

Commonwealth Intellectual Property Issues & Industry

Air
Land
Sea
Space
Cyberspace

Innovation. In all domains.

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So what is Intellectual Property & why is it so important?

Intellectual property represents the property of your mind or intellect. It can be an invention, trade mark, original design or the practical application of a good idea. In business terms, this means your **proprietary knowledge** - a key component of success in business today. It is often **the edge which sets successful companies apart** and as world markets become increasingly competitive, protecting your intellectual property becomes essential.

Source: IP Australia
www.ipaustralia.gov.au

Defence and Australian industry need IP Technical Data to access and use technologies that enable them, jointly or separately, to:

- develop a capability edge and a strategic advantage for Australia;
- sustain self-reliance through the effective and efficient operation, repair, maintenance and development of capabilities; and
- minimise the costs of operation, support and development.

Source: Defence Procurement Policy Manual
1 April 2011

Types of Intellectual Property

- **PATENTS** - for new or improved products or processes;
- **TRADE MARKS** - for letters, words, phrases, sounds, smells, shapes, logos, pictures, aspects of packaging or a combination of these, to distinguish the goods and services of one trader from those of another;
- **DESIGNS** - for the shape or appearance of manufactured goods;
- **COPYRIGHT** - for original material in literary, artistic, dramatic or musical works, films, broadcasts, multimedia and computer programs;
- **CIRCUIT LAYOUT RIGHTS** - for the three-dimensional configuration of electronic circuits in integrated circuit products or layout designs;
- **PLANT BREEDER'S RIGHTS** - for new plant varieties; and
- **CONFIDENTIALITY / TRADE SECRETS** - including know-how , trade secrets and other confidential or proprietary information.

Commonwealth Framework for IP Management ⁽¹⁾

- INTELLECTUAL PROPERTY PRINCIPLES FOR AUSTRALIAN GOVERNMENT AGENCIES (ATTORNEY-GENERAL'S DEPARTMENT, AS AMENDED 1 OCT 2010):
 - IP should be managed in accordance with all relevant legislation, policies and guidelines.
 - Agencies should establish IP management policies that reflect their objectives i.e, public interest, commercial imperatives, etc.
 - Agencies should maintain appropriate systems and processes to identify, record and protect IP in an appropriate manner.
 - Agencies should maintain a flexible approach in considering options for ownership, management and use of IP, taking into consideration – operational objectives, policy objectives, financial costs / benefits, etc.
 - Agencies should ensure that IP rights secured under contract are appropriate to identified needs and objectives and should only obtain those rights required taking into account efficient, effective and ethical use of agency resources.
 - Agencies should be mindful of opportunities to share IP with other agencies, and should consider commercialisation opportunities, including resource implications and risks associated with such activities.

- DEFENCE INTELLECTUAL PROPERTY POLICY 2008:
 - Implementation of the IP Principles.
 - Emphasise the importance of IP in the development and sustainment of national Defence capability.
 - IP arrangements should reflect value for money, promote best practice to develop and sustain capability, and, where practical ensure Defence does not pay for ownership or licensing more than once.
 - Defence will obtain appropriate ownership and licensing rights to IP consistent with its capability needs and objectives for the life of the capability (whole-of-life considerations).

Commonwealth Framework for IP Management ⁽²⁾

- DEFENCE PROCUREMENT POLICY MANUAL (DPPM) 1 APRIL 2011:
 - Procurement officers should determine the ownership of Foreground IP (FIP) on a case by case basis in acquisition and support contracts. Factors to consider include: the party in the best position to exploit the FIP; national security; technical maturity; future applications; existing obligations; value for money.
 - Where Defence does not retain ownership of FIP, appropriate licensing rights, including the right to sub-licence FIP, must be secured to ensure that the capability can be developed and sustained.
 - The scope of the licence for both FIP and Background IP (BIP) required by Defence will vary based upon the particular needs of the project and circumstances of the procurement.
 - For Third Party IP, a licence on the best available commercial terms should be obtained.
 - Procurement officers must ensure that Defence obtains access to all Technical Data that is required in order to exercise its IP rights under the contract.
 - An IP Needs Analysis (IPNA) may be required to identify the IP needs (including ownership) of complex and strategic procurement. This may include an assessment of what IP may be required compared to the IP rights that may be available.
 - A risk assessment, including mitigations measures, should be performed to assess the risk of failing to secure the necessary rights for each aspect of the capability being procured.

Is there an Issue in Implementation?

- ASDEFCON is drafted very broadly in the context of what it seeks to achieve for the Commonwealth:
 - Exercise IP to use and support Supplies;
 - Remedy defects or omissions
- ASDEFCON focuses on “rights” rather than enablers to carry out the “licensed” activities. There is a mismatch between the rights to exploit IP and the nature of the activities and the requirement to have enablers to perform those activities (i.e. “use, maintain, dispose, modify, adapt, develop, etc). Technical Data (TD) is an enabler to achieve “licensed” functions.
- Definition of IP is holistic rather than specific. Licensed rights do not distinguish between the various forms of IP and the different rights of exploitation for goods, services, systems and software; and how licensing regimes vary according to the nature and scope of the procurement.
- Decisions regarding ownership versus licensed rights are inconsistently applied.
- ASDEFCON does not adequately recognise the involvement of Third Party IP in many goods, services and systems at some level. It is not commercially realistic to achieve the levels of rights in all cases, particularly when dealing with subcontractors, foreign parties, SMEs, etc – *nemo dat rule* means the Commonwealth will only achieve what industry can obtain from its various interested parties.
- The focus on the Foreground IP (FIP)/Background IP(BIP)/Third Party IP (3PIP) dichotomy can be difficult where material supplied or produced under a contract is a hybrid of these rights. It makes management of TD and the IP rights more difficult when a particular deliverable is a combination of material.

Industry Reaction

- Defensive, minimalist behaviours.
- ASDEFCON is viewed by industry as undermining the legally recognised monopoly rights conferred by law in relation to IP, which is critical to the competitiveness, sustainability and viability of industry.
 - There is an inherent contradiction between product pricing and the value of the IP rights required to exploit IP.
 - Competitor access to IP has commercial implications beyond the specific program.
 - Elimination of competitive discriminators.
- Frustration in industry, particularly where ownership of FIP related to minor enhancements or modifications to existing commercial products is sought to vest in the Commonwealth, coupled with the reluctance of the Commonwealth to provide for an extensive licence to FIP rights it acquires in the course of the contract negotiations.

Can we work together more effectively?

YES WE CAN!

- Focus on enablers to achieve outcomes rather than “rights” per se. This will support a more practical management of IP rights and associated Technical Data provided under a contract
- Conduct joint workshops to complete the IP Needs Analysis – what is it that the Commonwealth really needs to achieve capability and sustainability requirements.
- Consider a developmental versus non-developmental distinction rather than Foreground / Background / Third Party dichotomy in recognition of the complex nature of products and systems which use COTS / MOTS products.
- Focus on the constituent elements of capabilities and systems that is (a) Goods; (b) Services; (c) Systems and (d) Software to tailor requirements for IP rights to the nature of each of these constituent elements, and associated requirements. A ‘one size fits all approach’ that defines IP as a collection of rights does not work for all requirements.
- Improve the use of IP Schedules (with the associated Technical Data List) to define deliverables, the nature of the rights attaching to the deliverables, and whether the TD is existing TD and that which will be developed for the purposes of the Contract.
- Provide for more flexibility through the use of sunrise, sunset and escrow arrangements.