

VICTORIA

Auditor General

Victoria

Managing intellectual property in government agencies

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AUDITOR GENERAL
VICTORIA

The Hon. Monica Gould MP
President
Legislative Council
Parliament House
Melbourne

The Hon. Judy Maddigan MP
Speaker
Legislative Assembly
Parliament House
Melbourne

Dear Presiding Officers

Under the provisions of section 16AB of the *Audit Act 1994*, I transmit my performance audit report on *Managing intellectual property in government agencies*.

Yours faithfully

JW CAMERON
Auditor-General

20 July 2005

Foreword

The development of ideas and the application of new knowledge can position an organisation ahead of its competitors. Intellectual property (IP) is often at the heart of these new innovative goods and services, and is an important and valuable asset that needs to be properly managed.

For government agencies, proper management of IP is challenging. If agencies do not protect IP, the state may lose valuable knowledge and its application. Conversely, if the management of IP is too restrictive, the asset may be under-utilised and the community benefit unrealised. Agencies are also major consumers of IP owned by others, so the use of this IP needs to be prudently negotiated and managed.

This audit assessed the effectiveness of the management of IP assets in selected government agencies. This report makes some important observations about the public management of IP and recommends the need for more explicit recognition, management and application of IP in the public sector.



JW CAMERON

Auditor-General

20 July 2005

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1. Executive summary



1.1 Overall conclusion

Intangible assets and intellectual property (IP) are increasingly important in today's economy. Government agencies deal with many different kinds of IP, for example, scientific research, information technology solutions, information datasets such as global information systems (GIS) and social research.

The ineffective management of IP poses a number of risks to organisations, including risks of liability and of lost opportunities. This audit considered whether selected government agencies effectively manage their IP assets.

Intellectual property includes copyright material, trademarks, patents, registered designs, plant breeder's rights, circuit layouts and confidential information. It is currently managed without a whole-of-government policy framework. The guidelines in existence relate to copyright only; however, several agencies currently use the guidelines on copyright to support their approaches to managing other, non-copyright IP.

There is currently little proactive management of IP in the agencies examined - many take a default position that the state must own all IP created under funding agreements or through purchasing contracts. IP is routinely vested in the state through the use of clauses in contracts and agreements without any analysis of whether significant IP will be created. We found there is little analysis of whether other access models, rather than state ownership, would promote better project or organisational outcomes.

There is little in place to ensure that agencies are aware of IP owned under agreements, or have established mechanisms to facilitate use and access. Monitoring of contract and funding agreement terms relating to the creation and use of IP is weak. This leads to a tendency for IP to be "locked up"¹, and therefore it is less likely that it will realise its full potential as a public asset.

The audit found some gaps in the policies, guidelines and processes in IP management. However, the lack of clear data makes it difficult to assess the size of the risks associated with IP.

¹ The terms "locking up" and "unlocking" IP are commonly used in debates about the public management of IP. "Locking up" IP refers to the protective management of IP, where exclusive rights are asserted and the use of, and access to, IP are restricted. The "unlocking" of IP refers to an open management style that favours a wide dissemination and sharing of the information, knowledge and ideas protected by IP laws.

An IP framework needs to be developed that:

- Encourages agencies to consider IP issues during the planning phase of projects, before tendering of government work and at the planning phase of funding decisions.
- Supports flexible decision-making about the allocation of IP ownership and access. Rather than routinely vesting IP in the state, agencies need to actively consider the optimal arrangements to deliver government, agency and project objectives, and put arrangements in place to support this position.
- Supports the active management of IP to facilitate the “unlocking” of the asset for wider dissemination and use.

1.2 Policy and direction

At a whole-of-government level, guidelines and directions on the management of IP in Victoria are piecemeal. The current policies and guidelines provide limited assistance in individual agencies’ management of IP. However, government has not clearly articulated how public IP assets should be managed to support the statewide policy direction provided by *Growing Victoria Together*, and *Victorians. Bright Ideas. Brilliant Future*.

The planned revision of the copyright policy by the Department of Justice will address some of the current gaps and weaknesses in the guiding framework for government agencies. However, this policy will not apply to all types of IP that public sector agencies manage; for example, trademarks, patents and registered designs. The draft copyright policy makes this clear, and agencies need to ensure that staff are aware of its applicability and limitations.

Although agencies are not required to have their own IP policies, we found that many have one. In the individual agencies where policies were further developed, we found that staff had a better understanding of, and were more consistent in, their approach to IP issues.

However, a number of agencies that have stewardship of significant IP resources do not have policies to guide staff. In these agencies, staff lack direction in managing one of the most valuable resources in today’s economy.

Decision-making on allocation of IP rights is a crucial and challenging part of managing IP. Agencies have a responsibility to manage resources in line with their organisational objectives and for the benefit of the community. Effective allocation of IP rights can protect the state's interests while ensuring that IP is accessible by the parties best positioned to capitalise on it for the benefit of the state.

At an operational level, translating this general obligation to manage resources for the benefit of the state is not simple or straightforward. Agencies can assist staff by clarifying and documenting the kinds of considerations that should be taken into account.

The lack of documented decision-making criteria has an impact on the transparency and defensibility of decisions. Decisions on allocation of IP rights can have significant economic consequences, and the current lack of a clear framework exposes staff to risks that their decisions are not seen as fair and impartial.

Current advice on IP matters in the agencies we audited was generally limited to legal advice. This is essential, and we found it to be comprehensive and accessible. Legal advice needs to be obtained early, but should not drive the initial considerations. It should be complemented with other perspectives; taking into account financial, operational and social considerations.

Recommendations

- 1. That the government nominate an agency to take responsibility for the development of a whole-of-government policy on all IP. This policy will need to be developed in conjunction with the Department of Treasury and Finance, the Department of Innovation, Industry and Regional Development, the Department of Justice, the Department of Premier and Cabinet, and line agencies.**
- 2. That the Department of Justice complete its planned revision of the copyright policy and guidelines for departments on copyright management as a priority.**
- 3. That government departments and agencies develop policies providing detailed guidance on managing IP in line with the whole-of-government direction and organisational objectives.**

1.3 Day-to-day management of intellectual property

The agencies that participated in the audit identify and protect their significant IP, but not always at an early stage. For copyright, identification and protection is often a matter of routine process rather than active planning and management. It needs to be better integrated into project planning methodologies, so that IP likely to be produced in projects is identified at an early stage, and appropriate arrangements are made to ensure that it is protected.

Effective protection of IP also requires that there are clear policies for employees on ownership of IP. Currently, the conditions for non-executive staff in the Victorian public sector refer only to copyright and are silent on other forms of IP. While this is a low-risk for most agencies, as there is minimal development of other forms of IP, amending the *Code of Conduct for the Victorian Public Sector* as part of any broader review of Victorian Public Service conditions would clarify the issue.

Agencies also need to consider issues of attribution of authorship to employees and possible implications of the moral rights amendments to the *Copyright Act 1968* (Cwlth). While public sector agencies rarely acknowledge authorship, where they do so, moral rights need to be considered.

There is limited and dispersed record keeping of IP in the agencies. IP record keeping should not be an end in itself. However, adequate record keeping is fundamental to managing assets effectively.

During 2005, agencies will have to implement Accounting Standard AASB 138 *Intangible Assets*. This requirement is an opportunity to identify and properly record significant IP managed by agencies.

The audited agencies rely on vesting arrangements in contracts and agreements to protect the agency against risks of IP infringements and liabilities. Little monitoring is done of these vesting arrangements. Similarly, when agencies licence-in and out IP, there is an expectation that the terms and conditions of the licence will be automatically complied with. Where infringement is discovered, it is usually by chance. Agencies should not necessarily monitor the use of all IP; instead, monitoring efforts should be commensurate with the risk that IP infringement poses to the agency.

Recommendations

4. **Code of conduct provisions for public sector employees should address employer ownership of all types of IP, not just copyright. For example:**
 - the Victorian Public Sector Standards Commissioner should consider this when issuing new codes of conduct under the *Public Administration Act 2004 (Vic.)*
 - government agencies that produce their own codes of conduct should address this as codes are reviewed and updated.
5. **Agencies should assess whether the provisions in the *Copyright Act 1968 (Cwlth)* regarding moral rights can be implemented in their agency and, if not, obtain consents as far as possible from their staff and contractors.**
6. **Agencies subject to the *Financial Management Act 1994 (Vic.)* should conduct an IP audit or in other ways assess the value of their IP assets to comply with Accounting Standard AASB 138.**

1.4 Purchasing contracts and intellectual property

Current policies and guidelines for managing IP in purchasing contracts can be improved. While a number of Victorian Government Purchasing Board policies and associated guidelines address IP considerations, these assume that the ownership model has already been established. Agency policies and guidelines need to encourage consideration of flexible models of ownership prior to the calling of tenders and the negotiation of contracts.

Staff in the agencies we audited used the provisions in template contracts as the main guidance on issues to consider. This reduces the risk as long as there are effective controls over who can vary contract clauses, and where this only happens with legal advice. In 2 of the agencies we audited, there was clear control, but this was less clear in the Department of Education and Training.

However, reliance on standard clauses in template contracts means that consideration of IP issues occurs well into negotiations, rather than at the purchase planning stage. Opportunities for agencies to be proactive and to think flexibly about the IP rights needed to fulfil contract objectives are lost.

It is important to note that in many of the contracts we examined, decisions relating to the need to protect IP were not made prior to preparing the request for tender.

Currently, with the exception of information technology purchases, many agencies view full ownership of IP as the default position. Thinking more flexibly about IP ownership when developing requests for tender and purchasing arrangements may:

- create opportunities for purchasing agencies to acquire goods and services at a lower price
- attract a wider range of suppliers
- reduce time spent in contract negotiations.

While it is a long established principle that agencies own tender submissions, this was not intended to include the IP (that is, the ideas expressed) in those submissions. Most agencies we examined were clear on this. Nevertheless, it was evident from tenders we examined that some tenderers would like to see it clarified. Agencies should make their ownership intentions clear.

Government agencies should strive to devise standard contract terms and conditions to achieve best outcomes and manage and minimise risks. Agencies that have not considered various contingencies may face poor IP management outcomes. Current documentation of IP arrangements in purchasing contracts is variable. VicRoads and the Department of Human Services have detailed and specific clauses about IP in standard contracts, while the Department of Education and Training relies on more general provisions. This has been a conscious decision by the department. However, the general nature of the provisions may lead to uncertainty for vendors and contract managers on what has been agreed in the contract.

The standard terms and conditions provide a tool for contract management but cannot be relied upon to achieve outcomes in isolation. Contract managers should also actively manage the contract to ensure obligations are adequately met.

Recommendations

- 7. That the Department of Treasury and Finance develop improved guidance on IP considerations in purchasing. This should:**
 - **take into account the whole-of-government policy direction, once established**
 - **recognise that IP decisions need to be made before contractual solutions are found.**

8. That agencies clarify IP ownership of tender submissions, and make this clear in requests for tender.
9. That the Department of Education and Training review:
 - the adequacy of its controls over changes to contract templates
 - the terms relating to IP in its contract templates.

1.5 Funding arrangements and intellectual property

Current approaches to determining the arrangements applicable to IP in funded agencies are based on staff's best interpretations of a limited policy framework. Consequently, we found a range of different practices in the agencies that participated in the audit.

At one extreme, some agencies took the position that all IP created in funded bodies vest in the state. This position was justified as complying with Crown Copyright, but we consider it to be stretching the Copyright Act beyond its mandate. At the other extreme, agencies made no claim to IP or copyright in funded bodies.

With no clear whole-of-government policy, where departments with significant funding relationships had not developed departmental policies on IP, we found:

- different approaches and attitudes to the allocation of IP ownership and rights in various business units in the same department
- progressive changes in agency practices over a succession of years without clear consideration of the reasons for, and implications of, the changes
- tacit agreements that the vesting arrangements would not be enforced
- ad hoc interventions by the department to defend ownership of IP.

Departments face complex issues when they consider the allocation of IP rights in funding arrangements. In some situations (e.g. DHS' provision of funding of medical research or its funding of health service activities that may incidentally lead to the creation of IP) there is much at risk. These departments are justifiably concerned to prevent the potential loss to the state of access to valuable IP.

However, a position that automatically vests ownership of all IP in the state, without addressing stewardship considerations, poses a substantial risk. These considerations include:

- Which party is best placed to capitalise on the IP to provide community benefit?
- Does the department maintain records of IP that it notionally “owns” under these arrangements?
- Does the department have a plan for managing access to, and capitalising on, these resources?

Few of the agencies that participated in the audit consider whether funded bodies have arrangements in place to identify, protect and manage IP. Whether ownership is vested in the state or the funded body, these arrangements are essential. If significant IP is involved, it may be appropriate for departments to develop specific policies, and spell out minimum requirements for funded bodies. For example, a number of other states have developed specific policies applying to health research, specifying minimum requirements in IP management for state-funded health services.

The current lack of clarity and range of practices within and between agencies can be confusing and frustrating for the funded sector. A funded body can receive funding from several different government agencies and is likely to have different vesting arrangements applying in each agreement.

These issues are not new, and have been noted in previous investigations into arrangements with funded bodies. While the government made a commitment in 2002 to clarify this, we are concerned that a resolution seems to be no closer.

Recommendations

- 10. Government should develop guidelines addressing the allocation of IP rights under funding agreements.**
- 11. That DHS develop a comprehensive departmental IP policy which clarifies arrangements for:**
 - **copyright and non-copyright IP**
 - **IP in funded agencies, including occasions when it is appropriate for the default position to prevail, and where exceptions can be considered.**

12. **Departments with significant funding commitments to bodies where IP is likely to be created should specify minimum requirements for IP policies and practices in those bodies. For example:**
 - **DHS should develop guidelines on minimum IP management requirements for public health services and hospitals.**

All agencies that were asked to respond to the report supported the recommendations. The responses have been included in the relevant chapters of the report.



2. About intellectual property



2.1 Overview

“Intellectual property” (IP), refers to “the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields”¹. As a starting point, the creator of IP is the owner of the legal rights, but, like other property, IP can be owned, sold, rented or given away.

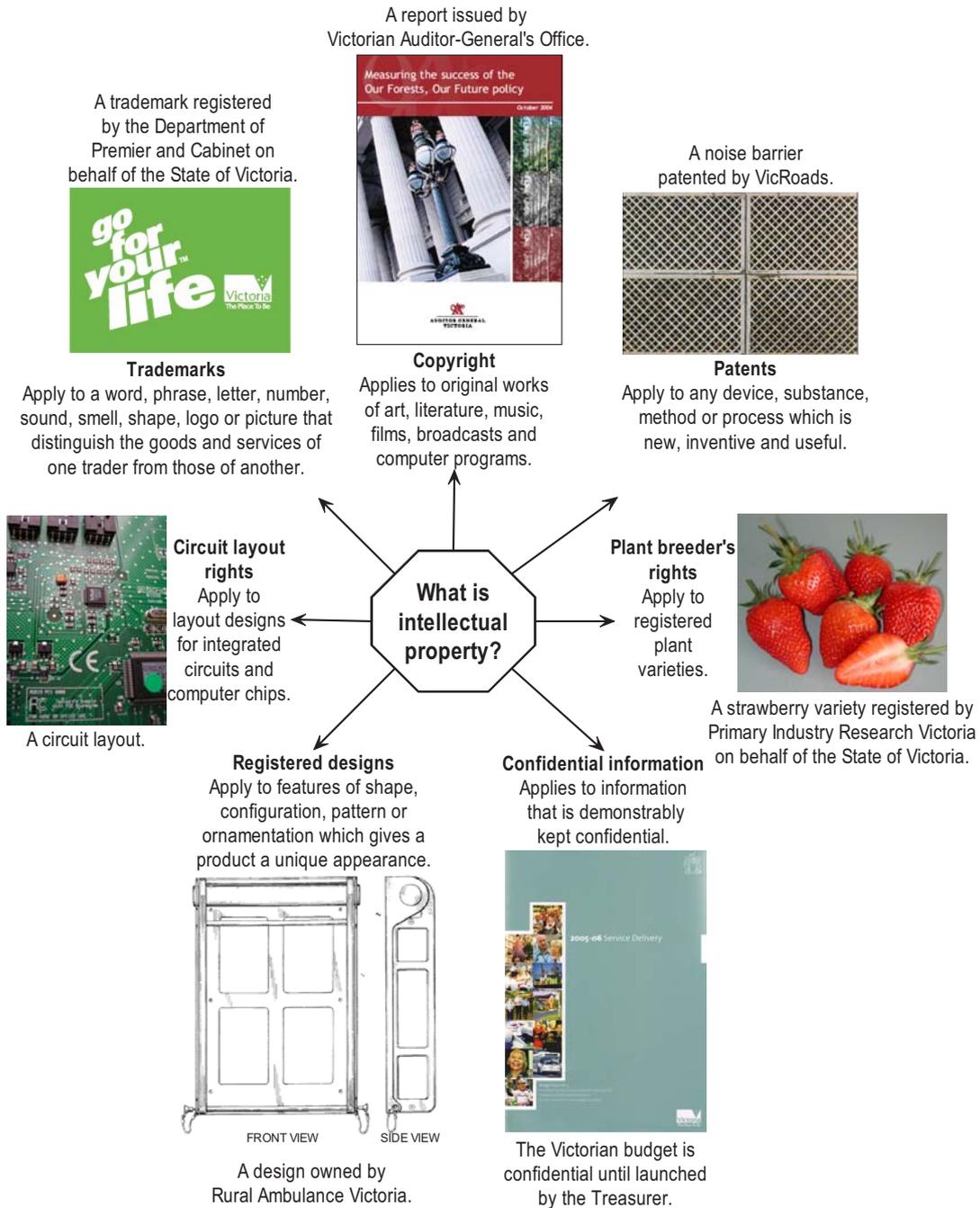
In some cases, for example copyright, the protection of IP is automatic. In other cases, the ownership of IP can be protected through a variety of mechanisms, including patents, plant breeder’s rights, trademarks and circuit layout rights.

IP does not always need to be owned outright. Rights can be asserted by licences, royalties etc. where there is not full ownership.

Figure 2A shows different types of IP, and some common examples of these types of IP in the public sector.

¹ The World Intellectual Property Organization 2004, *WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO, Geneva, viewed on 4 January 2005, < <http://www.wipo.int/about-ip/en/iprm/pdf/ch1.pdf> >

FIGURE 2A: DIFFERENT TYPES OF INTELLECTUAL PROPERTY



Source: Victorian Auditor-General's Office. Images used with permission from the Department of Premier and Cabinet, Primary Industry Research Victoria, Rural Ambulance Victoria, VicRoads.

2.2 Why is intellectual property important?

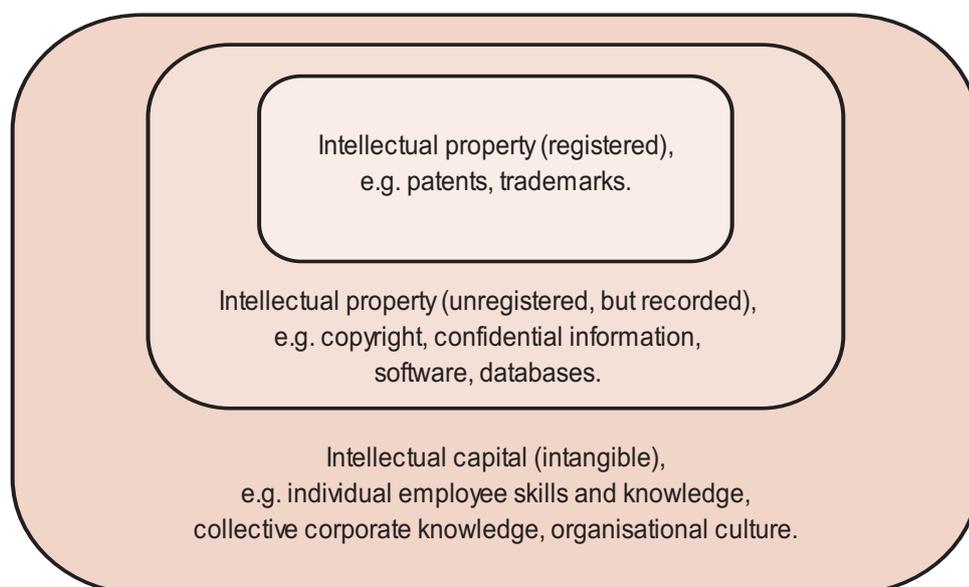
IP is a resource that can be used, managed and commercialised to provide economic, social and environmental benefits for government, the community and business. If managed correctly, some of the benefits that can spring from IP resources include:

- revenue or royalties from commercialisation
- expansion of business opportunities
- improved competitiveness
- economic growth and job creation in the jurisdiction, if IP is commercialised
- social and environmental benefits from the broader take-up of IP.

More broadly, IP is a divisible asset that can be shared across the public sector and disseminated to the wider community. In the public management of IP, benefits can be achieved through the state's ownership of IP.

IP is also a part of the framework of corporate knowledge and the knowledge management approach. Figure 2B shows how registered and unregistered forms of IP sit in this wider framework of intellectual capital to be managed in the public sector.

FIGURE 2B: INTELLECTUAL PROPERTY AND INTELLECTUAL CAPITAL



Source: Victorian Auditor-General's Office.

The ineffective management of IP poses a number of risks to public sector agencies. These include:

- The failure to protect the integrity and accuracy of government information can lead to false information being disseminated to the public.
- The failure to adequately protect confidential information (e.g. trade secrets or information covered by the *Information Privacy Act 2000*) can mean that other parties use it inappropriately.
- Government may fund research without retaining ownership of, or access to, the resultant IP. In these cases, government may not be able to ensure access by other researchers to the knowledge that is produced, and may not have rights to a return on commercially successful outcomes (loss of “freedom to operate”).
- Agencies may come to arrangements that are inconsistent, poorly documented and where no clear title to the IP results (“polluted” IP). The absence of clear title can mean that future development of the innovation by any party is difficult.
- Service providers may be unwilling to enter into arrangements with government (e.g. to conduct research) where they are not guaranteed access to, and use of, their research after the completion of a project, or where they feel that the pre-existing IP that they bring to a project is not adequately recognised. This may result in research not proceeding, or proceeding without government involvement.
- Projects utilise pre-existing IP as well as creating new IP, and many projects depend on contributions from third parties who also have a claim on IP. If ownership or right of access to IP is not clarified and monitored, agencies may infringe on the IP of others and expose the government to litigation.
- If contracts and agreements are incomplete, inconsistent or do not clarify IP ownership and rights, considerable taxpayers’ funds may be spent on legal advice or litigation if the matter has to be resolved in court.
- Agencies may be spending time and money negotiating full ownership of IP that they only need licence rights to. For example, in negotiating for the development of a custom information technology solution, the agency may pay a premium to ensure full ownership of all IP developed by the project. If the agency has no plans to commercialise the solution, it may be that it could have negotiated a lower price for the development by allowing the developer to retain rights to the IP, and simply purchasing a licence for its own use.

If these risks are not managed effectively, conflicts and liabilities may have to be resolved in court. This is financially costly, and can also cost time, delaying access to the innovation; sometimes leading to lost opportunities.

2.3 Intellectual property, knowledge and the public good

IP is often associated with the debate about Australia's move from an "old" resource-based economy to a "new" economy that is variously known as the "knowledge economy", the "information economy" or the "digital economy". Whatever its ambiguity, the new economy is "based on the production, distribution and use of knowledge and information"².

Victoria's Innovation Statement³ aims to drive innovation across the Victorian economy. It recognises the pervasiveness of the new economy and argues that: "Innovation is about making sure we use the ideas, skills, knowledge and experience of all Victorians to drive economic growth, improve our living standards and secure high quality jobs of the future"⁴.

Not only is it the government's role to achieve multiple public good outcomes from innovation; the use and dissemination of knowledge, ideas and information is at the core of democratic systems of governance. This makes public sector management of IP complex. There are ideological issues underpinning the direction of IP management that centre around the public sector producing research that is freely available and/or for the "public good". A general principle for public sector IP management is that it should be done "to the benefit of the State but not to the detriment of government activities"⁵.

2.4 The distinctive nature of intellectual property assets

IP differs from tangible assets in some important ways.

- IP assets are divisible through shared ownership, licensing and royalty arrangements.

² OECD 1996, *The Knowledge-based Economy*, OECD, p. 7, Paris, viewed on 15 April 2005.
<<http://www.oecd.org/dataoecd/51/8/1913021.pdf>>

³ Victorian Government 2002, *Victorians. Bright ideas. Brilliant Future.*, Victorian Government, Melbourne, viewed on 15 April 2005,
<[http://192.148.120.96/CA256C530000A4BF/ImageLookup/PDFS/\\$file/Innov_all.pdf](http://192.148.120.96/CA256C530000A4BF/ImageLookup/PDFS/$file/Innov_all.pdf)>

⁴ Department of Innovation, Industry and Regional Development 2004, *Victorians. Bright ideas. Brilliant Future.*, *Victorian Government Driving Innovation*, Victorian Government, Melbourne, viewed on 15 April 2005,
<<http://192.148.120.96/CA256C530000A4BF/All/FAB8D2CEF5C9B03CCA256C60007A9733?OpenDocument>>

⁵ Department of Innovation and Information Economy 2003, *IP Principles*, Queensland Government, Brisbane.

- IP tends to be cumulative in nature. A single innovation can be built on many “layers” of IP contributed by different people and projects over time, for example, a software development that is continuously upgraded.
- It is also difficult to have an exclusive ownership of IP – information and ideas, once exchanged, are difficult to take back (i.e. IP is non-rivalrous).
- Unlike physical assets, the value of IP is not necessarily diminished over time or through use. However, the contra to this is that for some forms of IP, timeliness is everything, and an idea’s value can quickly be diminished as it is superseded by newer innovations.
- IP can emerge from a variety of sources. Within government agencies, employees, contractors and funded bodies commonly create IP.
- Different professions think about IP differently, for example, lawyers refer to IP as having a property right in law; accountants refer to it as identifiable intangible assets; and managers think of it as an investment which has no physical existence.

These differences make IP a difficult asset to capture and manage.

2.5 Objective of the audit

The objective of the audit was to assess whether selected Victorian public sector agencies manage their IP assets effectively.

We examined 3 agencies: the Department of Education and Training, the Department of Human Services and VicRoads in detail (“the audited agencies”) and surveyed 26 other departments and agencies (“the surveyed agencies”).

We considered:

- policy and direction
- day-to-day management of IP, including how agencies identify, protect and record IP
- management of IP in purchasing contracts
- management of IP in funding arrangements.

More information about the conduct of the audit and list of participating agencies are provided in Appendix B of this report. We have included some good practice principles at the end of each chapter of this report. These principles are also collated as one document in Appendix D.



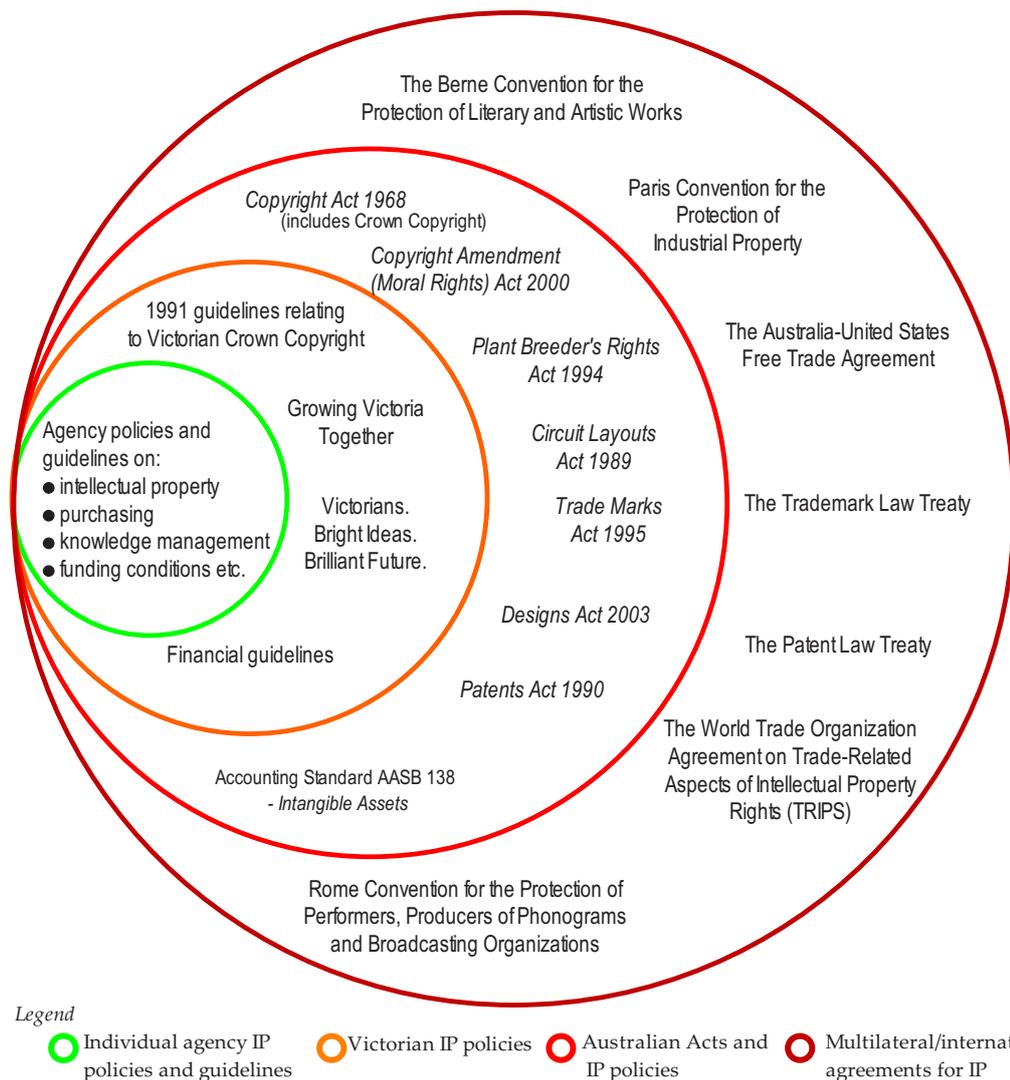
3. Policy and direction



3.1 The Australian legislative and policy framework

Figure 3A shows some of the international, national, state and organisational policies and guidelines that govern intellectual property (IP) management.

FIGURE 3A: AGREEMENTS, POLICIES AND LEGISLATION GOVERNING INTELLECTUAL PROPERTY MANAGEMENT



Source: Victorian Auditor-General's Office.

3.2 Do Victorian whole-of-government intellectual property guidelines and policies provide clear direction?

Victoria does not have a single policy governing the management of IP across government. The policy responsibility for public sector IP in Victoria is spread throughout various departments and agencies.

A number of Victorian policies or guidelines are relevant to aspects of IP management. We examined the relevant guidelines and considered the extent to which they provide a clear direction and advice for the Victorian public sector in managing elements of IP.

3.2.1 Guidelines relating to copyright

Copyright is the most common form of IP in the public sector. Effective management of copyright is important to:

- ensure the integrity of government materials
- control costs
- allow departments to ensure public access to government publications
- enable government to control the material it produces.

Copyright also covers one of the more high-risk forms of IP – software.

The *Copyright Act 1968*

Under the *Copyright Act 1968* (Cwlth) the creator of literary, dramatic, musical or artistic works is usually the owner of the copyright. However, the Act states that where a work is created “by, or under the direction or control of, the Commonwealth or the state”¹, the copyright is owned by the Commonwealth or state². This provision is known as “Crown Copyright”.

¹ *Copyright Act 1968* (Cwlth), Part VII, Division 1, s. 176(2).

² Note that under s. 179 of the *Copyright Act 1968* (Cwlth), Crown ownership of copyright can be modified by agreement.

Crown Copyright

The scope and application of Crown Copyright is, in practice, a grey area. First, there are different views on what agencies are encompassed by “the state”. Whether or not a public body is part of the state will depend on several factors, including the wording of the statute establishing the body, and the degree of autonomy of the agency from state control. This issue becomes heated when public bodies receive funds from government departments. Agencies that do not consider themselves to be part of “the state”, tend to be less accepting of provisions regarding Crown Copyright in funding agreements.

Second, “the direction and control” requirement is unclear. The South Australian Auditor-General, for example, pointed out in 1997, that:

“Since under most outsourcing agreements the Government is contracting for ‘the delivery of a service’ it could well be argued that any material created under an outsourcing agreement is not developed under its ‘direction or control’ ”³.

In April 2005, the Commonwealth Copyright Law Review Committee recommended that the provisions relating to subsistence and ownership of Crown Copyright in sections 176–9 of the *Copyright Act 1968* (Cwlth) be repealed⁴

Victorian guidelines relating to Crown Copyright

The Attorney-General has responsibility for the management of Crown Copyright in Victoria. In 1991, the Department of Justice produced, and Cabinet endorsed, *Guidelines relating to Victorian Crown Copyright*⁵ (the guidelines).

The guidelines set down general principles relating to state copyright. They are limited in scope and concentrate on requests by third parties to reproduce, or obtain a licence to use, materials subject to Crown Copyright. The guidelines do not provide assistance on how to ascertain whether materials are subject to Crown Copyright.

³ Auditor-General of South Australia 1997, *Managing Intellectual Property Assets and Government Information when Outsourcing*, Report of the Auditor-General for the year ended 30 June 1997, Government of South Australia, Adelaide.

⁴ The Copyright Law Review Committee 2005, *Crown Copyright*, Commonwealth of Australia, Canberra, p. xxii.

⁵ Attorney-General 1991, *Guidelines relating to Victorian Crown Copyright*, Victorian Government, Melbourne.

As we discuss in later parts of this report, some departments interpret the guidelines in ways that go beyond their intended scope. For example, using the guidelines on Crown Copyright to give direction on ownership of non-copyright IP.

The guidelines require that the Attorney-General or authorised minister grants or refuses requests to reproduce copyright material produced or funded by government departments. A problem with the 1991 guidelines is that they do not consider the materiality of copyright to be released. Copyright material can range from something as trivial as a photograph from an old government publication to a million dollar software development. In most cases, the release of materials can be done as routine, and the requirement to put up every copyright licence request to the minister has potential to create considerable inefficiencies.

Audited departments expressed frustration with the 1991 guidelines, and considered the requirement for ministerial approval for all materials to be onerous and inefficient.

The Department of Justice advised that it is currently developing a comprehensive *Victorian State Copyright Management Policy*. We have examined the draft policy and found that it is clear and comprehensive, addressing many of the weaknesses identified in the current guidelines.

The policy is planned for consideration by Cabinet during 2005, pending the outcome of the Commonwealth review of Crown Copyright.

3.2.2 Innovation policy

The Department of Innovation, Industry and Regional Development (DIIRD) is the policy custodian for the Victorian Innovation Policy, *Victorians. Bright Ideas. Brilliant Future*. The policy makes the following commitment about government's management of IP:

“The Government will follow new IP guidelines to ensure that the knowledge generated by innovation across government is developed and shared more broadly for the benefit of all Victorians”⁶.

In 2001, the Science, Technology and Innovation (STI) group in DIIRD produced a discussion paper as a beginning to a high-level, whole-of-government approach to the management of IP.

⁶ Victorian Government 2002, *Innovation Statement – Victorians. Bright Ideas. Brilliant Future*. p. 74, Victorian Government, Melbourne, viewed on 21 April 2005, <[http://192.148.120.96/CA256C530000A4BF/ImageLookup/PDFS/\\$file/Innov_all.pdf](http://192.148.120.96/CA256C530000A4BF/ImageLookup/PDFS/$file/Innov_all.pdf)>

The discussion paper was updated in 2003, but has not yet been developed into formal guidelines.

DIIRD advised us that the discussion paper was produced in response to the STI group being approached by other government agencies to advise on IP. It is unclear whether DIIRD should be responsible for developing IP guidelines for whole-of-government.

3.2.3 Financial guidelines

Victoria's *Financial Management Act 1994* does not refer to intangible assets, or define the term "asset". However, the Ministerial Directions under the Act state that:

"Public Sector Agencies must implement and maintain an effective internal control framework for asset management to ensure that assets are identified, recorded accurately and accounted for in accordance with Australian Accounting Standards ... Records and details for intangible assets must be sufficient to ensure compliance with accounting standards and disclosure requirements, in addition to any operational needs of the business"⁷.

The Act also lays down broad directions for financial management and prudent management of financial risks, which may impact on agency considerations in managing IP, particularly at the commercialisation stage.

Under the same Act, the Victorian Government Purchasing Board (VGPB) issues supply policies, guidelines and standard form contracts that are binding for purchasing by departments and 10 administrative offices⁸. The standard form contracts include a number of IP provisions that should be included in contracts of those bound by the VGPB policies.

In 2001, Partnerships Victoria, a unit in the Department of Treasury and Finance, issued a practitioners' guide that addresses IP arrangements in contracts for public private partnerships⁹.

⁷ Minister for Finance 2003, *Directions of the Minister for Finance - 3.4.9. Physical and Intangible Assets*, Department of Treasury and Finance, Victorian Government, Melbourne.

⁸ Victorian Government Purchasing Board 2005, *Public entities bound by VGPB procurement policy*, Victorian Government, Melbourne, viewed on 21 April 2005, <<http://www.vgpb.vic.gov.au/CA256C450016850B/0/686DA5B53FD13348CA256FC0001B05CC?OpenDocument>>

⁹ Partnerships Victoria 2001, *Practitioner's Guide*, pp. 90-1, Victorian Government, Melbourne.

3.3 Are agency level intellectual property policies and guidelines clear?

There is currently no requirement for Victorian public sector agencies to have specific IP policies and guidelines. The policy direction on IP in an agency can be derived from various materials, such as purchasing policies, funding directions, knowledge management policies etc.

In assessing whether agencies had policies and guidelines for IP, we considered:

Policy coverage:

- Are there clear and documented policies and procedures?
- Do documented policies cover all IP relevant to the agency?
- Is it clear to which functions and agencies the policies apply?

Policy accountability:

- Are accountabilities for implementation and policy oversight clear?
- Are accountabilities for procurement, licensing and transfer of IP clear?

Policy administration:

- Are policies revised as appropriate?
- How well are the policy requirements communicated to staff?

3.3.1 Policy coverage

In the audited agencies, we found that VicRoads and the Department of Education and Training (DET) had clear, documented and comprehensive, if slightly dated, policies on IP. DET's policy covered state schools, but not technical and further education (TAFE) institutes, as these entities are self-governing bodies corporate that create and administer their own IP.

In the Department of Human Services (DHS), the documented policy was limited to statements relating to funded bodies.

Of the 26 agencies surveyed, 42 per cent have in place clear, documented and comprehensive IP policies. We examined these policies and found that they clearly define:

- what constitutes IP
- the types of IP covered by the policy
- the application of the policy to component parts of the agency.

3.3.2 Accountability

In VicRoads, the accountability for implementation, policy oversight and development is clear. The policy custodian is the Legal Services department with assistance from the Contract Services department. Responsibilities for procurement, licensing and transfer of IP are linked to financial delegations. Generally, contract managers have responsibility to manage IP created under contracts. In 1999, VicRoads took the decision that the delegation to release IP should be lower than the financial delegation. Should VicRoads relinquish ownership of IP in a contract valued at or over \$100 000, the release must be approved by the chief executive.

In DET, the manager of Liability Management is the policy custodian.

As DHS has not developed an IP policy, there is no responsible policy custodian.

Under the *Guidelines relating to Victorian Crown Copyright*, which covers DET and DHS, there is a requirement that the minister should approve the release of copyright material.

Both departments receive many requests to use their materials, for example, old photos and requests from contractors for permission to use materials developed as part of the contract. In the interest of efficiency, the Minister for Education has authorised the secretary, deputy secretaries, general managers and regional directors in the department to release Crown Copyright on her behalf. In DHS, the requests were also commonly handled by the secretary, rather than passing every request to the minister.

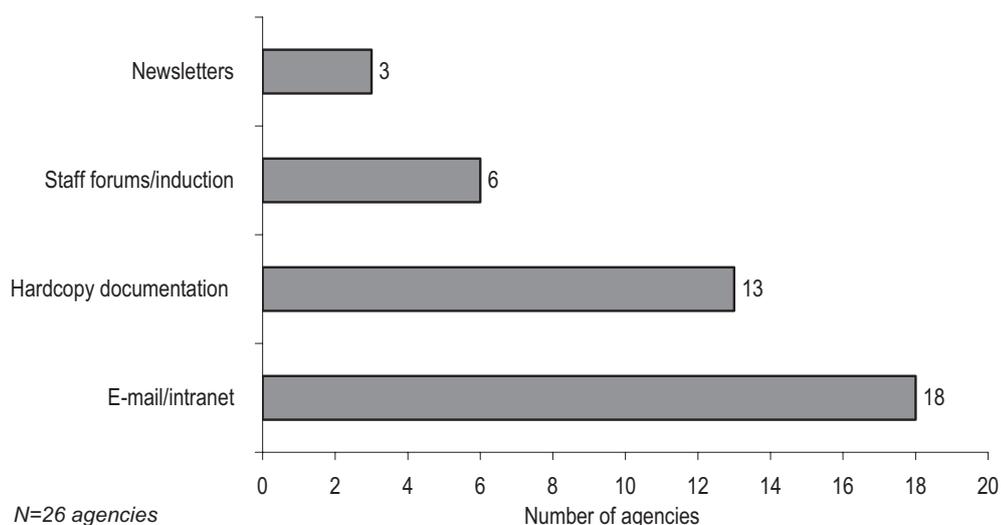
3.3.3 Policy administration

Policy administration was ad hoc in the audited agencies. Policies had been updated from time-to-time, but have not been comprehensively reviewed recently. Only a third of policies in surveyed agencies contain time frames and review mechanisms.

Some policy requirements were not implemented in the agencies, for example, annual IP audits in VicRoads, and not all employees were aware of the policy.

In the audited agencies, we found that communication with staff on the IP policy was limited. VicRoads held training sessions when its policy was launched in 1999 and staff can email questions to the policy custodian. DET keeps its policy and other relevant information on its intranet, which is accessible to all staff. The surveyed agencies responded that they communicate with staff about their IP policies in a range of ways. These are outlined in Figure 3B.

FIGURE 3B: COMMUNICATION OF INTELLECTUAL PROPERTY POLICIES TO STAFF



Note: Number of agencies does not add up to 26 as multiple responses were permitted.

Source: Victorian Auditor-General's Office.

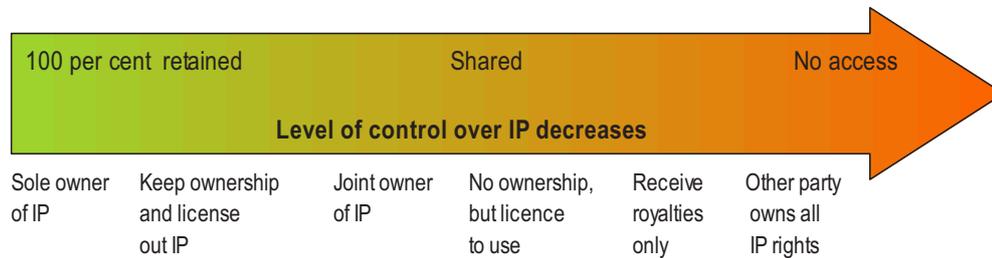
3.4 Are there clear directions on considerations in allocation of intellectual property rights?

IP differs from tangible assets in that the rights to access and to use the asset are divisible. Many core public sector activities such as contracting for goods and services, grants funding, funding for service delivery and IP created by employees require decisions about the allocation of these rights.

Most agencies in the Victorian public sector adopt the position that the state always owns IP created, purchased under contract arrangements or funded through agreements, as a default. In practice, this is not always possible or necessarily desirable. It may not be acceptable to the other party in a negotiation and may not always give the best outcomes for the agency or the community. In the absence of a whole-of-government policy on IP, agencies have more flexibility on vesting arrangements than many recognise.

Some of the ownership options are illustrated in Figure 3C.

FIGURE 3C: OPTIONS FOR OWNERSHIP AND USE OF INTELLECTUAL PROPERTY RIGHTS



Source: Victorian Auditor-General's Office.

In assessing agencies' decision-making processes about the allocation of IP rights, we did not take the view that a particular position was desirable. However, the decision-making process should be transparent and decisions should be made to best achieve agency objectives.

We considered the following aspects of the agency decision-making process:

Direction

- Does the agency have a clear position on allocation of IP rights?
- Does this position consider IP that is created within the agency, created under contract or created under funding arrangements?

Decision-making

- Is there clear guidance for staff managing negotiations on when, how and why to consider negotiations away from the base position?
- Are key decision-making considerations documented/transparent?
- Are decisions timely?

Access to expertise

- Do staff have access to appropriate expertise and advice as required?

3.4.1 Direction

DET's policy was that IP created in the department and purchased by the department should vest in the state. This was reflected in DET's contract documentation and purchasing guidelines. In funding agreements, DET does not claim ownership of all IP but claims Crown Copyright over materials created. This position was reflected in DET's funding guidelines and documentation.

VicRoads' policy was that IP should vest in itself. However, the VicRoads policy did not explicitly refer to IP created under funding arrangements and, for the 2 agencies that VicRoads provide funding to, the IP vests in the funded body. These arrangements were reached on a case-by-case basis to account for the multiple streams of funding and the collegiate nature of the funding partners. VicRoads acknowledged that it is likely to fund (as opposed to contract) more research in the future, and plans to upgrade its IP policy to outline its position on IP vesting in funded bodies.

DHS purchasing guidelines and contracts take the position that all IP shall vest in the state. DHS also has a number of statements and guidelines relating to funded agencies indicating that IP created under funding arrangements should vest in the state.

Generally, staff consulted in the 3 agencies had a strong view that the default position was that ownership of IP should vest in the state. Many believed that this was required under government guidelines.

Allocation of intellectual property rights in purchasing contracts and funding agreements

We found all 3 audited agencies consistently applied a principle that ownership should vest in the state, at least as a starting point for negotiations. This position was reflected in template contract terms and conditions used by the agencies.

The exception to this position was generally found in IT contracts, as these terms are rarely acceptable to the vendor (e.g. vendors are generally unwilling to release ownership of source code in development work).

In other situations, contract managers were conservative and tended to strictly implement a position of "we pay, we own".

The IP conditions in funding agreements vary across government agencies. Some agencies claim ownership/vest all IP in the state as part of the funding conditions. Some agencies claim Crown Copyright over specific projects or funds. Some agencies make no claim on IP created, but leave it in the funded body. Generally, those that do claim ownership over copyright and/or all IP, see this as the correct implementation of the Crown Copyright provisions. As we discuss in Part 6 of this report, we believe that in some circumstances, this interpretation stretches the provisions for Crown Copyright beyond its mandate.

3.4.2 Decision-making

We found that other parties – either contractors or funded agencies – initiated any movement away from an agency’s stated position on the allocation of IP rights, rather than an agency considering the best position for delivery of the required outcome.

Where negotiations were initiated over IP rights, the audited agencies had no documented guidance available to staff on circumstances where it would be appropriate to consider alternative rights allocation. They had no guidance on what to take into account (e.g. risk management principles), or preferred models of rights allocation (e.g. whether joint ownership should be permitted or discouraged, how government could retain rights of access while relinquishing ownership).

Decision-making criteria need to take account of both government and agency objectives; so one size will not necessarily fit all. Figure 3D provides an example of decision-making guidance produced by DIIRD as part of its discussion paper considering issues for the development of a whole-of-government approach.

FIGURE 3D: THE DEPARTMENT OF INNOVATION, INDUSTRY AND REGIONAL DEVELOPMENT – SUGGESTED CONSIDERATIONS IN MANAGING INTELLECTUAL PROPERTY RIGHTS

DIIRD has produced a discussion paper which outlines some of the considerations it believes are appropriate for staff to consider in managing IP rights. These considerations include:

- agencies should seek economies in IP acquisition and management by obtaining and retaining only the IP rights that are necessary for operational activities. In some instances, however, government ownership of IP may be desirable
- IP rights should be in the hands of the party whose corporate mission is to exploit and improve such IP, and is best able and willing to do so
- when engaging external parties to develop IP that may have a commercial potential, and where the external party is able and willing to commercialise the IP, government is encouraged to grant ownership or commercialisation rights to the external party where to do so will result in a cost saving for government, especially where the external party is in a better position to do so
- joint ownership of IP should be discouraged. If unavoidable, steps (e.g. an IP agreement) should be taken to deal with potential problems associated with joint IP ownership (e.g. blocking of sale or licensing of IP)
- where joint ownership of IP is agreed to by a public authority, the contract should contain appropriate provisions relating to the use, management and administration of IP assets.

Source: Department of Innovation, Industry and Regional Development 2001, Capitalising on Government Intellectual Property – An issues paper for the development of a Victorian government intellectual property management policy, Discussion Paper, revised August 2003.

Where there are no guidelines, staff involved in negotiations over IP frequently have to address the considerations as best they can, seeking advice, first from internal legal services and, if necessary, the Victorian Government Solicitor or other legal advisors. Occasionally, matters were escalated to the minister or staff sought advice from other departments. As a result of the wide consultations sometimes required, disputes over the contractual arrangements for allocation of IP rights tend to take a long time to resolve.

3.4.3 Access to expert advice

Decision-making and dispute resolution on allocation of IP rights and other IP issues require access to expert legal, financial and commercial advice.

The 3 audited agencies had good access to legal expertise, both internally through legal services and/or contract services, and through external legal advice from the whole-of-government panel.

Legal advice focused on risk management and ensuring that IP provisions in agreements and contracts were legally defensible.

Access to other kinds of advice - for example on financial, commercial and social implications of decisions - and assistance with evaluation of options for broader issues than legal risks was limited. At a whole-of-government level, as there is no agency nominated as a policy custodian, there is no central point for advice on IP issues that agencies can call on.

All audited agencies had experienced cases where IP-related disputes had been escalated to their legal services and/or external legal advice for action. On some of these occasions, we were concerned that the expert advice was brought in to fix a crisis or dispute once it had occurred, where earlier advice (e.g. in the project planning phase) may have prevented the dispute.

3.5 Conclusion

At a whole-of-government level, guidelines and directions on the management of IP in Victoria are piecemeal. The current policies and guidelines provide limited assistance in individual agencies' management of IP. However, government has not clearly articulated how public IP assets should be managed to support the statewide policy direction provided by *Growing Victoria Together*, and *Victorians. Bright Ideas. Brilliant Future*.

The planned revision of the copyright policy by the Department of Justice will address some of the current gaps and weaknesses in the guiding framework for government agencies. However, this policy will not apply to all types of IP that public sector agencies manage; for example, trademarks, patents and registered designs. The draft copyright policy makes this clear, and agencies need to ensure that staff are aware of its applicability and limitations.

Although agencies are not required to have their own IP policies, we found that many have one. In the individual agencies where policies were further developed, we found that staff had a better understanding of, and were more consistent in, their approach to IP issues.

However, a number of agencies that have stewardship of significant IP resources do not have policies to guide staff. In these agencies, staff lack direction in managing one of the most valuable resources in today's economy.

Decision-making on allocation of IP rights is a crucial and challenging part of managing IP. Agencies have a responsibility to manage resources in line with their organisational objectives and for the benefit of the community. Effective allocation of IP rights can protect the state's interests while ensuring that IP is accessible by the parties best positioned to capitalise on it for the benefit of the state.

At an operational level, translating this general obligation to manage resources for the benefit of the state is not simple or straightforward. Agencies can assist staff by clarifying and documenting the kinds of considerations that should be taken into account.

The lack of documented decision-making criteria has an impact on the transparency and defensibility of decisions. Decisions on allocation of IP rights can have significant economic consequences, and the current lack of a clear framework exposes staff to risks that their decisions are not seen as fair and impartial.

Current advice on IP matters in the agencies we audited was generally limited to legal advice. This is essential, and we found it to be comprehensive and accessible. Legal advice needs to be obtained early, but should not drive the initial considerations. It should be complemented with other perspectives; taking into account financial, operational and social considerations.

Recommendations

1. That the government nominate an agency to take responsibility for the development of a whole-of-government policy on all IP. This policy will need to be developed in conjunction with the Department of Treasury and Finance, the Department of Innovation, Industry and Regional Development, the Department of Justice, the Department of Premier and Cabinet, and line agencies.
2. That the Department of Justice complete its planned revision of the copyright policy and guidelines for departments on copyright management as a priority.
3. That government departments and agencies develop policies providing detailed guidance on managing IP in line with the whole-of-government direction and organisational objectives.

RESPONSE provided by Secretary, Department of Innovation, Industry and Regional Development

Recommendation 1

The Department supports the development of a whole-of-government policy on all IP. This should be undertaken with a degree of urgency to ensure that policy development on specific aspects of IP management such as copyright and the allocation of IP rights in tendering and grant funding are developed in line with the whole-of-government direction and policy objectives. It is of particular importance that the policy established should be sufficiently robust and flexible to support the government's aims of encouraging innovation and economic growth.

As the planned revision of the copyright management policy and guidelines by the Department of Justice is near finalisation it would be advantageous not to hold up its completion but to have it inform the development of the whole-of-government IP policy, as best practice principles apply in both instances. The two processes could occur concurrently, with one informing the other.

RESPONSE provided by Acting Secretary, Department of Justice

The Department of Justice welcomes the Auditor-General's review and agrees with the conclusions and recommendations of the report.

Recommendation 1

The Department will welcome the opportunity to be involved in the development of a whole-of-government policy on all intellectual property in conjunction with other Government agencies.

Recommendation 2

As recommended by the report, the Department is currently completing its revision of the Government's policy and guidelines on copyright management. The policy is planned for Cabinet consideration during 2005, but cannot be finalised until the Commonwealth Attorney-General's response to the Copyright Law Review Committee report on Crown copyright is known. The Review Committee recommended sweeping change to the law of Crown copyright and it would be premature to finalise the revised policy before the Commonwealth's intentions in respect of the report are clear.

RESPONSE provided by Secretary, Department of Premier and Cabinet

Recommendations 1, 2, 3

The Department of Premier and Cabinet agrees with the recommendations.

RESPONSE provided by Secretary, Department of Education and Training

Recommendation 3

The Department accepts this recommendation.

The Department of Education and Training recognises the need to provide guidance to employees with respect to any whole-of-government direction and organisational objectives. Existing copyright guidelines will be reviewed upon the establishment of a whole-of-government direction.

RESPONSE provided by Secretary, Department of Human Services

Recommendations 1, 2, 3

The department strongly supports the need for a whole of government approach to IP. A whole of government IP policy should clearly articulate the policies applicable to IP but should be sufficiently flexible to allow the policy to be tailored to the particular needs of departments and the stakeholders that they serve.

Clearly the bulk of IP developed by or for government consists of copyright works and other subject matter. In the light of the recommendation that a whole of government IP policy be developed, it is undesirable for a whole of government copyright policy to be completed separately. The department's view is that the copyright policy should form part of a broader IP policy.

It is not considered necessary, however, for this process to await the outcome of the Australian Government's review of crown copyright. In practical terms, the crown copyright provisions of the Copyright Act 1968 are rarely, if ever, relied upon by government. Almost invariably government practice has been that its copyright rights and liabilities are governed by the general provisions of the Copyright Act. In this light, there is little to be gained by delaying development of a whole of government policy while crown copyright is reviewed.

RESPONSE provided by Chief Executive, VicRoads

Recommendation 1

Agree. However, VicRoads suggests that the Department of Infrastructure and its agencies should be included in the list of Departments to be consulted.

Recommendation 2, 3

Agree.

RESPONSE provided by Deputy Secretary, Department of Treasury and Finance**Recommendations 1, 2**

The report concludes that many of the selected agencies audited, consistently take a default position in relation to Government ownership of intellectual property (IP) without any analysis of whether significant IP will be created or whether other access models would promote better project or organisational outcomes.

The inference that adopting a default position on IP ownership does not generate benefit to government needs to be considered from the position that the contracting authority has contracted and paid for the IP related to the project objectives. In many instances departments also negotiate access to 'back-end' IP owned by the contractor to ensure the long-term applicability of the IP created during the contract.

There is a presumption that there is significant foregone benefit to government in relation to IP management as a consequence of adopting a default position on IP management. The report suggests benefits from the application of other access models resulting in reduced tender prices or from commercial arrangements.

The survey results reported a strong commitment to sharing the benefit of IP purchased or generated by government. Nine of the ten departments and 15 of the 18 agencies surveyed have given other parties authority to use IP belonging to an individual department/agency.

The interchange of IP between State agencies and between national jurisdictions has a major impact on standardising procurement processes leading to efficiencies in agency transactional costs. The report does not recognise that the outcome of consistent processes across government agencies and jurisdictions has significant commercial benefits to suppliers to government. Consistent processes also reduce the transactional costs for government.

The report recommends the development of a whole-of-government policy on IP which would have benefited if an analysis had been provided on the scope of foregone benefits or which access models could have applicability in different agency settings or sectors of procurement.

DTF is of the opinion that any procurement recommendation flowing from the report must proceed on the basis of 'value for money' in line with project objects.

RESPONSE provided by Deputy Secretary, Department of Treasury and Finance - continued

Recommendations 1, 2

Given the adoption of this principle, DTF supports proceeding with the following procurement related recommendations:

- *That the government nominate an agency to take responsibility for the development of a whole of government policy on all IP in conjunction with DTF, DIIRD, DOJ and DPC.*
- *That the Department of Justice complete the revision of the copyright policy and guidelines.*
- *That DTF will provide guidance on IP considerations in purchasing that take into account the whole-of-government policy.*

3.6 Good practice principles

To assist agencies in developing IP policies and decision-making guidelines, we have collated some high-level good practice considerations. These are outlined in Figures 3E and 3F.

FIGURE 3E: GOOD PRACTICE FOR AGENCY INTELLECTUAL PROPERTY POLICES

The **agency's policy** supports and guides the management of IP to ensure that:

- IP assets are managed for the benefit of the state
- the management of IP supports the agency's objectives
- the risks associated with the use of IP are minimised and managed
- the control and custodianship of IP assets resides with the most appropriate agency or in the most appropriate part of the agency
- the accountability for IP management is aligned with control and custodianship of IP assets.

Policies and procedures should:

- be documented and user-friendly (e.g. in plain English and not excessively long)
- identify all forms of IP assets likely to be developed, used or managed by the agency
- identify who is accountable for implementation
- provide clear and appropriate guidance for staff
- be integrated with other agency policies and objectives
- be communicated to staff and readily accessible
- be periodically reviewed.

Source: Victorian Auditor General's Office. Based on analysis of New South Wales Audit Office 2001, Better Practice Guide: Management of Intellectual Property, New South Wales Audit Office, Sydney; and Government of Western Australia 2003, Government Intellectual Property Policy and Best Practice Guidelines, Department of Industry and Resources, Perth.

FIGURE 3F: GOOD PRACTICE FOR DECISION-MAKING ON INTELLECTUAL PROPERTY ALLOCATION

The **decision-making** in the allocation of IP ownership and rights should:

- assess the benefits, costs and risks associated with any decision relating to the allocation of IP
- ensure that when allocating IP rights, both IP yet to be created and pre-existing IP are adequately considered and addressed to ensure that the IP can be effectively used or commercialised as intended
- record in a register, details regarding the allocation of all IP rights and all relevant conditions
- document the allocation of IP rights in a legally binding written contract *before* the IP is created
- where relevant, obtain a license to the IP where ownership is allocated away from the agency.

Source: Victorian Auditor General's Office. Based on analysis of New South Wales Audit Office 2001, *Better Practice Guide: Management of Intellectual Property*, New South Wales Audit Office, Sydney; and Government of Western Australia 2003, *Government Intellectual Property Policy and Best Practice Guidelines*, Department of Industry and Resources, Perth.



4. Day-to-day management of intellectual property



4.1 Background

This part of the report considers the day-to-day management of intellectual property (IP) in public sector agencies. We assessed how agencies:

- identify significant IP (existing or under development)
- adequately protect IP
- manage HR processes related to staff rights and responsibilities for IP
- manage record keeping
- manage the risks of infringement and liability.

4.2 Is significant intellectual property identified?

IP can only be managed if it can be identified. Our criteria for assessment for the identification of IP were:

- Are there guidance materials to assist staff to recognise IP and understand how to protect it?
- Are there mechanisms to identify IP that is created by staff, contractors and collaborative projects, like funded research?
- Is there a notification process for IP created by employees, contractors and funded bodies?
- Is the possible creation of IP considered in project planning phases?

4.2.1 Guidance materials

The Department of Education and Training (DET) and VicRoads provide guidance materials to help staff identify IP. Some of these guidelines are outdated and not all employees are aware of them. The Department of Human Services (DHS) has limited guidance on IP, mostly restricted to definitions of IP in its purchasing guidelines, contract and funding documentation.

The audited agencies have no specific mechanisms to identify IP created by staff, contractors or funded projects. Consideration of whether IP may be created is not integrated into guidelines on project planning.

VicRoads' IP guidelines include a requirement for a yearly IP audit in each business unit. However, this was not implemented. The audited agencies were confident that they would be able to identify IP that staff created, and that in many cases they worked closely enough with contractors to know if significant IP was being developed. VicRoads requires contractors to notify it of significant IP created in their contracts. This requirement is not monitored.

4.3 Do agencies adequately protect intellectual property?

When IP is protected, the right to use, share and commercialise the IP vests with the organisation that secures the protection. Even if agencies have no desire to commercialise IP, protection of "freedom to operate" can be an important consideration in decisions to protect IP. Without adequate protection, access to important IP can be lost.

Protection of IP also includes:

- protection of confidential information
- protection of the integrity of information by managing copyright provisions effectively
- protection of image and reputation, for example by registering trademarks.

Our criteria for assessment of IP protection were:

- Where registration of IP rights is required in order to secure protection (e.g. patent protection, plant breeder's rights and trademark registration) do agencies take appropriate steps to preserve the possibility of registration?
- Where rights are protected through registration, do agencies consider the costs and benefits against the risks of not registering?
- Do agencies take adequate steps to protect non-registrable IP (e.g. maintaining confidentiality, using copyright notices)?
- Do agencies periodically evaluate whether to maintain registered rights?

4.3.1 Protecting intellectual property

The audited agencies have only limited development of registrable IP. On the rare occasions when the agencies developed and registered a trademark or a patent, they met our expectations on the above criteria.

Agencies are conscious of, and take steps to protect, agency trademarks and image. Where trademarks have been registered, this has been done after consideration of the costs of registration balanced against the risks of not registering. For example, VicRoads invested time and resources into developing “Thingletoodle” (Figure 4A), a children’s road safety character, and made the decision to register the trademark both to protect its investment and because it believed there may be potential commercial opportunities.

FIGURE 4A: THE THINGLETOODLE TRADEMARK



Source: VicRoads.

Most government-owned IP is copyright material. As copyright protection does not require registration, and as agencies assert their rights to the IP in contracts, IP protection tends to be a routine rather than a decision-making process.

4.4 Are employee rights and responsibilities for intellectual property clear?

Employees create IP as part of their work and their rights and responsibilities for IP should be considered as a part of human resource management policies.

In assessing human resource management practices for IP, we considered:

- Do employment agreements clarify ownership of IP between employer/employees?
- Do recruitment processes consider any IP employees may bring to their employment and are there processes in place to manage any issues arising?

- Does the exit process for employees leaving the agency include information on obligations in relation to IP and confidential information?
- Does the agency consider and manage the moral rights of its employees?

Employment arrangements

It is generally the case under law that the employer owns the IP created by employees during their employment. However, the modern workplace is complex; employees work part-time, or have more than one job. It can also be difficult to define what employees' "scope of employment" entails.

This was the situation in a recent court case that involved Victoria University of Technology, which is outlined in Figure 4B. In the absence of a clear IP policy, IP rights and responsibilities should be explicitly addressed under the terms and conditions of employment.

FIGURE 4B: THE IMPORTANCE OF CLEAR POLICIES ON EMPLOYEE CREATION OF INTELLECTUAL PROPERTY

In a recent case, *Victoria University of Technology v Wilson*, Victoria University of Technology (VUT) sought to take control of a system and software invented by 2 academics employed by the university.

The Supreme Court found that the university had not had a properly constituted policy on IP that could be regarded as binding on employees. In the absence of a policy, the university could not claim ownership of the IP, as the court deemed it to have been invented outside the scope of the academics' employment.

However, the court found that the academics had a duty to inform the university of their research and that the university was entitled to a share of the profits. The judgement ordered VUT to pay the academics' legal costs and to reimburse them for relinquishing their shares of the IP to the university, at cost of approximately \$2 million.

In January 2005, the company associated with the system and software launched a \$48 million claim against VUT for loss of business.

Source: Victorian Auditor-General's Office and Victoria University of Technology v. Wilson & Ors (2004) VSC 33.

When assigning ownership of IP to the employer, the audited agencies treat executive staff and non-executive staff differently. Executive employees are required to sign the government's standard contract for executive services¹. The contract contains the following clause on IP ownership:

"Any IP invented or created by the Executive as a result of the employment during the period of this Contact shall remain the property of the Employer unless otherwise agreed in writing between the Employer and Executive"².

For non-executive staff, the audited agencies rely on codes of conduct. The *Code of Conduct for the Victorian Public Sector*³ includes the following provision for IP ownership:

"There are several types of IP or, in other words, ownership of information, including copyright, patents, trademarks, trade secrets, design rights and plant breeder's rights. Copyright covers the expression of ideas such as in writing, music and pictures. Your employer retains the copyright of work produced by you during your employment. You retain the copyright of the work only if approved by your employer, or if you can demonstrate that you did not use your employer's time, name, information or resources in producing work"⁴.

VicRoads' code of conduct has a similar clause assigning copyright to the employer⁵.

Consequently, we found that employment agreements for executive staff clarify ownership for all IP, whereas only copyright is assigned to the employer for non-executive staff.

Of the 26 surveyed agencies, we found that:

- 8 agencies had no code of conduct or their code was silent on IP
- 1 had a code of conduct which only covered confidential information
- 12 relied on the Victorian Public Service code of conduct
- 5 had a code of conduct that covered all IP.

¹ State of Victoria, *Executive Services - Contract of Employment, Public Sector Management and Employment Act 1998* (Vic.).

² *ibid*, clause 15.3.

³ Under the *Public Sector Management and Employment Act 1988* (Vic.), the Commissioner for Public Employment produced the *Code of Conduct for the Victorian Public Sector*. The code continues in force, despite the *Public Sector Management and Employment Act 1988* (Vic.) recently being subsumed by the *Public Administration Act 2004* (Vic.). The Act also replaced the Commissioner for Public Employment with the Public Sector Standards Commissioner.

⁴ Office of Public Employment 2003, *Code of Conduct for the Victorian Public Sector*, s. 28, State Government of Victoria, Melbourne.

⁵ VicRoads 2002, *Code of Conduct and Ethics for VicRoads*, s. 29, VicRoads, Melbourne.

Entry and exit practices

When employees move between organisations, they take with them knowledge and skills that they have developed in their previous employment. In the case of employees recruited for research (and some other areas), this can include knowledge and information that the previous employer regards as their IP. If this process is not managed, subsequent employers may find that they have inadvertently infringed on the IP of another party.

In the audited agencies, recruitment processes do not consider any IP that new employees may bring with them, other than to require certain competencies for the position.

The audited agencies' codes of conduct⁶ include a provision obliging staff to protect confidential information obtained during their employment once they leave the organisation⁷. Audited agencies' exit processes do not cover this matter. Employee exit check lists that include information on employee obligations in relation to IP and confidential information are used in only 27 per cent of surveyed agencies.

Moral rights

In 2000, the *Copyright Amendment (Moral Rights) Act 2000* (Cwlth), changed the *Copyright Act 1968* (Cwlth), to recognise that the creators of copyright material retain certain rights even if ownership of copyright is transferred. These rights are:

- to protect the integrity of the work
- to attribution of authorship
- not to have authorship falsely attributed.

Moral rights are an exception to the general principle that the employer owns any IP developed by employees in the course of their employment unless specifically agreed otherwise. Moral rights automatically belong to the creator, although authors can consent to acts that would normally be an infringement of these rights (e.g. changes to a written report).

⁶ DHS and DET operate under the *Code of Conduct for the Victorian Public Sector*, produced by the Office of Public Employment, VicRoads has produced an individual *Code of Conduct and Ethics for VicRoads*.

⁷ Office of Public Employment 2003, *Code of Conduct for the Victorian Public Sector*, s. 32 and 62, State Government of Victoria, Melbourne, and VicRoads 2002, *Code of Conduct and Ethics for VicRoads*, s. 64, VicRoads, Melbourne.

In the public sector, the attribution of individual authorship is uncommon, as copyright material is usually created by teams and reviewed by a number of line managers. None of the agencies audited have a clear policy on if and when to attribute authorship, and how to address the moral rights of employees. The audited agencies have varying practices on recognition of authors and project teams. Many of those interviewed were unclear on the application of moral rights, and believe moral rights and Crown Copyright are mutually exclusive.

In 2004, the Copyright Law Reform Committee's review of Crown Copyright called for submissions on "whether moral rights should apply in the context of government copyright"⁸.

The Victorian Government's submission to the committee acknowledged that moral rights are inalienable to individual authors and supported the application of moral rights in the context of government copyright. However, the submission suggested that further clarification was needed "on the situations where the State is not obliged to attribute the rights associated within any works to the creator(s)"⁹.

In its final report, the committee considered that:

"If an employee writes a report for a government department, where reasonable, authorship of the work must be attributed to the employee and must not be falsely attributed to someone else, and the work must not be subject to derogatory treatment"¹⁰.

The committee pointed to sections 195AR and 195AS of the *Copyright Act 1968* as providing sufficient information about situations when it is reasonable not to identify the author¹¹. The committee suggested: "... that the author may also provide written consent to any or all acts or omissions that would otherwise constitute an infringement of his or her moral rights". The committee recommended better training for government employees about the application and responsibilities about moral rights.

⁸ Copyright Law Review Committee 2004, *Crown Copyright – Issues Paper*, p. 13, February 2004, Commonwealth of Australia, Canberra, viewed on 13 May 2005, <[http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F32F341DBE097801FF\)-0+LATEST+ISSUE+PAPER.DOC/\\$file/0+LATEST+ISSUE+PAPER.DOC](http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)-0+LATEST+ISSUE+PAPER.DOC/$file/0+LATEST+ISSUE+PAPER.DOC)>

⁹ State of Victoria 2004, *Submissions to Copyright Law Reform Committee on Crown Copyright Issues Paper*, p. 5, April 2004, Victorian Government, Melbourne, viewed on 13 May 2005, <http://www.clrc.gov.au/agd/WWW/clrHome.nsf/Page/Present_Inquiries_Crown_copyright_Submissions_2004_Sub_No_64_-_Victorian_Government>

¹⁰ Copyright Law Review Committee 2005, *Crown Copyright – Final Report*, pp. 147-8, 6 April 2005, viewed on 13 May 2005, <<http://www.clrc.gov.au/agd/WWW/clrhome.nsf/AllDocs/4F25A124B6E6F1A4CA256FDB0015D5A7?OpenDocument>>

¹¹ These sections include factors such as the nature of the work, the purpose for which the work is used and whether the work was made in the course of the author's employment.

In the light of this, Victorian public sector agencies will have to consider their responsibilities resulting from the moral rights amendments to the *Copyright Act 1968* (Cwlth).

Figure 4C illustrates the Victorian Environment Protection Authority's (EPA's) policy on moral rights:

FIGURE 4C: ADDRESSING MORAL RIGHTS AT THE ENVIRONMENT PROTECTION AUTHORITY

Victoria's EPA has an extensive policy on IP, which includes the following direction regarding authorship attribution and moral rights.

Moral rights: Authorship and attribution

EPA will comply with its obligations in relation to moral rights and wherever reasonable and practicable, attribute authorship of works or subject matter to its creators whether those creators are its employees or third parties.

EPA will not falsely attribute authorship of any work published by it.

EPA will, to the extent reasonable, abstain from derogatory treatment of an author's works.

Source: Environment Protection Authority 2004, *Intellectual Property Policy*.

4.5 Is record keeping sound?

A register of IP, or some form of information management system, allows agencies to know, at a corporate level, what strategically or commercially significant IP they own or are licensed to use.

A central register of IP also makes it easier to assess commercial values, update registrations and develop strategies for the use of IP. Useful information on an IP register includes:

- location
- ownership details
- where contractors are used, details on copyright clauses in contracts
- where material is licensed-out, details of licence, licensee, payment details and assignment details.

There are currently no requirements for agencies to keep a register of IP, though the Department of Justice's draft copyright policy includes a recommendation that agencies keep a register of all their copyright materials¹².

¹² The draft *Victorian State Copyright Management Policy* suggests that that agencies include computer programs developed for the agency where cost exceeded \$10 000, computer programs licensed by the agency, print publications sold or given away, television and radio advertising material developed by the agency, artwork and photographs commissioned, and training materials where development cost exceeded \$10 000.

This audit considered whether agencies had effective management information systems for commercially valuable/strategically significant IP.

Management information systems

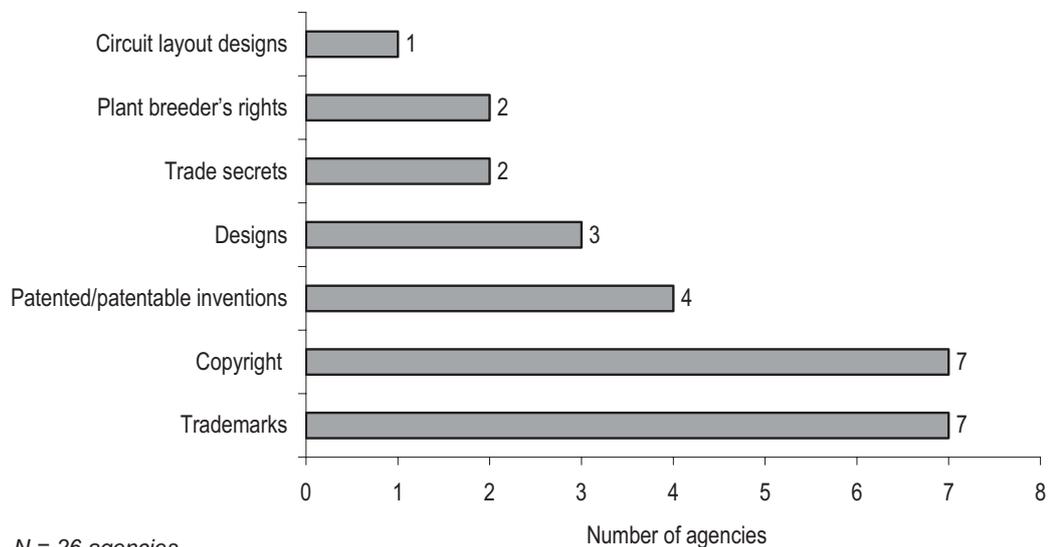
All audited agencies have some kind of management information system to maintain a section of their IP, although these are dispersed in the agencies. All agencies maintain databases of their important copyright materials. VicRoads developed a full IP register in 1999, but it lapsed as VicRoads divested itself of many of its old patents.

DET has several decentralised databases to register its IP. For example, there is a central register for the 50 or so trademarks that the department manages. An external contractor maintains a register of the curriculum materials DET owns and licences for a fee to other jurisdictions. Some materials developed under funding agreements are required to be registered in regional offices.

DHS maintains a database of significant copyright materials.

Of the surveyed agencies, close to 40 per cent maintain a register or database for valuable or significant IP. The different types of IP assets included in the register are as illustrated in Figure 4D.

FIGURE 4D: INTELLECTUAL PROPERTY ASSETS RECORDED IN AGENCIES



Note: Multiple answers allowed.

Source: Victorian Auditor-General's Office.

The majority of surveyed agencies with a register include both IP the agency owns and IP it has licensed others to use. Around half of agency registers specify the responsible manager and location. Only one agency records a commercial value of the IP on its register.

Accounting for intellectual property

The Ministerial Directions under the *Financial Management Act 1994* require public sector agencies, including government departments, to manage their intangible assets in accordance with Australian Accounting Standards.

Until recently, the financial directions did not require agencies to record intangible assets, apart from internally developed software with a value greater than \$500 000.

The Australian Accounting Standard relevant to intangible assets (AASB 138) changed on 1 January 2005.

The AASB 138 is applicable to annual reporting periods beginning on or after 1 January 2005 to both for-profit and not-for-profit entities, including public sector. The standard's definition of an intangible asset is: "an identifiable non-monetary asset without physical substance"¹³. As compliance with the standard is compulsory, organisations that fail to meet it in a material way will be issued qualified audit opinions. In March 2005, The Department of Treasury and Finance issued Financial Reporting Directions to assist agencies to comply with AASB 138¹⁴.

None of the audited agencies, and 4 of the surveyed agencies, record IP in their financial statements.

All audited agencies consider that to accurately or meaningfully record a monetary value for their IP would be difficult. Still, both VicRoads and DET have developed models to value some of their IP. VicRoads uses models based on cost recovery and the price of a substitutable alternative. DET's charges reflect a number of factors, including the potential market value of the materials and the desirability that publicly funded materials should be made widely available.

¹³ Australian Accounting Standards Board 2004, Accounting Standard AASB 138 *Intangible Assets*, July 2004, Australian Government, Canberra.

¹⁴ The DTF Financial Reporting Directions are available on the Department's website (Financial Management Knowledge Centre), but requires a password. Access the gateway through the following link, viewed on 17 June 2005.

<<http://www.dtf.vic.gov.au/dtf/rwp323.nsf/headingpagesdisplay/INFORMATION+FOR+VICTORIA+N+GOVERNMENTIFRS+Adoption?OpenDocument&Expand=7.7&>>

4.6 Are the risks of infringement and liability managed?

Core risks in IP management include the hazards that an agency's IP is stolen or misused, or that the agency misuses someone else's IP. These risks do not necessarily diminish at arms-length: the actions of third parties can still create liabilities for a government agency.

Agencies need to defend their IP in order to avoid commercial and reputational losses. Agencies should ensure that they do not infringe on others' IP, or they may be liable for damages.

Our criteria to assess infringement and liability management covered 4 areas:

- Does the agency monitor potential infringement of its IP and take appropriate actions to protect it?
- Does the agency effectively manage the risk of infringing the IP of other parties?
- Where IP is transferred outside the agency through sale or licensing arrangements, are the risks associated with liability and indemnity considered and managed effectively?
- Is the management of IP-related risks integrated into broader agency risk management processes?

We expected the agencies' risk protection efforts to be commensurate with the risk IP infringement posed. For example, we did not expect agencies to closely monitor the use of all copyright materials, but we would expect tighter controls around valuable/significant software, patents, trademarks etc.

Monitoring infringement and defending intellectual property

DET, DHS and VicRoads have all, on occasion, taken action to defend IP. For example:

- DET and VicRoads have issued "cease and desist" letters for the inappropriate use of the agency's IP, including trademarks
- DET has opposed contractors' claims on copyright materials
- DHS has asserted ownership when funded bodies have attempted to commercialise IP vested in the state under a funding agreement.

Generally, this action resulted from chance discovery of infringement, rather than active monitoring. While monitoring all IP is rarely likely to be cost-effective, none of the agencies identified high-risk IP that may have needed active monitoring.

The audited agencies point to the ownership provisions in their contracts as their risk management tool. However, the contracts only clarify ownership; they do not ensure that agency's IP is not infringed.

From time-to-time, the public alerts agencies of possible IP infringements. Figure 4E details the results of one of these tip-offs.

FIGURE 4E: A CYBER SQUATTER IN VICROADS

In 2002, VicRoads received a feedback item on its website that indicated that the domain name <www.vicroads.com.au> redirected users to the website of a private company, which sold car insurance. This created the impression that the insurance was sold under the auspices of VicRoads.

In order to register a domain name, an applicant has to prove an association with the name. In this case, the insurance company had registered the business name "Vic Roads Insurance Quotes" with the Department of Fair Trading in NSW.

VicRoads sought legal advice and subsequently sent a letter to the insurance company to cease and desist. VicRoads also successfully sought to have the business name registration removed from the NSW Department of Fair Trading register. Since then, VicRoads has registered more domain names.

Source: Victorian Auditor-General's Office.

Eleven out of the 26 surveyed agencies monitor infringement of their IP rights by others. Procedures used by agencies include:

- monitoring newly registered IP
- monitoring use of domain names
- managing contractual relationships which license use of trademarks
- being on the look-out for, and receiving information from, the public, for example, confusing/misleading advertisement in newspapers.

Around a quarter of surveyed agencies advised us that they have taken action to defend specific IP since July 2002. These actions relate to:

- theft of an agency's website (architecture, design etc.) by an unrelated company
- a company using an agency's name in advertising materials
- consultants providing reports branded with their own logos and incorporating copyright notices asserting ownership where the contract provided the copyright was owned by the state
- an agency defending its position in relation to alleged plant breeder's rights and trademark infringement.

Managing the risks of infringing the intellectual property rights of other parties

The audited agencies' main risks of infringing other parties' IP lies in misunderstandings of contractual arrangements, particularly in licence agreements, and in the (mis)use of copyright materials.

In terms of copyright infringement, the audited agencies were confident that their employees were adequately aware of the requirements to use, attribute and, as appropriate, seek permission. Our audit found nothing to contradict this. However, agencies should be aware that new staff might require training.

There is little or no monitoring of compliance with the terms of licence agreements, either when agencies licensed-in or licensed-out IP.

Thirteen out of 26 surveyed agencies conduct monitoring to ensure that staff do not infringe/make unauthorised use of IP belonging to others.

Managing the risks of liability and indemnity

Where IP is transferred outside the organisation through a licence, all agencies we audited have appropriate indemnity and liability clauses in their licence agreements to protect the organisation against third-party risk.

Integration into agency risk management processes

VicRoads does not recognise any IP-related risks on its risk register. DET is still developing its risk management system, and is unsure whether any IP-related risks emerge during the scanning process. DHS is also developing its risk register, but no IP-related risks have been raised in the environmental scanning to date. It would appear that IP matters are not considered a big risk issue in the agencies we audited.

Seven out of the 26 surveyed agencies have identified IP-related risks on their risk registers. These risks include:

- loss of sensitive information
- theft of proprietary information or software
- breach of copyright due to lack of staff awareness
- failure to protect the corporate image
- under-development or compromising of organisational capability.

4.7 Conclusion

The agencies that participated in the audit identify and protect their significant IP, but not always at an early stage. For copyright, identification and protection is often a matter of routine process rather than active planning and management. It needs to be better integrated into project planning methodologies, so that IP likely to be produced in projects is identified at an early stage, and appropriate arrangements are made to ensure that it is protected.

Effective protection of IP also requires that there are clear policies for employees on ownership of IP. Currently, the conditions for non-executive staff in the Victorian public sector refer only to copyright and are silent on other forms of IP. While this is a low risk for most agencies, as there is minimal development of other forms of IP, amending the *Code of Conduct for the Victorian Public Sector* as part of any broader review of Victorian Public Service conditions would clarify the issue.

Agencies also need to consider issues of attribution of authorship to employees and possible implications of the moral rights amendments to the *Copyright Act 1968* (Cwlth). While public sector agencies rarely acknowledge authorship, where they do so, moral rights need to be considered.

There is limited and dispersed record keeping of IP in the agencies. IP record keeping should not be an end in itself. However, adequate record keeping is fundamental to managing assets effectively.

During 2005, agencies will have to implement Accounting Standard AASB 138 *Intangible Assets*. This requirement is an opportunity to identify and properly record significant IP managed by agencies.

The audited agencies rely on vesting arrangements in contracts and agreements to protect the agency against risks of IP infringements and liabilities. Little monitoring is done of these vesting arrangements. Similarly, when agencies licence-in and out IP, there is an expectation that the terms and conditions of the licence will be automatically complied with. Where infringement is discovered, it is usually by chance. Agencies should not necessarily monitor the use of all IP; instead, monitoring efforts should be commensurate with the risk that IP infringement poses to the agency.

Recommendations

4. **Code of conduct provisions for public sector employees should address employer ownership of all types of IP, not just copyright. For example:**
 - the Victorian Public Sector Standards Commissioner should consider this when issuing new codes of conduct under the *Public Administration Act 2004* (Vic.)
 - government agencies that produce their own codes of conduct should address this as codes are reviewed and updated.
5. **Agencies should assess whether the provisions in the *Copyright Act 1968* (Cwlth) regarding moral rights can be implemented in their agency and, if not, obtain consents as far as possible from their staff and contractors.**
6. **Agencies subject to the *Financial Management Act 1994* (Vic.) should conduct an IP audit or in other ways assess the value of their IP assets to comply with Accounting Standard AASB 138.**

RESPONSE provided by Public Sector Standards Commissioner

Recommendation 4

The report correctly identifies that the Code of Conduct issued by the former Commissioner for Public Employment does not specifically address employer ownership of IP, beyond copyright. That Code was and continues to be binding on employees of the Victorian Public Service, until replaced by any code I may issue.

*The functions of my role allow me to issue codes of conduct that are binding on classes of public official beyond those employed in the Victorian Public Service. I accept the recommendation made in the report, that I should consider employer ownership of all types of IP, when issuing new codes under the *Public Administration Act 2004*.*

RESPONSE provided by Secretary, Department of Education and Training

Recommendation 4

The Department of Education and Training accepts this issue being addressed in any Codes of Conduct under the Public Administration Act 2004 as part of a whole-of-government approach to employees' general rights and obligations.

Recommendation 5

The Department of Education and Training accepts this recommendation. The Department of Education and Training recognises the importance of addressing moral rights issues (if possible) despite their complexity and will seek further expert advice on the most practical way (if any) of addressing this issue.

Recommendation 6

The Department of Education and Training accepts this recommendation. DE&T recognises its obligation to comply with AASB 138 and will seek advice on how best to comply with it.

RESPONSE provided by Secretary, Department of Human Services

Recommendations 4,5, 6

These recommendations are supported. However, it is important that they be coordinated with and form part of the development of a whole of government IP policy.

Employment issues regarding IP should also encompass temporary employees and individual contractors, many of whom are engaged because of their specialist knowledge of, or access to, IP that is contributed to the work done by the public sector. This "background" IP often supports, and is essential to the use of, new IP developed in the course of the projects and assignments in which these individuals participate. The proper use of such IP can be frustrated where background IP rights have not been secured appropriately.

Equally, it is important that any decisions in relation to moral rights are dealt with under a whole of government policy. Frequently the copyright material produced by the department has composite authorship which includes contributions from a number of public sector employees and external contractors.

In the department's case some of the most potentially valuable IP it develops is in relation to IM&ICT projects. The participation of the Office of the Chief Information Officer in bringing a whole of government perspective to the implementation of recommendation six would be desirable.

RESPONSE provided by Chief Executive, VicRoads

Recommendations 4, 5, 6

Agree.

RESPONSE provided by Secretary, Department of Premier and Cabinet

Recommendation 4

The Department of Premier and Cabinet agrees with the recommendation.

Recommendation 5

Recommendation No. 5 of the Report proposes that agencies assess whether moral rights can be implemented in their agency, and, if not, to obtain consents from their staff and contractors.

DPC's view is that policy on moral rights for Victorian Public Sector employees should not be determined on an agency-by-agency basis, but as part of the whole of government IP policy to be developed by the group proposed in Recommendation No. 1. That group should also consider whether the operation of ss 195AR and 195AS of the Copyright Act 1968 make it unnecessary for agencies to seek consents from employees.

Recommendation 6

The Department of Premier and Cabinet agrees with the recommendation.

4.8 Good practice principles

Good practice principles for day-to-day management of IP are summarised in Figure 4F.

FIGURE 4F: GOOD PRACTICE FOR DAY-TO-DAY MANAGEMENT OF INTELLECTUAL PROPERTY

To identify, protect and record IP, agencies should:

- have appropriate mechanisms in place to identify IP generated by employees, contractors and funded bodies
- take reasonable steps to protect and safeguard government-owned IP, noting that some forms of IP are protected automatically (e.g. copyright, trade secrets, circuit layouts) and other forms require active steps to be taken to obtain protection (e.g. patents, plant breeder's rights, registered trademarks and registered designs)
- consider the costs, benefits and risks in making decisions about IP registration
- periodically review the appropriateness of continued registration
- establish a register or other information management system to record important information relating to IP assets and rights
- ensure staff have timely access to commercial, financial and legal advice to assist in decision-making
- in the case of research activities, maintain adequate records in order to prove the date of the invention.

Human resource management practices should consider IP issues, ensuring:

- clarity in employment contracts for the ownership and rights of IP developed by staff in the course of their employment
- staff are aware of how IP management supports the agency's objectives
- appropriate up-to-date training in IP-related issues is provided to relevant staff
- staff who develop valuable IP are rewarded for their work
- HR has clarified the agency's position on moral rights
- that new staff entering the organisation are aware of their duties not to infringe on previous employers' IP
- that exit procedures include a reminder on responsibilities for the organisation's IP and confidential information.

Source: Victorian Auditor-General's Office. Based on analysis of New South Wales Audit Office 2001, *Better Practice Guide: Management of Intellectual Property*, New South Wales Audit Office, Sydney; and Government of Western Australia 2003, *Government Intellectual Property Policy and Best Practice Guidelines*, Department of Industry and Resources, Perth.



5. Purchasing contracts and intellectual property



5.1 Contract management and intellectual property

Intellectual property (IP) is an invisible but crucial deliverable in any contract entered into by public sector agencies for the purchase of goods and services.

Effective contracts will clarify IP rights, minimise and manage risks, and support optimal outcomes for the agency and the state. Ineffective IP management of contracts can result in:

- a lack of clarity in IP ownership and rights
- additional costs to license the contractor's pre-existing IP or other essential supporting materials
- exposure to third-party infringement
- limited access to relevant project IP
- lack of awareness by the agency of valuable IP developed under the contract.

We examined the guidelines on managing contracts for purchasing in audited agencies to see if they provided clear guidance for staff on IP issues to consider. We also examined agency practices in developing specifications, managing the tender process and documenting agreements to see if they adequately addressed IP issues.

5.2 Are policies and guidelines on intellectual property issues in purchasing clear and consistent?

In Part 3 of this report, we considered whether agencies had policies giving clear direction on the allocation of IP rights. This part of the report looks in more detail at the clarity and consistency of agency policies and guidelines regarding IP created under contracts for purchasing.

In assessing guidance available on IP issues in contract management, we considered:

Guidance

- Does the agency have clear guidelines to assist staff in managing IP in purchasing?

Contract control

- Do policies or procedures ensure that only staff with the relevant expertise can authorise a departure from standard contract provisions?

5.2.1 Guidance

All the audited agencies have clearly defined tendering guidelines, documents and templates available to staff, on shared central databases, for day-to-day contract management. However, none of these guidelines specifically address IP or guide IP management in purchasing.

The Victorian Government Purchasing Board (VGPB) has developed a suite of standard template contracts that includes some generic IP terms. All Victorian government departments and 10 administrative offices are required to either use the VGPB template contracts or to develop their own in such a way that they do not conflict with the VGPB templates.

The VGPB encourage all public sector agencies to use or refer to its templates to guide agencies' development of essential generic standard contract provisions, for example, IP warranties and indemnities.

The inclusion of standard IP clauses in these template contracts provides some guidance to staff about issues which need to be considered. The usefulness of this guidance depends on the clarity and simplicity of the contract. The Department of Human Services (DHS) showed good practice in this area, with standard contracts in plain English with explanatory summary sentences in the contract margins.

5.2.2 Contract control

Standard contracts offer agencies a consistent and controlled IP management tool that can be applied across business units. All audited agencies use standard contract templates, for example:

- DHS has 2 template contracts, a short-form and a long-form commercial agreement. There is also a separate consultancy agreement used by the Capital Management Branch for engaging consultants in building and construction. This contract is currently under review.
- VicRoads has 13 template contracts, adapted for a range of common purchase types such as design and construct, road and bridge works, hardware and software, and short- and long-form general contracts.

- The Department of Education and Training (DET) has 2 very similar template contracts: one for contractors and one for consultants.
- Departments that fall under VGPB policies, including DHS and DET, use the Government Information Technology Conditions (GITC) contracts for significant IT software and hardware purchases.

We found in both VicRoads and DHS that there were clear contract control processes for amending the terms in the standard contract, including the terms relating to IP. In both agencies, legal services and contract services respectively control any amendments to electronic versions of the contracts.

DET also encourages legal services involvement, but the controls over changes are voluntary, with ultimate control resting within the relevant business units. DET is piloting tighter contract management by adding a contracts module to its electronic purchasing system.

5.3 Do tender processes adequately address intellectual property issues?

In assessing whether tender processes adequately addressed relevant IP issues, we considered:

Planning

- Are IP issues considered before tenders/bids are called?
- Does the agency consider the IP rights necessary to meet the operational needs of the agency?
- Does the IP need to be purchased outright or could adequate access be obtained through other means (e.g. through licensing) for a lower price?

Calling tenders

- Are the agency's preferred IP provisions clearly defined, implemented and communicated to tenderers?

IP in tender submissions

- Does the agency have procedures for managing the disclosure of agency IP to tenderers?
- Does the agency clarify rights to IP contained in tender submissions?

Active management of IP needs to consider these issues early to allow for a planned approach. Integration into the planning and tendering stages of projects/purchasing allows IP management to be outcomes-focused rather than having a focus on risk minimisation. The earlier that agencies decide on their IP requirements, the earlier they can negotiate with tenderers and contractors to reach an agreement. This will help the ongoing relationship and minimise the potential for future conflict.

5.3.1 Planning

Unlike other contract deliverables, an agency does not always need to obtain full ownership of IP developed in the course of a contract in order to meet its operational needs. As part of the planning process, the agency may consider alternative approaches, including:

- assigning IP ownership to the contractor and obtaining necessary licences to use the IP in exchange for a lower price
- retaining ownership and assigning the contractor a licence to further develop and/or disseminate for the benefit of the state.

We found that IP was not considered during the planning phase. The only time project managers took an active approach was when tenderers or contractors raised an issue with the standard IP arrangements. Generally, in this situation, contract managers sought advice from Legal Services branches. Advice from legal services tended to concentrate on achieving clear contract terms and protecting the agency from legal risk.

There were few sources of broader advice (such as financial, commercial and policy perspectives) about more flexible ownership models that may lead to better outcomes.

5.3.2 Calling tenders

All agencies' Request For Tender (RFT) documents include the agency's standard contract as an attachment, to communicate the likely, or preferred, contract terms and conditions regarding IP to the tenderer.

Agencies acted in accord with the VGPB RFT guidelines, allowing provisions for tenderers to submit non-complying tender where tenderers do not wish to, or cannot agree to the standard contract conditions. In that case, the tenderer must indicate that they do not comply, explain why they do not comply and propose amendments that are acceptable to the tenderer¹.

¹ Victorian Government Purchasing Board, *VGPB Request for Tender guidelines "PART A - CONDITIONS OF TENDERING,"* Victorian Government Purchasing Board, Melbourne, viewed 28 April 2005, <[http://www.vgpb.vic.gov.au/CA256C450016850B/WebObj/RFTPartA-ConditionsofTendering04-04/\\$File/RFTPartA-ConditionsofTendering04-04.01.doc](http://www.vgpb.vic.gov.au/CA256C450016850B/WebObj/RFTPartA-ConditionsofTendering04-04/$File/RFTPartA-ConditionsofTendering04-04.01.doc)>

We found a number of tender submissions that did not comply with the standard IP terms and conditions. DHS officers reported that almost all non-complying submissions took issue with either the level of indemnity or the IP terms. Most non-complying submissions were found at DET, where tenderers would not accept an agreement without terms clarifying the ownership of pre-existing IP in the standard contract. One non-complying tender submission challenged IP ownership of the tender materials. There were no non-conforming tenders challenging the ownership of the materials produced under the contract itself.

5.3.3 Intellectual property included in tender submissions

Tenderers often devote significant resources to a submission and the materials presented may represent a significant component of their competitive advantage (e.g. architectural designs). It is important that information to tenderers clarifies the arrangements applicable to any IP provided in tenders.

It is standard practice for agencies calling for tenders to advise tenderers that the tender *documentation* becomes the property of the agency. However, the request for tender documents in the audited agencies did not communicate their intentions regarding the ownership of any IP (e.g. the concepts and ideas) contained in the submissions.

We found one instance at VicRoads where a tenderer questioned the ownership of a tender submission. VicRoads' guidelines do not address this issue. The Contract Services Department was asked to clarify the matter and advised that the IP submitted by a tenderer remains the property of a tenderer. It is only once a contract is entered into with the successful tenderer that VicRoads purchases any IP.

In the agencies we surveyed:

- 74 per cent had standard procedures for managing the disclosure of agency IP to tenderers
- 65 per cent had policies and procedures for managing the receipt of IP from tenderers.

5.4 Are agreements effectively documented?

In assessing whether agreement documentation was clear and comprehensively addressed relevant IP issues, we considered:

Intellectual property definition and allocation of rights

- Does the contract define IP, and is the definition adequate to cover all types of IP likely to be developed under the contract?
- Is there clarity in the IP ownership and other rights (e.g. licences and royalties)?

Pre-existing intellectual property

- Is there recognition that ownership of pre-existing IP will not be affected by the contract?
- Does the agency receive a licence to use the contractor's pre-existing IP and/or other IP necessary for the full use of the contract deliverables (at no additional cost)?

Risk clauses

- Does the contractor indemnify the agency against claims and liabilities?
- Does the contractor warrant that it has the legal ability to assign or transfer IP ownership over works produced under contract?

Rights and obligations

- Does the contract address the question of moral rights?
- Does the contract include conditions requiring the contractor to notify the agency of any IP developed under the contract?

Standard template contracts are an effective IP management tool if they include terms that unambiguously ensure appropriate access, minimise risks, and clarify both parties' rights and responsibilities. The final contract terms should also reflect a considered view on whether or not IP protection contributes to the outcomes sought. However, this tool is not effective on its own and must be actively managed to make sure obligations are complied with.

Figure 5A illustrates the extent to which agencies' template contracts include terms to manage IP issues in purchasing.

FIGURE 5A: STANDARD CONTRACT TERMS SUMMARY

Agency	Recognition of both parties' pre-existing IP	Provides licence for further necessary IP	Indemnity against claims and liabilities	Warranty for the contractor's right to assign IP	Moral rights obligations are clear	Notification obligations are clear
DHS	✓	✓	✓	✓	✓	(a) ✓
VicRoads	(b) ✓	✗	✓	✓	✓	✓
DET	✗	✗	(c) ✓	(c) ✓	✗	✗
Surveyed agencies (d)	5/14	3/14	11/14	11/14	4/14	5/14

(a) Not in short form contract.

(b) Most, but not all.

(c) Generic indemnity and warranty, not specific to IP.

(d) Fourteen of the 26 surveyed agencies provided template contracts for analysis.

Source: Victorian Auditor-General's Office.

5.4.1 Intellectual property definition and rights

All template contracts in the audited agencies adequately defined IP with a definition that was relevant to the types of IP the agency is likely to be dealing with.

Purchasing contracts examined at audited and surveyed agencies made the ownership of IP produced under the contract clear – terms and conditions vested IP in the state.

An exception was where agencies dealt with large IT vendors. Here, they often have to abide by the contractor's terms and conditions. In these cases, IP ownership is vested in the contractor and the agency receives a licence.

5.4.2 Pre-existing and component intellectual property

Pre-existing intellectual property

Contractors are often selected because they have previous experience and capacity, and contracted work builds on this. Therefore, contractors will often insist upon the inclusion of pre-existing IP terms that recognise this previous work and ensure that they retain ownership.

Effective project planning and contracts should consider and address the issue of pre-existing IP, and clarify the ownership and rights of access to this work.

Of the audited agencies, DHS is the only one to include terms addressing pre-existing IP in all standard contracts. VicRoads include pre-existing IP terms in most of its 13 standard contracts, including the 2 most frequently used.

DET did not have any explicit clauses relating to pre-existing IP. There were a number of cases at DET where tenderers submitted non-complying tenders because of the lack of pre-existing IP recognition in the standard contract. DET has accepted the amendments on a case-by-case basis but has not made permanent changes to the standard contract. DET advises that it considers that the current clause is broad enough to claim ownership of both the relevant pre-existing and any IP emerging as part of the contract. The clause states:

“All intellectual property rights created, discovered or coming into existence as a result of or arising out of this contract shall be the property of and vested in the State of Victoria. Intellectual property rights include any documentation produced by the contractor in providing the services”².

Other intellectual property that may be required for full use of contract deliverables

Agencies should have standard contracts that adequately protect against additional fees and charges by contractors. There is a risk, particularly with IT contracts, that a contractor may deliver the agreed product in a form that is not accessible unless other products are purchased, potentially at an inflated price. To mitigate this risk, the contract should include a term that ensures a royalty-free licence to the contractor’s pre-existing IP, or a third-party’s IP, as necessary.

We found DHS ensured a licence to the contractor’s pre-existing IP in its standard contracts. VicRoads’ contracts included a similar clause, protecting the agency from any further fees or payments.

DET’s contracts do not ensure access to pre-existing IP, creating a risk that it may be exposed to either an unfulfilled project deliverable or further costs. As discussed above, legal services in DET consider that the existing clause on IP is broad enough to include ownership of pre-existing IP. We consider that the matter can be made clearer in the template documentation.

Figure 5B highlights considerations in identifying and ensuring access to pre-existing and component IP.

² Department of Education and Training 2004, *General Purpose Contract 2004*, c. 8, Victorian Government, Melbourne.

FIGURE 5B: UNDERSTANDING COMPONENT INTELLECTUAL PROPERTY IN PROJECT DELIVERABLES

When an agency purchases database development and maintenance services, there are layers of IP underpinning the project deliverables. These all need to be identified and clarified in agreements.

The deliverable may be the development and ongoing maintenance of a database, that is, initial development (including programming), and then the ongoing provision of information that is valid, accessible, and useful. In order to reach this deliverable, the contractor must undertake a number of activities, including:

- programming tasks to establish the database (which may include utilising pre-existing source code and additional design work)
- collecting information from various sources. This can include information provided by the agency and copyright materials owned by other parties
- collating and customising the information
- presenting it in an appropriate form
- regularly reviewing the content of the database.

These activities are likely to result in significant and valuable component IP, and the purchasing agency must clarify the ownership of, and access to, each element.

If this is not considered, the purchasing agency is exposed to the risk of disputes, supplier capture and loss of control over the integrity and accuracy of the information.

Source: Victorian Auditor-General's Office.

5.4.3 Risk clauses

Agencies should include indemnity obligations in contracts. Where agencies do not seek an indemnity against liabilities, they are exposed to risks beyond the agency's normal control. Risk clauses such as indemnity clauses can ensure public sector agencies are removed from such risks.

All audited agencies had indemnity clauses in their standard contracts. Some clauses referred specifically to IP, while others referred to legal claims in general.

Agencies may be exposed to risks if they do not include warranty terms to ensure that the contractor has the right to use and sell/transfer IP to the agency. We found variable use of warranties in the standard contracts of the audited agencies. DET included a blanket warranty that did not specifically address IP. DHS included an IP-specific warranty in its standard contracts, VicRoads had IP warranty clauses or similar in most of its standard contracts.

5.4.4 Contractor rights and obligations

Moral rights

As discussed earlier in this report, moral rights are separate rights vested in the authors of copyright material. Moral rights are not assignable. However, a written consent can, under certain circumstances, protect the agency against acts or omissions that would normally constitute an infringement of the contractor's moral rights. This can include the freedom not to attribute authorship, to make reasonable changes, and to make decisions on publication.

VicRoads and DHS have comprehensive moral rights terms in their contract documentation. DET does not include any moral rights terms. DET's legal services have considered adding moral rights terms to their contracts but have found proposed clauses to be unwieldy and vague.

Intellectual property notification obligations

Agencies should consider the inclusion of conditions obliging contractors to notify the agency of IP developed under the contract (a "notification clause"). A notification clause may help ensure that agencies receive the full benefit of the materials developed under the contract.

VicRoads has the most comprehensive notification terms, requiring the contractor to deliver all materials produced under the contract at its completion and to maintain regular contact with the contract manager for the contract's duration. But, while VicRoads has clear notification clauses in its standard contracts, we did not find any evidence that contract managers monitor this obligation.

DHS has a notification term in all their contracts. DET does not have a notification term in its contracts.

5.5 Conclusion

Current policies and guidelines for managing IP in purchasing contracts can be improved. While a number of Victorian Government Purchasing Board policies and associated guidelines address IP considerations, these assume that the ownership model has already been established. Agency policies and guidelines need to encourage consideration of flexible models of ownership prior to the calling of tenders and the negotiation of contracts.

Staff in the agencies we audited used the provisions in template contracts as the main guidance on issues to consider. This reduces the risk as long as there are effective controls over who can vary contract clauses, and where this only happens with legal advice. In 2 of the agencies we audited, there was clear control, but this was less clear in the Department of Education and Training.

However, reliance on standard clauses in template contracts means that consideration of IP issues occurs well into negotiations, rather than at the purchase planning stage. Opportunities for agencies to be proactive and to think flexibly about the IP rights needed to fulfil contract objectives are lost.

It is important to note that in many of the contracts we examined, decisions relating to the need to protect IP were not made prior to preparing the Request For Tender.

Currently, with the exception of information technology purchases, many agencies view full ownership of IP as the default position. Thinking more flexibly about IP ownership when developing RFTs and purchasing arrangements may:

- create opportunities for purchasing agencies to acquire goods and services at a lower price
- attract a wider range of suppliers
- reduce time spent in contract negotiations.

While it is a long established principle that agencies own tender submissions, this was not intended to include the IP (that is, the ideas expressed) in those submissions. Most agencies we examined were clear on this. Nevertheless, it was evident from tenders we examined that some tenderers would like to see it clarified. Agencies should make their ownership intentions clear.

Government agencies should strive to devise standard contract terms and conditions to achieve best outcomes and manage and minimise risks. Agencies that have not considered various contingencies may face poor IP management outcomes. Current documentation of IP arrangements in purchasing contracts is variable. VicRoads and DHS have detailed and specific clauses about IP in standard contracts, while DET relies on more general provisions. This has been a conscious decision by the department. However, the general nature of the provisions may lead to uncertainty for vendors and contract managers on what has been agreed in the contract.

The standard terms and conditions provide a tool for contract management but cannot be relied upon to achieve outcomes in isolation. Contract managers should also actively manage the contract to ensure obligations are adequately met.

Recommendations

7. **That the Department of Treasury and Finance develop improved guidance on IP considerations in purchasing. This should:**
 - **take into account the whole-of-government policy direction, once established**
 - **recognise that IP decisions need to be made before contractual solutions are found.**
8. **That agencies clarify IP ownership of tender submissions, and make this clear in requests for tender.**
9. **That the Department of Education and Training review:**
 - **the adequacy of its controls over changes to contract templates**
 - **the terms relating to IP in its contract templates.**

RESPONSE provided by Deputy Secretary, Department of Treasury and Finance

Recommendation 7

DTF supports the recommendation that DTF will provide guidance on IP considerations in purchasing that take into account the whole-of-government policy.

RESPONSE provided by Secretary, Department of Education and Training

Recommendation 8

The Department of Education and Training accepts this recommendation. The Department of Education and Training agrees to clarify IP ownership of tender submissions.

RESPONSE provided by Secretary, Department of Education and Training - continued

Recommendation 9

The Department of Education and Training accepts this recommendation. The Department has from time to time (when necessary) reviewed its standard contract templates and made appropriate and necessary changes. The last review occurred in November of 2004. The Department intends to review its contract templates once the Victorian Government Purchasing Board has finalised its latest contracts and will be reviewing all clauses in its contract templates including the IP clause.

The Department recognises the need to limit changes to contract templates and will update its contract management system and the Purchasing at DE&T website to provide both more information to business units at an early stage and greater control of the contract documentation.

RESPONSE provided by Secretary, Department of Human Services

Recommendations 7, 8, 9

These recommendations are supported.

RESPONSE provided by Chief Executive, VicRoads

Recommendations 7, 8

Agree.

Recommendation 9

Not applicable to VicRoads.

RESPONSE provided by Secretary, Department of Premier and Cabinet

Recommendations 7, 8, 9

The Department of Premier and Cabinet agrees with the recommendations.

5.6 Good practice principles

For agencies reviewing the IP provisions in their standard contracts, we have collated some good practice guidelines. These are provided in Figure 5C.

FIGURE 5C: GOOD PRACTICE FOR PURCHASING CONTRACTS

Pre-tendering **decision-making** on IP in contracts for purchase should:

- consider IP issues before tenders or bids are invited or consultants are engaged
- consider a range of IP ownership models suitable for the different types of service deliverables
- obtain the IP rights required to meet the operational objectives of the agency
- consider how the IP may be used to achieve the best outcomes for the contractor, the agency and the state.

In the **tender process** and **pre-contract negotiations**, the agency should:

- include the preferred terms and conditions of the agreement, including IP rights and ownership, in the RFT documentation
- consider whether a lower purchase price (or other benefits to the agency and state) can be negotiated when the agency only requires a licence to the IP.

Purchasing contract terms should:

- ensure that all contracts under which IP might be created specifically address the issues of ownership of, and rights to, pre-existing IP, and also IP to be created during the contract
- ensure a licence to use other IP that may be required for full use of contract deliverables
- include appropriate warranties and indemnities necessary to adequately manage IP risks
- obtain all necessary consents associated with moral rights in copyright material created by contractors to the extent possible
- ensure that contractors notify the agency of any IP additional to the specific project deliverables at the time of its creation
- avoid joint ownership of IP as this arrangement can be legally uncertain and difficult, even when the contract terms are clear.

Project managers should:

- actively manage contracts to ensure that the ownership of IP created will vest as agreed in the contract (which may involve obtaining assignments or licenses of IP from subcontractors or other third parties, or an obligation for the contractor to notify the agency upon creation of any unexpected IP)
- have timely access to appropriate commercial, financial and legal expertise.

Source: Victorian Auditor General's Office. Based on analysis of New South Wales Audit Office 2001, *Better Practice Guide: Management of Intellectual Property*, New South Wales Audit Office Sydney; and Government of Western Australia, 2003, *Government Intellectual Property Policy and Best Practice Guidelines*, Department of Industry and Resources, Perth.



6. Funding arrangements and intellectual property



6.1 About the funding relationship

Much of the work of government is conducted by bodies that are not part of “the state” but are funded by government to deliver services. In these situations, a funding agreement¹ is entered into between the funding agency and the funded body, specifying the services to be delivered on behalf of government, and other funding conditions.

Funding agreements may be for ongoing service provision - for example agreements between the Department of Human Services (DHS) and a community service organisation for the provision of community services. Alternatively, funding may be provided for a discrete task - for example, an agreement to provide funds for research on a specific issue.

A funding agreement tends to be more general in language than a contract in order to recognise that government agencies and their funded bodies operate in partnerships, not in a strict purchasing relationship.

We examined arrangements in a number of funding agreements, and intellectual property (IP) practices in a number of funded bodies, including health services and technical and further education (TAFE) institutions. We also consulted a number of bodies in the funded sector.

6.2 Are policies on intellectual property arrangements with funded bodies clear and consistent?

In Part 3 of this report, we considered whether agencies have policies giving clear direction on the allocation of IP rights. This part of the report looks in more detail at the clarity and consistency of agency policies and guidelines regarding IP created under funding agreements.

In examining this area, we considered:

Clarity of direction and consistency

- Are guiding policies, principles and considerations on IP arrangements with funded bodies clear to agency staff and to funded bodies?
- Is the allocation of IP rights under funding agreements consistent with the agency’s stated direction?

¹ The agreements entered into for funding are variously called “grants agreements”, “funding and services agreements”, and “performance agreements” in different agencies. For the purposes of this report, we are using the term “funding agreement” to encompass all of these.

Decision-making

- Is decision-making responsive to service delivery needs and concerns of funded bodies?
- Do decisions take into account the level of risk, government service delivery objectives and potential community benefits?

6.2.1 Approaches to allocation of intellectual property rights

Department of Human Services

DHS spends around 70 per cent of its budget to fund more than 2 700 bodies to provide a range of services. These include both non-government and government-related agencies such as public hospitals, community service organisations, local government, community health services, and the metropolitan and rural ambulance services.

The kinds of IP potentially created within the organisations funded by DHS include:

- complex medical research with potentially significant patentable discoveries
- social research
- educational material created in community bodies
- copyright materials.

Some of this IP is created under specific agreements where the IP is an integral part of the service deliverables (e.g. research agreements). In other cases, the IP is created incidentally under funding arrangements where the funds are provided for broader service delivery.

DHS documentation states that all IP created under funding arrangements will vest in the state.

Department of Education and Training

The Department of Education and Training (DET) funds the delivery of education services through bodies such as TAFE institutions, registered training organisations, and adult and community education organisations.

The kinds of IP potentially created in these arrangements are predominantly copyright materials, including curriculum, research projects, good practice guides etc.

In the Education and Training portfolio, there is some variety in the provisions regarding IP in the funding agreements. However, the basic approach is that the Heads of Agreement is silent on IP (including copyright). Instead, funded bodies have to sign a separate deed which vests all copyright materials produced under the agreement in the State of Victoria.

The TAFE performance agreement is also silent on IP in the Heads of Agreement, but Crown Copyright is claimed over certain projects. At least one of the statutory bodies attached to DET, Adult Community and Further Education (ACFE), vests all IP in the state in its funding agreements.

VicRoads

In comparison with DHS and DET, VicRoads has few funding relationships. In common with other states' road authorities, VicRoads provides funding for research conducted by Austroads and AARB Transport Research. VicRoads and other funding partners also provide funds to Monash University Accident Research Centre.

While DHS and DET both provide operating funds for bodies, VicRoads' funding is tied more closely to specific research activities.

In VicRoads, the funding relationships predate the establishment of the Roads Corporation². The funding documentation does not address IP specifically, which means that the IP vests in the creators of the IP (the funded bodies). The organisations providing the funds share decision-making over the use and publication of research results, which are generally publicly available.

Surveyed agencies

The different approaches to IP rights allocation for funded bodies were mirrored in our survey. Twelve of the 26 surveyed agencies provide funding to other entities for activities that may lead to IP creation. Of these, 5 agencies vest IP created under the agreement in the state, one agency vests IP in the funded body, and the remaining 6 consider the vesting on a case-by-case basis.

6.2.2 Clarity of direction

Both DHS and DET justify their policy on ownership of IP in funded bodies through the Crown Copyright provisions under the *Copyright Act 1968* (Cwlth).

² In 1989, the Road Traffic Authority and the Road Construction Authority in Victoria merged to become the Roads Corporation, using VicRoads as its trading name.

However, the 2 departments interpret Crown Copyright differently. DET limits its claim to copyright material; DHS claims ownership of all IP, not just copyright materials.

DHS claims that its position is in accordance with the *Copyright Act 1968* (Cwlth) in its current Funding and Service Information Agreement kit that states:

“The Victorian State Government policy on IP provides that ownership of all IP rights in materials created under a service agreement funded by the State of Victoria vests in the State. This position is in accord with Part VII Division II [sic] of the Copyright Act 1968.”³

We consider DET’s interpretation of Crown Copyright to be correct. Crown Copyright covers copyright materials, not all IP. Further, the test for Crown Copyright is that copyright materials need to be developed under the “direction and control” of the state. There is uncertainty about what “direction and control” actually means⁴. However, there is a plausible argument that making a blanket claim to all IP created by a funded body as the result of an application of public funds is too broad to meet the “direction and control” test.

We found that DHS’ position on ownership of IP created under funding agreements had evolved over time. In funding agreement templates from 1996, the IP provisions in the Heads of Agreement vested copyright in the state and patentable innovations in the funded body. Over the years, the provisions progressively clawed more rights back to the state, finally vesting all IP in the state. There is no evidence that the changes in approach were a result of a considered process of policy review within DHS.

Some of DHS’ funded bodies, including health services, multi-purpose services and ambulance services have been established under Acts that empower them to own and manage IP. The legal interpretation of this arrangement is that when these bodies sign a funding agreement vesting IP in the state, then they have effectively contracted out of their powers under the Act.

³ Department of Human Services 2004, *Service Agreement Information Kit for Agencies - 4. Schedule One: Terms and Conditions – 4.3 Intellectual Property*, Victorian Government, Melbourne, viewed on 28 April 2005, <http://www.dhs.vic.gov.au/srvc_agmnt/chpt43.htm>

⁴ See for example, the Copyright Law Review Committee 2004, *Crown Copyright - Discussion paper for consultation forum*, pp. 9-13, Commonwealth of Australia, Canberra, viewed on 25 May 2005, <[http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/personal/AEBD7488933CE38ECA256ED1001D8881/\\$FILE/0+0+Cleaned+Revised+Discussion+Paper+14+July.doc](http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/personal/AEBD7488933CE38ECA256ED1001D8881/$FILE/0+0+Cleaned+Revised+Discussion+Paper+14+July.doc)>

In practice, the interconnections between agreements and enabling legislation cause complexities and inconsistencies, particularly when agreement clauses change over the years. For staff and funded bodies, it can be difficult to interpret what arrangements apply. Public hospitals and health services are a good example of this, as illustrated in Figure 6A.

FIGURE 6A: A COMPLEX FRAMEWORK – DHS, HOSPITAL FUNDING AND INTELLECTUAL PROPERTY VESTING ARRANGEMENTS

In Victoria, public health services (large metropolitan and regional hospitals) and other hospitals operate under the *Health Services Act 1988* (Vic.). The Act empowers them “to undertake commercial exploitation of any research or IP rights undertaken by or belonging to the hospital”⁵. Until 2004, public health services and hospitals were also required to sign a funding agreement with DHS, vesting IP in the state as a condition of funding.

In 2004, a Statement of Priorities (SOP) replaced the core funding agreement between DHS and public health services. The SOP is a high-level agreement between the minister and the chair of the health service. The SOP is silent on IP, which effectively allows these bodies to own their IP under the provisions of the *Health Services Act 1988*.

As a result, DHS makes no claim on ownership of IP in the largest hospitals, which operate under a SOP, however, it does claim ownership of IP created in smaller hospitals, which still operate under a funding agreement.

Source: Victorian Auditor-General’s Office.

6.2.3 Decision-making

Department of Human Services

In DHS, any negotiations on IP in funding agreements are generally initiated by the funded body. If a funded body requests a different vesting arrangement, DHS will negotiate. However, the majority of staff viewed the IP vesting in the funding agreement as a non-negotiable condition of funding.

There is still some flexibility in the funding agreements. We found some occasions when IP arrangements had been altered to vest in the funded body for individual projects. On these occasions, the IP provisions in Schedule 1 of the funding agreement had not been updated to reflect the modified arrangements.

In practice, we found only one occasion when the IP provisions in Schedule 1 of the funding agreement had been changed. This alteration still vested IP in the state, but gave the funded body a licence to all IP created.

⁵ *Health Services Act 1988* (Vic.), Div. 5, s. 41.

The Business Development Branch in DHS is reluctant to negotiate with individual agencies on the Heads of Agreement terms. As DHS has more than 2 700 funded bodies, this would create an unreasonable burden. The Business Development Branch prefers to negotiate the conditions of funding with umbrella groups of the funded sector during the annual updates of the Heads of Agreements. The IP vesting clauses remain an unresolved issue in these negotiations.

Department of Education and Training

As in DHS, the funded body usually initiates any negotiations varying IP/copyright clauses in DET funding agreements. However, DET could not recall an occasion when a funded body had objected to the funding conditions regarding IP/copyright. DET reported that funding agreements are rarely varied.

The statutory body we looked at, ACFE, could recall only one negotiation. On that occasion, ACFE did not waver from its default position that all IP should vest in the state.

Views from the funded sector on allocation of intellectual property rights

Most funded bodies are able to reach agreement with their funding agency on the vesting provisions, particularly where a funding agreement is for a limited time period and a very specific output (e.g. to produce an information package, or conduct clearly defined research). However, funded bodies have expressed concern about IP vesting in the state/Crown Copyright for a variety of reasons. These are outlined below:

- A funded body is likely to receive funding from several different sources under different agreements. If the body creates IP in its day-to-day operations, it is difficult to identify which source of funds is linked to the IP.
- If a funded body patents a discovery or produces marketable copyright material, this is often a result of years of cumulative work within the organisation. Again, there is not a clear link between the source of funds and the outcome.
- Vesting ownership in the state can create practical problems. For example, if the funded body wishes to present research findings at a conference, or publish work, then it needs to obtain permission of the department that notionally “owns” this work.

- Some funded bodies, for example Koori groups and other community bodies, object to the claim by the state to own IP created under funding agreements on principle. Particularly where the creation of IP is incidental to the purpose of the funding, some funded bodies view the claim by the state to own all IP as fundamentally unfair.

These issues are particularly important for research bodies, with additional concerns that funding agreements which vest ownership in the state could inhibit the potential commercialisation opportunities which are necessary to take innovations from IP to marketable products.

In 2002, the Victorian Public Accounts and Estimates Committee report on service agreements for community, health and welfare services noted many of these concerns. It recommended that: “The Government, as a matter of priority, resolve the issue of IP rights for service providers”⁶.

The government accepted this recommendation and stated: “The Department of Justice is working with all relevant Government departments, including the Department of Human Services, to address this issue”⁷.

To date, little progress has been made. As discussed in Part 3 of this report, the Department of Justice is working to revise the copyright policy and guidelines. However, this will not cover all types of IP.

Views from agencies providing funding

While funded bodies are keen to maintain as much freedom to operate as possible with regard to IP, funding agencies must also consider the risks to government and consider ways that the benefits from publicly-funded research can accrue to the public.

In an attempt to balance these considerations, DHS is currently piloting a new funding agreement for pure research. In this agreement, ownership is given to the funded body and DHS ensures access to the IP with a non-exclusive license. While this model may not be suitable for all funding agreements, it shows a useful initiative for addressing the problematic relationship with funded bodies that sometimes result from the IP vesting arrangements.

⁶ Public Accounts and Estimates Committee 2002, *Report on Department of Human Services – Service Agreements for Community, Health and Welfare Services*, pp. 244-6, Forty-seventh Report to Parliament, Parliament of Victoria, Melbourne, viewed on 20 October 2004, <http://www.parliament.vic.gov.au/paec/reports/PAEC-47_DHSServiceAgreements_2002.pdf>

⁷ Department of Human Services 2002, *The Victorian Government Response to the Public Accounts and Estimates Committee 47th Report to Parliament: Report on the Department of Human Services – Service Agreements for Community, Health and Welfare Services (April 2002)*, p. 30, Victorian Government, Melbourne. Viewed on 23 April 2005, <<http://www.dhs.vic.gov.au/pdpd/pdfs/govtresponsetopeac.pdf>>

6.3 Are agreements effectively documented and managed?

In examining the administrative arrangements for IP created under funding arrangements, we considered:

Documentation

- Does agreement documentation between the department and the funded bodies:
 - make ownership of and rights of access to IP clear?
 - adequately recognise rights regarding the pre-existing IP of each party?
 - give adequate warranty against possible misuse of IP belonging to other parties?
- Does agency record keeping give clear indications of the IP rights of each party?

Management

- Do funding agencies ensure that the funded body has adequate arrangements to safeguard the IP?
- Where rights to IP are vested in the funding agency, are there effective records so the funding agency knows what it “owns”?
- Does the agency have a strategy to manage external access and future exploitation of significant IP?

6.3.1 Agreement documentation

Department of Human Services

DHS has 8 template funding agreements in use for funded bodies. Seven of these templates include clauses covering IP. The current funding agreement for multi-purpose services⁸ does not include any reference to IP.

In the 7 template agreements that include references to IP, the clauses vary. All state that IP rights of any party existing on the start date remain the property of that party and that any IP created by either party under the agreement vests in the State of Victoria. Only 2 template agreements, for hospitals and community health centres, require the funded body to give the agency an undertaking that it will not use any IP under the agreement if it breaches the rights of any other person.

⁸Under the *Health Services Act 1988*, s.115 C (2), the function of a “multi-purpose service” is to provide any or a combination of public hospital services, health services, aged care services; and community care services.

Even where DHS has clear template agreements with robust IP clauses, we found that they were often not applied rigorously. In some cases, clauses relating to IP had been deleted from signed agreements.

Further, DHS acknowledged that individual negotiators might reach a tacit agreement with funded bodies that DHS will not enforce its rights to IP. We identified several instances in DHS where funds had been provided to bodies, even when the funding agreements were not signed. This makes all the conditions established in Schedule 1 of the funding agreement of uncertain status.

Department of Education and Training

In DET, both the standard funding agreement and the TAFE performance agreement do not claim ownership of all IP. The standard funding agreement claims Crown Copyright over all materials as defined under the *Copyright Act 1968* (Cwlth) and produced under the agreement.

The TAFE performance agreement only claims Crown Copyright in certain projects, developed using particular funds, for example, money from the Innovation Fund⁹.

As DET does not claim full ownership of IP in its funding agreements, its documentation does not cover pre-existing IP or specific IP warranties. We found the documentation clarified the IP rights of each party and that DET has a reasonable interpretation of Crown Copyright. However, the actual provisions could be expressed in less legalistic language.

The funding agreements used by one of DET's statutory authorities, ACFE, make a stronger claim on IP. ACFE uses performance agreements to fund peak organisations and regional councils to deliver adult, community and further education. These agreements:

- vest all IP in the state
- direct the funded body to include "Copyright State of Victoria" annotations in all reports and materials
- require the funded body to provide a form of moral rights waiver
- require the funded body to maintain a database and index of all materials created.

⁹ The Innovation Fund is established for TAFE institutes to trial new initiatives in innovation, emerging skills and industries and flexible delivery.

6.3.2 Management

Arrangements to safeguard intellectual property in funded bodies

Whether funding agreements vest IP in the State of Victoria or in the funded body, if the funded body does not have adequate arrangements in place to safeguard the IP, then benefit may be lost to all parties.

We found that few agencies consider whether funded bodies have adequate arrangements in place to manage IP. A number of staff from audited agencies responded that, as IP was vested in the state, this was not a consideration. We disagree with this interpretation, as the vesting arrangement cannot be realised if the creating body does not have adequate IP management practices.

Twelve of the 26 agencies surveyed provided funds to other bodies for activities that may lead the creation of IP. Of these agencies, only 4 out of 12 required the funded body to demonstrate adequate IP management mechanisms.

While DHS has stringent conditions in most of its funding agreements regarding IP, we found that it did not have processes to ensure that the funded bodies had adequate arrangements to identify, register and protect any IP that is created.

In agencies which make a blanket claim to all IP created under funding agreements, we found limited awareness of any IP theoretically owned by the agency under these provisions. As a result there was no strategy to manage access to, or exploitation of, this IP.

We found instances where DHS had taken action to assert ownership when funded bodies had moved to commercialise IP. This action generally resulted from chance discovery rather than systematic monitoring. Figure 6B outlines one such dispute.

FIGURE 6B: UNDERSTANDING THE TERMS OF YOUR FUNDING AGREEMENTS – THE PATIENT BROWSER

In 1998, three researchers employed by Peter MacCallum Cancer Institute (PMCI) developed a patient details reporting system, the Patient Browser.

The browser allowed staff to access patients' details online, including medical history, diagnostics and pathology results from multiple sources. It was a significant improvement on other systems available at that time. As well as being valuable to PMCI, the software was seen as leading edge and potentially valuable to other hospitals.

Development costs were supported by PMCI's operating budget and some specific grants from DHS.

In partnership with the developing employees, PMCI established a spin-off company, Verinet, to handle commercialisation of the browser. PMCI considered that this arrangement would enable the system's ongoing development, distribution and support, while limiting the risk incurred by PMCI.

Verinet sought commercial partners to further develop the browser.

When PMCI advised DHS of its browser development and planned commercialisation in 2001, DHS advised that under the conditions of the operating funding agreement, all copyright, including the browser, vested in the state.

Any commercialisation was put on hold as PMCI and DHS went into negotiations. Both parties received legal advice and finally reached agreement in November 2002. The parties signed various agreements, which outlined the following conditions for commercialisation:

- the IP fully vests in the state and DHS act on behalf of the state
- PMCI is licensed to use, develop and sub-license
- Verinet is a sub-licensee to PMCI
- the IP is to be used for the benefit of the state.

The lengthy time taken to resolve the dispute and clarify IP ownership and rights impeded the search for commercialisation partners, and caused considerable frustration for PMCI.

DHS planned to develop a policy framework for funded IT development in order to avoid similar future disputes with funded bodies. No action has been taken to date.

Source: Victorian Auditor-General's Office.

6.4 Conclusion

Current approaches to determining the arrangements applicable to IP in funded bodies are based on staff's best interpretations of a limited policy framework. Consequently, we found a range of different practices in the agencies that participated in the audit.

At one extreme, some agencies took the position that all IP created in funded bodies vest in the state. This position was justified as complying with Crown Copyright, but we consider it to be stretching the Copyright Act beyond its mandate. At the other extreme, agencies made no claim to IP or copyright in funded bodies.

With no clear whole-of-government policy, where departments with significant funding relationships had not developed departmental policies on IP, we found:

- different approaches and attitudes to the allocation of IP ownership and rights in various business units in the same department
- progressive changes in agency practices over a succession of years without clear consideration of the reasons for, and implications of, the changes
- tacit agreements that the vesting arrangements would not be enforced
- ad hoc interventions by the department to defend ownership of IP.

Departments face complex issues when they consider the allocation of IP rights in funding arrangements. In some situations (e.g. DHS' provision of funding of medical research or its funding of health service activities that may incidentally lead to the creation of IP), there is much at risk. These departments are justifiably concerned to prevent the potential loss to the state of access to valuable IP.

However, a position that automatically vests ownership of all IP in the state, without addressing stewardship considerations, poses a substantial risk. These considerations include:

- Which party is best placed to capitalise on the IP to provide community benefit?
- Does the department maintain records of IP that it notionally "owns" under these arrangements?
- Does the department have a plan for managing access to, and capitalising on, these resources?

Few of the agencies that participated in the audit consider whether funded bodies have arrangements in place to identify, protect and manage IP. Whether ownership is vested in the state or the funded body, these arrangements are essential. If significant IP is involved, it may be appropriate for departments to develop specific policies, and spell out minimum requirements for funded bodies. For example, a number of other states have developed specific policies applying to health research, specifying minimum requirements in IP management for state-funded health services.

The current lack of clarity and range of practices within and between agencies can be confusing and frustrating for the funded sector. A funded body can receive funding from several different government agencies and is likely to have different vesting arrangements applying in each agreement.

These issues are not new, and have been noted in previous investigations into arrangements with funded bodies. While the government made a commitment in 2002 to clarify this, we are concerned that a resolution seems to be no closer.

Recommendations

10. **Government should develop guidelines addressing the allocation of IP rights under funding agreements.**
11. **That DHS develop a comprehensive departmental IP policy which clarifies arrangements for:**
 - **copyright and non-copyright IP**
 - **IP in funded agencies, including occasions when it is appropriate for the default position to prevail, and where exceptions can be considered.**
12. **Departments with significant funding commitments to bodies where IP is likely to be created should specify minimum requirements for IP policies and practices in those bodies. For example:**
 - **DHS should develop guidelines on minimum IP management requirements for public health services and hospitals.**

RESPONSE provided by Secretary, Department of Human Services

Recommendations 10, 11, 12

The department's expectation would be that a whole of government IP policy would establish a framework for a consistent approach to IP produced under funding agreements. These recommendations are supported.

RESPONSE provided by Secretary, Department of Premier and Cabinet

Recommendation 10, 11

The Department of Premier and Cabinet agrees with the recommendations.

Recommendation 12

Recommendation No. 12 proposes that departments with significant funding commitments to bodies where IP is likely to be created should specify minimum requirements for IP policies and practices in those bodies.

DPC generally agrees with this recommendation, particularly where the funded body is a Victorian government entity. However, it may be inappropriate where the funding is provided to non-government bodies, such as independent arts organisations receiving funding from Arts Victoria.

Guidelines for considering this issue should be developed as part of the whole of government IP policy to be developed by the group proposed in Recommendation No. 1.

RESPONSE provided by Secretary, Department of Education and Training

Recommendation 12

The Department of Education and Training accepts this recommendation.

RESPONSE provided by Chief Executive, VicRoads

Recommendation 10

Agree.

Recommendation 11

Not applicable to VicRoads.

Recommendation 12

Agree in principle: DHS comment not applicable to VicRoads.

6.5 Good practice principles

For agencies considering their policy position on IP management in funding agreements, the following good practice guidelines can be useful.

FIGURE 6C: GOOD PRACTICE FOR INTELLECTUAL PROPERTY MANAGEMENT IN FUNDING AGREEMENTS

Planning for IP provisions in funding agreements should:

- consider the kinds of IP likely to be developed under the funding agreement, and whether this IP is a core deliverable under the agreement, or arises incidentally
- consider a range of IP-vesting models suitable for different types of funding relationships and the significance of IP likely to be produced.

Funding agreements should:

- address the IP issues of ownership and other rights such as licences and royalties
- ensure the funded body has adequate IP management policies and procedures for its IP risks/responsibilities, (e.g. a biotech research institution is required to have a far more sophisticated set of IP management tools than a small community service provider)
- include appropriate warranties and indemnities necessary to adequately manage IP risks
- if using a joint ownership model of IP, the agreement should clearly address the joint owners' ability to use and commercialise the IP.

If the IP vests in the funding agency, the funding agency should manage the agreement to:

- clarify the scope of IP to be vested in the state (e.g. by linking funding to specific tasks/deliverables)
- ensure that the ownership of IP created will vest as agreed
- require an obligation for the funded body to notify the agency upon creation of any unexpected IP
- obtain all necessary consents associated with moral rights in copyright material created by employees of the funded agency
- clarify and manage the possibility of conflicting claims on the IP from other funding agencies (e.g. Commonwealth Government, private sector, donations and bequests etc.)
- actively manage the IP.

If the IP vests in the funded body, the funding agency should:

- consider placing conditions on the vesting/ownership (e.g. commercialisation must take place within the state, IP is to be used for research purposes and not for profit, or the agency holds "march-in rights" to be used when the funded body has not adequately pursued commercialisation or dissemination pathways)
- preserve appropriate access for the funding agency through licences
- ensure the funded body regularly reports on the developments, use and commercialisation activities of the IP
- maintain an ongoing relationship so that the benefits of the IP are best shared between the funded body, the funding agency and the state
- allow funded bodies adequate "freedom to operate".

Source: Victorian Auditor General's Office. Based on analysis of New South Wales Audit Office 2001, *Better Practice Guide: Management of Intellectual Property*, New South Wales Audit Office, Sydney; and Government of Western Australia 2003, *Government Intellectual Property Policy and Best Practice Guidelines*, Department of Industry and Resources, Perth.



Appendix A. Glossary



Glossary

Allocation

Refers to the division of rights to intellectual property (IP) between parties, including ownership and/or the grant of IP licences.

Circuit layout rights

Circuit layouts are used to build integrated circuits or chips that operate electronic devices, like heart pacemakers and personal computers. Circuit layout rights are similar to copyright in that original layout designs do not have to be registered; they are automatically protected. The administration of circuit layouts is covered by the *Circuit Layouts Act 1989* (Cwlth).

Commercialisation

The process by which the results of research projects are converted to marketable products or services, either by the inventors or by third-party developers.

Confidential information/trade secrets

Confidentiality and trade secrets are both types of IP and strategies for protecting IP. In the public sector, an example of confidential information is personal details protected by the *Information Privacy Act 2000* (Vic.). Trade secrets also include proprietary knowledge (know-how). Confidential information is protected, provided there is a demonstrable effort to keep it secret. However, there are no exclusive rights attached to confidential information - anyone can invent the same product or process independently.

Copyright

A bundle of exclusive economic rights to do certain things with an original work, including the right to copy, publish, broadcast and publicly perform the copyright material. Copyright protects the creative expression of an idea, rather than the idea itself. The *Copyright Act 1968* (Cwlth) applies to original works of art, literature, music, films and broadcasts. The term “literary” covers a wide range of written materials, including software. However, the *Copyright Act 1968* (Cwlth) does not cover patentable inventions, ideas or designs.

Crown Copyright

The *Copyright Act 1968* (Cwlth), ss. 176 to 179 establishes that where original works of art, literature, music, films and broadcasts are produced by or under the direction or control of the Commonwealth or a state, then the Commonwealth or state is the owner of copyright in that material, unless there is an agreement to the contrary.

Designs

Design refers to the features of shape, configuration, pattern or ornamentation which, when applied to a product, gives the product a unique appearance. Under the *Designs Act 2003* (Cwlth), designs can be registered if they are new and distinctive. Registration gives the owner exclusive and legally enforceable rights to use, license or sell the design.

Freedom to operate

Unfettered rights to use IP without infringing the IP rights of others. Freedom to operate is often considered as an issue when commercialising IP overseas. Different IP jurisdictions have varying administration and requirements, and IP protected in Australia is not necessarily protected overseas.

Intellectual property

The legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Different types of intellectual property are: copyright, patents, plant breeder's rights, confidential information/trade secrets, registered designs, circuit layout rights and trademarks.

Moral rights

Under Part IX of the *Copyright Act 1968* (Cwlth), the authors of works and cinematograph films have moral rights in material they create. These rights are:

- the right of attribution of authorship
- the right not to have authorship falsely attributed
- the right of integrity of authorship.

Moral rights apply to individual authors of copyright material even where the copyright is owned by another party. These rights are “non-economic” rights, as they do not directly confer a financial return on copyright creators or owners. In addition they may not be traded, sold or bequeathed in a will. However, moral rights are not infringed where the author provides a written consent, or where an otherwise infringing act can be considered as “reasonable” under ss. 195AR and 195AS of the *Copyright Act 1968* (Cwlth).

Patents

A right granted for any device, substance, method or process, which is new, inventive and useful. A patent is legally enforceable and gives the owner the exclusive right to commercially exploit the invention for the life of the patent. Patentable ideas are not automatically protected. Under the *Patents Act 1990* (Cwlth), there is a process where an application is examined against legal requirements before a patent can be granted.

Plant breeder’s rights

Used to protect new varieties of plants by giving exclusive commercial rights to market a new variety or its reproductive material. The rights are not automatic; new varieties have to be registered under the *Plant Breeder’s Rights Act 1994* (Cwlth). Once protected, the plant varieties may only be produced for sale, sold, imported, exported or conditioned with the authority of the owner.

Polluted IP

Where the IP allocation arrangements is so inconsistent or poorly documented that no clear title to the IP results. The absence of clear title can mean that future development of the innovation by any party is difficult.

Spin-off company

A new company established to commercialise the knowledge and skills of a university or corporate research team.

Trademarks

Anything used to distinguish goods and services of one trader from those of another. A trade mark can be a logo, picture, letter, word, shape, number, phrase, sound, smell, aspect of packaging or any combination of these. A trademark does not have to be registered for someone to use it. However, once it is, the owner has an exclusive legal right to use, license or sell it within Australia for the goods and services for which it is registered. Trademarks are administrated under the *Trademarks Act 1995* (Cwlth).

Vesting

Placing or settling something (especially property, rights, powers etc.) in the possession or control of someone.



Appendix B. **Conduct of the audit**



Methodology

This audit assessed whether selected Victorian government agencies manage their intellectual property (IP) assets effectively by:

- developing normative audit criteria for assessment of effectiveness. The criteria were derived from a variety of “good practice” guidelines and policies from other Australian jurisdictions
- examining IP management in VicRoads, the Department of Education and Training and the Department of Human Services (the “audited agencies”)
- examining 50 recently completed contracts and associated documentation in the audited agencies
- obtaining an overview of IP management practices in the broader public sector through a survey of 26 other departments and agencies (the “surveyed agencies”)
- reviewing IP practices in a number of funded bodies, including health services and technical and further education (TAFE) institutions. We also consulted a number of bodies in the funded sector and other organisations with an interest in IP (the “organisations interviewed”).

The audit did not assess whole-of-government contracts for the delivery of major IT services or infrastructure projects.

The audit was performed in accordance with the Australian auditing standards applicable to performance audits and, accordingly, included such tests and procedures considered necessary.

The cost of the audit was \$390 000. This cost includes staff time, overheads, expert advice and printing.

Assistance to the audit team

Professor Christopher Arup provided valuable specialist assistance and advice to the audit team. He is the head of the Legal Services and Justice Administration Research Unit at the Victoria University of Technology.

The Victorian Government Solicitor also provided legal advice to the audit team.

We appreciate the support and assistance of management and staff at the agencies and departments listed below.

Public sector organisations participating in the audit

Audited agencies

Department of Education and Training

Department of Human Services

VicRoads

Surveyed agencies

Department for Victorian Communities

Department of Infrastructure

Department of Innovation, Industry and Regional Development

Department of Justice

Department of Premier and Cabinet

Department of Primary Industries

Department of Sustainability and Environment

Department of Treasury and Finance

Austin and Repatriation Medical Centre

Country Fire Authority

EcoRecycle Victoria

EPA Victoria

Melbourne Health

Melbourne Water Corporation

Mental Health Research Institute of Victoria

Metropolitan Fire and Emergency Services Board

Office of the Chief Commissioner of Police

Office of the Victorian Privacy Commissioner

Royal Botanic Gardens Board

Royal Children's Hospital

Rural Ambulance Victoria

Transport Accident Commission

Victorian Institute of Forensic Medicine

Victorian Curriculum and Assessment Authority

Victorian WorkCover Authority

Western Health

Organisations interviewed

Agriculture Victoria Services Pty Ltd

Box Hill TAFE

Peter MacCallum Cancer Institute

Royal Children's Hospital

Victorian Breast Cancer Research Consortium

Victorian Council of Social Services

Victorian Healthcare Association



Appendix C. Responses to the survey



The aim of the survey is to gain a “snapshot” of key aspects of the management of intellectual property (IP) by the 26 agencies. Agencies and departments were requested to confine their responses to IP that is of significant operational or commercial value to their agency.

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services (a)	Dept of Education and Training (a)	Total government departments	Total other agencies
Agency policies and procedures relating to IP												
Does your organisation have a documented policy on IP?												
• Yes, a formal policy relating to IP.	✓				✓					✓	3	8
• Yes, a draft IP policy.								(b) ✓			1	0
• No formal or informal IP policy at present.											0	3
• No, not a single policy, but IP is contained in other organisational policies and procedures.		✓	✓	✓		✓	✓	(b) ✓	✓		7	7
Does the IP policy:												
• contain time frames and review mechanisms?											0	4
• define what constitutes IP?	✓				✓			✓		✓	4	6
• define the types of IP covered by the policy	✓				✓			✓		✓	4	6
• apply to all agency activities or functions?					✓			✓		✓	3	7
• apply to other agencies or bodies in the same portfolio?								✓		✓	3	1

Note: (a) As the Department of Education and Training and the Department of Human Services were selected for detailed audit, these assessments are based on the audit observations.

Note: (b) The DVC draft IP policy applies to parts of the department. There are also a number of other policies and procedures that cover IP.

Legend: ✓ Yes Ø To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
Does your agency have procedures that require notification upon the creation of IP by:												
● employees.	✓				✓			✓			3	7
● consultants.	✓				✓			✓			3	12
● contractors.	✓				✓			✓			3	12
Types of IP in your agency												
Does your agency own or control any of the following types of IP?												
● Copyright (including software, publications and training materials).	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	16
● Patents (including provisional patents).					✓						1	7
● Plant breeder's rights.					✓						1	2
● Registered trademarks.	✓	✓		✓	✓	✓			✓	✓	7	13
● Designs.								✓			1	6
● Confidential information and trade secrets .	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	15
● Circuit layout designs .											0	1
Does your agency have permission to use IP owned by other parties?												
● Copyright (including publications, software and training materials).	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	17

Legend: ✓ Yes ∅ To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
• Patents (including provisional patents).					✓						1	6
• Plant breeder's rights.					✓						1	0
• Registered trademarks.	✓	✓			✓						3	8
• Designs.											0	6
• Confidential information and trade secrets.	✓	✓	✓	✓	✓			✓			6	13
• Circuit layout designs.											0	2
Has your agency given other parties authority to use IP belonging to the agency?	✓	✓	✓	✓	✓			✓	✓	✓	9	15
If Yes, which of these types of IP?												
• Copyright (including publications, software and training materials).	✓	✓	✓	✓	✓	✓		✓	✓	✓	9	14
• Patents (including provisional patents).					✓						1	1
• Plant breeder's rights.					✓						1	1
• Registered trademarks.	✓	✓			✓						3	8
• Designs.											0	4
• Confidential information and trade secrets.	✓	✓	✓		✓	✓		✓			6	9
• Circuit layout designs.											0	0

Legend: ✓ Yes Ø To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
Record keeping												
Does the agency maintain a register (or database) for valuable/significant IP?	✓				✓						2	8
Please indicate which of the following types of IP assets are included in your agency's register (or database).												
• Copyright (including publications, software and training materials).	✓										1	6
• Patents (including provisional patents).	✓				✓						2	2
• Plant breeder's rights.	✓				✓						2	0
• Registered trademarks.	✓				✓						2	5
• Designs.	✓										1	2
• Confidential information and trade secrets.	✓										1	1
• Circuit layout designs.	✓										1	0
Does the register:												
• include IP owned by the agency?	✓										2	8
• include IP the agency owns and has licensed other users to use?	✓										2	7
• include IP the agency does not own, but has a licence to use?	✓										2	4

Legend: ✓ Yes ∅ To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
<ul style="list-style-type: none"> specify the responsible manager and location of the IP? record a commercial value, if known? 	✓				✓						2	4
Are there periodic reviews of agency IP which consider whether:												
<ul style="list-style-type: none"> the existing levels of protection are still required and appropriate? all significant IP in the agency is identified? the registration of existing patents is still warranted? 	✓				✓						2	8
No process in place at present.			✓	✓		✓	✓	✓	✓	✓	7	7
Does the agency own or manage IP that generates, or is likely to generate, revenues?	✓		✓		✓	✓		✓	✓	✓	7	10
Is the approximate value of this IP recorded in the agency's financial statements?						✓					1	3

Legend: ✓ Yes ○ To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
Managing the risks of IP												
Does the agency have any IP- related risks on the agency's risk register?		✓			✓						2	5
Does the agency conduct any monitoring to ensure that staff do not infringe/make unauthorised use of IP belonging to others?		✓			✓		✓				3	10
Does the agency monitor infringement of its IP rights by others?					✓						1	10
If No, does the agency see a need to?						✓		✓			2	1
Has the agency taken action to defend specific IP since 1 July 2002?				✓	✓				✓	✓	4	4
Protecting IP												
<i>IP created by employees</i>												
Do staff employed by the agency undertake activities likely to create the following types of IP?												
• Copyright (including software, publications and training materials).	✓	✓	✓	✓	✓	✓		✓	✓	✓	9	16
• Patents (including provisional patents).					✓	✓					2	5
• Plant breeder's rights.					✓	✓					2	0
• Registered trademarks.		✓			✓	✓			✓	✓	4	5
• Designs.						✓					1	6

Legend: ✓ Yes Ø To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
<ul style="list-style-type: none"> Confidential information and trade secrets. Circuit layout designs. 	✓	✓	✓		✓	✓		✓	✓	✓	8	13
<ul style="list-style-type: none"> Do employment agreements for staff include statements on the ownership of IP created by employees in the course of their employment and requirements to protect confidentiality? 	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	θ (Executive officers' contract only)	10	9
<ul style="list-style-type: none"> Does the code of conduct for staff include statements on the ownership of IP created by employees in the course of their employment and requirements to protect confidentiality? 	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	θ (VPS Code applies to copyright only)	10	11
<i>IP created through funded research</i>												
<ul style="list-style-type: none"> Does your agency provide funding to other entities for activities which may lead to the creation of IP? 	✓	✓	✓	✓	✓	✓		✓	✓	✓	9	5

Legend: ✓ Yes θ To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
If Yes, under the funding agreement, where is IP vested?												
● In the State of Victoria.	✓		✓		✓	✓		✓	✓		6	0
● In the funded agency.											0	1
● Varies on a case by case basis.		✓		✓						✓	3	4
If Yes, do you require the funded entities to demonstrate adequate IP management mechanisms?		✓			✓						2	2
Do standard agreements for funding of other bodies:												
● contain provisions covering the future use, management and administration of IP assets created under the agreement?		✓			✓			✓			3	3
● contain provisions covering pre-existing IP belonging to either party?	✓	✓		✓	✓			✓	✓		6	3
● specify that all IP created under the agreement is owned by the State of Victoria, unless this position is varied by agreement?	✓		✓		✓			✓	✓		5	2

Legend: ✓ Yes Ø To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
IP under contract/service agreements												
Does your agency enter into agreements for the provision of goods and services which may result in the creation of IP?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	15
Ownership and other rights to IP are:												
• considered during the contract specification development process?	✓	✓		✓	✓	✓	✓	✓	✓	✓	9	15
• addressed in any request for tender, quotation or call for expressions?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	15
• included in the tender evaluation process?	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10	11
Managing IP during tender processes												
Does the agency have standard policies or procedures for managing the disclosure of agency IP to tenderers?	✓	✓	✓			✓	✓				5	12
Does the agency have standard policies or procedures for managing the receipt of IP from tenderers?	✓	✓	✓								3	12

Legend: ✓ Yes ∅ To some extent

	Dept of Infrastructure	Dept of Innovation, Industry and Regional Development	Dept of Justice	Dept of Premier and Cabinet	Dept of Primary Industries	Dept of Sustainability and Environment	Dept of Treasury and Finance	Dept for Victoria Communities	Dept of Human Services	Dept of Education and Training	Total government departments	Total other Agencies
Guidance and support for staff in managing IP												
How is the IP policy and its contents communicated to all staff												
• e-mail/intranet?	✓	✓	✓		✓	✓		✓		✓	7	12
• newsletters?	✓										1	2
• staff forums/induction?		✓			✓						2	4
• hardcopy documentation?		✓		✓	✓			✓			4	9
There is no policy.			✓	✓							2	4
Do employee exit check lists include information on employee obligations in relation to IP and confidential information?					✓						2	5

Legend: ✓ Yes ∅ To some extent



Appendix D. Good practice principles



This appendix collates the good practice principles for the management of IP that we have included at the end of each chapter. The principles cover policies, decision-making, day-to-day management, purchasing contracts and funding agreements.

GOOD PRACTICE FOR AGENCY INTELLECTUAL PROPERTY POLICES

The **agency's policy** supports and guides the management of IP to ensure that:

- IP assets are managed for the benefit of the state
- the management of IP supports the agency's objectives
- the risks associated with the use of IP are minimised and managed
- the control and custodianship of IP assets resides with the most appropriate agency or in the most appropriate part of the agency
- the accountability for IP management is aligned with control and custodianship of IP assets.

Policies and procedures should:

- be documented and user-friendly (e.g. in plain English and not excessively long)
- identify all forms of IP assets likely to be developed, used or managed by the agency
- identify who is accountable for implementation
- provide clear and appropriate guidance for staff
- be integrated with other agency policies and objectives
- be communicated to staff and readily accessible
- be periodically reviewed.

GOOD PRACTICE FOR DECISION-MAKING ON INTELLECTUAL PROPERTY ALLOCATION

The **decision-making** in the allocation of IP ownership and rights should:

- assess the benefits, costs and risks associated with any decision relating to the allocation of IP
- ensure that when allocating IP rights, both IP yet to be created and pre-existing IP are adequately considered and addressed to ensure that the IP can be effectively used or commercialised as intended
- record in a register, details regarding the allocation of all IP rights and all relevant conditions
- document the allocation of IP rights in a legally binding written contract *before* the IP is created
- where relevant, obtain a license to the IP where ownership is allocated away from the agency.

GOOD PRACTICE FOR DAY-TO-DAY MANAGEMENT OF INTELLECTUAL PROPERTY

To **identify, protect and record** IP, agencies should:

- have appropriate mechanisms in place to identify IP generated by employees, contractors and funded bodies
- take reasonable steps to protect and safeguard government-owned IP, noting that some forms of IP are protected automatically (copyright, trade secrets, circuit layouts) and other forms require active steps to be taken to obtain protection (e.g. patents, plant breeder's rights, registered trademarks and registered designs)
- consider the costs, benefits and risks in making decisions about IP registration
- periodically review the appropriateness of continued registration
- establish a register or other information management system to record important information relating to IP assets and rights
- ensure staff have timely access to commercial, financial and legal advice to assist in decision-making
- in the case of research activities, maintain adequate records in order to prove the date of the invention.

Human resource management practices should consider IP issues, ensuring:

- clarity in employment contracts for the ownership and rights of IP developed by staff in the course of their employment
- staff are aware of how IP management supports the agency's objectives
- appropriate up-to-date training in IP-related issues is provided to relevant staff
- staff who develop valuable IP are rewarded for their work
- HR has clarified the agency's position on moral rights
- that new staff entering the organisation are aware of their duties not to infringe on previous employers' IP
- that exit procedures include a reminder on responsibilities for the organisation's IP and confidential information.

GOOD PRACTICE FOR PURCHASING CONTRACTS

Pre-tendering **decision-making** on IP in contracts for purchase should:

- consider IP issues before tenders or bids are invited or consultants are engaged
- consider a range of IP ownership models suitable for the different types of service deliverables
- obtain the IP rights required to meet the operational objectives of the agency
- consider how the IP may be used to achieve the best outcomes for the contractor, the agency and the state.

In the **tender process** and **pre-contract negotiations**, the agency should:

- include the preferred terms and conditions of the agreement, including IP rights and ownership, in the RFT documentation
- consider whether a lower purchase price (or other benefits to the agency and state) can be negotiated when the agency only requires a licence to the IP.

Purchasing contract terms should:

- ensure that all contracts under which IP might be created specifically address the issues of ownership of, and rights to, pre-existing IP, and also IP to be created during the contract
- ensure a licence to use other IP that may be required for full use of contract deliverables
- include appropriate warranties and indemnities necessary to adequately manage IP risks
- obtain all necessary consents associated with moral rights in copyright material created by contractors to the extent possible
- ensure that contractors notify the agency of any IP additional to the specific project deliverables at the time of its creation
- avoid joint ownership of IP as this arrangement can be legally uncertain and difficult, even when the contract terms are clear.

Project managers should:

- actively manage contracts to ensure that the ownership of IP created will vest as agreed in the contract (which may involve obtaining assignments or licenses of IP from subcontractors or other third parties, or an obligation for the contractor to notify the agency upon creation of any unexpected IP)
- have timely access to appropriate commercial, financial and legal expertise.

GOOD PRACTICE FOR INTELLECTUAL PROPERTY MANAGEMENT IN FUNDING AGREEMENTS

Planning for IP provisions in funding agreements should:

- consider the kinds of IP likely to be developed under the funding agreement, and whether this IP is a core deliverable under the agreement, or arises incidentally
- consider a range of IP-vesting models suitable for different types of funding relationships and the significance of IP likely to be produced.

Funding agreements should:

- address the IP issues of ownership and other rights such as licences and royalties
- ensure the funded body has adequate IP management policies and procedures for its IP risks/responsibilities, (e.g. a biotech research institution is required to have a far more sophisticated set of IP management tools than a small community service provider)
- include appropriate warranties and indemnities necessary to adequately manage IP risks
- if using a joint ownership model of IP, the agreement should clearly address the joint owners' ability to use and commercialise the IP.

If the **IP vests in the funding agency**, the funding agency should manage the agreement to:

- clarify the scope of IP to be vested in the state (e.g. by linking funding to specific tasks/deliverables)
- ensure that the ownership of IP created will vest as agreed
- require an obligation for the funded body to notify the agency upon creation of any unexpected IP
- obtain all necessary consents associated with moral rights in copyright material created by employees of the funded agency
- clarify and manage the possibility of conflicting claims on the IP from other funding agencies (e.g. Commonwealth Government, private sector, donations and bequests etc.)
- actively manage the IP.

If the **IP vests in the funded body**, the funding agency should:

- consider placing conditions on the vesting/ownership (e.g. commercialisation must take place within the state, IP is to be used for research purposes and not for profit, or the agency holds "march-in rights" to be used when the funded body is perceived not to have adequately pursued commercialisation or dissemination pathways)
- preserve appropriate access for the funding agency through licences
- ensure the funded body regularly reports on the developments, use and commercialisation activities of the IP
- maintain an ongoing relationship so that the benefits of the IP are best shared between the funded body, the funding agency and the state
- allow funded bodies adequate "freedom to operate".

Source: Victorian Auditor General's Office. Based on analysis of New South Wales Audit Office 2001, Better Practice Guide: Management of Intellectual Property, New South Wales Audit Office, Sydney; and Government of Western Australia 2003, Government Intellectual Property Policy and Best Practice Guidelines, Department of Industry and Resources, Perth.

Auditor-General's Reports

2004-05

Report title	Date issued
Results of special reviews and other studies	August 2004
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Report of the Auditor-General on the Finances of the State of Victoria, 2003-04	November 2004
Results of 30 June 2004 financial statement and other audits	December 2004
Meeting our future Victorian Public Service workforce needs	December 2004
Managing school attendance	December 2004
Regulating operational rail safety (2005:1)	February 2005
Managing patient safety in public hospitals (2005:2)	March 2005
Management of occupational health and safety in local government (2005:3)	April 2005
Results of special reviews and other investigations (2005:4)	May 2005
Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits (2005:5)	May 2005
Our children are our future: Improving outcomes for children and young people in Out of Home Care (2005:6)	June 2005
In good hands: Smart recruiting for a capable public sector (2005:7)	June 2005
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