognised by the Western Australian Government in 2002:

The Premier's Collaborative Research Program was developed in 2002 response to the Premier's Science Council report entitled *Report into Research In Western Australian State Government Agencies*, which identified the need to support increased collaboration between State Government agencies and between agencies and external research providers. The first round of the program, through which funding of \$600,000 was available, was run in 2003.

As a result of the importance of enhancing research activity in State Government agencies and given the success of the first round of the Premier's Collaborative Research Program, available funding for the current, second round of the program (2004/05) has been increased to \$1 million over three years.

Office of Science and Innovation, *Premier's Collaborative Research Program* (2005) Department of the Premier and Cabinet <<http://www.scienceandinnovation.dpc.wa.gov.au/index.cfm?event=collaborativeResearch>> at 24 July 2006.

^v In May 2003, as part of the *Our Universities: Backing Australia's Future* policy, the Australian Government announced that it would establish a taskforce to develop a nationally integrated research infrastructure strategy to apply to public higher education institutions and publicly funded research agencies: NCIRS strategy; Queensland University of Technology states on its website:

Queensland University of Technology has an excellent track record in collaborative research involving industry partners, Government (local, state and federal) and community organisations... Collaborative research at QUT spans a variety of disciplines including but not limited to biomedical innovation, construction management, nanotechnology, interaction design, human vision technologies, education, diagnostics, information security, cyber law and molecular farming...QUT's success in collaborative research and partnerships with industry is underpinned by our acknowledged strength in applied research, and our ability to translate research outcomes into real-world solutions.

Office of Research and Research Training, Collaborative Research (2004) Queensland University of Technology<<http://www.research.qut.edu.au/oresearch/collaborativ/>> at 24 July 2006.

Similarly, Sydney University have recognised the greater emphasis on collaborative research:

The University of Sydney Short Term Visiting Collaborative Research Fellowships are offered to postdoctoral researchers of high standing at any stage in their career to share and disseminate new and original ideas and/or techniques, initiate and undertake collaborative research and facilitate interaction and training of University staff and students... The University has a rich and diverse research base enabling significant and multi-disciplined research collaboration at all levels, from regional to major international collaborative partnerships.

Research Department, Short Term Visiting Collaborative Research Fellowships (2006)

<<http://www.usyd.edu.au/research/fellowships/visiting.shtml>> at 24 July 2006;

Dr Kylie Mansfield, Collaboration Department of Physiology and Pharmacology (2003)

<<http://psych.med.unsw.edu.au/psychweb.nsf/page/home>> at 24 July 2006:

Collaborations: My research is part of a team effort involving Prof Elizabeth Burcher and Dr Lu Liu (Physiology and Pharmacology, UNSW) and Associate Professor Kate Moore and Ms Vittoria Lazzaro (Obstetrics and Gynaecology, St George Hospital) along with clinical urologists Prof Richard Millard and Dr Ken Vaux.

^{vi} For example, interest holders in the mining industry recognise collaborative research as an integral part of maintaining a competitive advantage:

Minerals Down Under: collaborative research in the minerals industry

Minerals Down Under coordinates minerals research from exploration through mining to processing, to ensure the future competitiveness of Australia's resource base. Minerals Down Under (MDU) aims to identify and solve scientific and technical challenges that inhibit the future competitiveness of our resource base in an increasingly globalised industry, thereby securing ongoing national benefit to Australia as a result of its comparative advantage in minerals.

The vision of Minerals Down Under is to develop collaborations that will help Australia add A\$1 trillion to its in-ground resource base and re-establish its position as a pre-eminent global destination for exploration investment.

Minerals Down Under provides an umbrella to pull together research work along the full minerals value chain from exploration through mining to processing.

'CSIRO...is in an excellent position to coordinate large-scale research efforts in the minerals field'

Dr Rod Hill, Group Executive, Information, Manufacturing & Minerals
Mineral Exploration, *Minerals Down Under: collaborative research in the minerals industry* (2006) CSIRO<
<http://www.csiro.au/csiro/content/standard/ps1ey,,.html>> at 1 August 2006.

University academics are encouraged to look to industry for collaborative research opportunities:

The changing nature of research has seen the arrival of a more collaborative approach to research activities. The Australian Research Council's strategic direction is targeted to more collaborative projects as outlined in their paper Knowledge and Innovation: A policy statement on research and research training.

This collaborative approach is a good way for junior academics to develop their own research profiles so that they may be funded for more individual work. As emphasised in this guide the future of research funding will strongly be determined by linkages - ie collaboration with industry partners.

Collaborative research gives you a starting point for developing research skills without feeling you are completely on your own. Ideally it should be about learning from those with more experience, but they need to see the importance of their development role also, and be committed to improving the research skills of junior staff rather than taking a back seat once funding has been obtained.

Research and Development, *Collaborative Research* (2006)
<<http://www.research.murdoch.edu.au/grants/mo/ecrcollaboration.html>> at 1 August 2006.

^{vii} *Novartis AG v Bausch & Lomb (Australia) Pty Ltd* [2004] FCA 835 (Merkel J, 24 August 2004), [29]:

The invention the subject of the patent is claimed to achieve ophthalmic compatibility for periods of extended wear. The invention was the outcome of the "SEE3" project, a collaboration between Ciba Vision in the United States, Ciba-Geigy's Central Research Unit in Switzerland, and the Cooperative Research Centre for Eye Research and Technology ("CRCERT") in Australia. CRCERT was itself a collaboration between various Australian research groups, including the second applicant and the Cornea and Contact Lens Research Unit ("the CCLRU") at the University of New South Wales. The SEE3 project was headed by Paul Nicolson ("Nicolson"), who was called as a witness for Novartis. Other people who played significant roles in the SEE3 project and/or the patent's drafting, and who were called as witnesses for Novartis, included the Ciba Vision patent attorneys for the United States and Europe respectively, Scott Meece ("Meece") and Joerg Dietz ("Dietz"), and Lyn Winterton ("Winterton") who developed the ionoton measurement for ion permeability.

^{viii} *Patents Act* s 163(1).

^{ix} *Patents Act* 1990: Chapter 17; *Designs Act* 2003: Part 8; *Copyright Act* 1968 s 183.

^x *Patents Act* s 163(2)

^{xi} *Patents Act* s 165.

^{xii} *G.S. Technology Pty Ltd v Brisbane City Council* ('BCC') No. QUD 268 of 2006 Transcript 13 December 2007 P-34 lines 38-46.

^{xiii} *Ibid* P-30 lines 10, 40-42, 47 – P-31 line 3.

^{xiv} *Re Patchett's Patent* (1967) RPC 237.

^{xv} *Ibis* at p239.

^{xvi} *Ibid* p251-252.

^{xvii} An exception occurs in circumstances invoking s 176 of the *Copyright Act*.