

The Management Of Intellectual Property In Australia

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INTRODUCTION

IP management can be viewed along a spectrum. One end of the spectrum reflects the position that IP management is simply ceasing to deal with intellectual property on an ad hoc basis; the other end views IP management as a vital and essential strategic tool. IP management can therefore mean different things to different organisations.

I am going to provide an overview of IP management both in an Australian and a U.S. context in order that you can consider where along that spectrum your organisation does, or should sit, if it wants to sit anywhere at all.

I am also going to argue strongly

for the proposition that proper IP management is an important and undervalued component in Australia's aspiration to successfully commercialise its "inventiveness." It is the missing infrastructure between "research and development" and "commercialisation." Australia's deficiencies in commercialisation have, however, long been recognised. The IP management gap however, has not, and this needs to be clearly addressed.

I will consider the rationale, purposes, elements and variables relating to IP management. I will also make some observations about IP management in the Australian context, as well as identify what action is required at a policy level in order to bring IP management into greater focus.

RATIONALE

There is a value based rationale for IP management which is reflected in

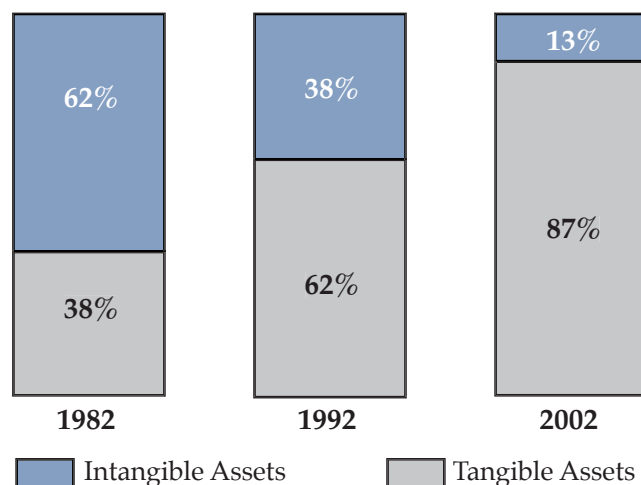
Chart 1, sourced from the Brookings Institute, and from some figures referred to below:

Specifically, we are talking about the use and ownership of subject matter which does and can give rise to significant value. That value is reflected in the U.S. corporate context as part of the growing portion that intangible assets make up of the S&P 500. No study that I am aware of has undertaken the further step of identifying what portion of those intangible assets comprise intellectual property, but I would be surprised if that portion did not amount to a significant value.

I am also not aware of any similar study being done in Australia, but again I would think there would be a certain comparability with the U.S., in that intangible assets as the first layer and intellectual property as a subset of that layer, are likely to form a significant portion of our Australian Stock Exchange companies. Therefore, just like any other type of asset, intellectual property needs to be properly managed in order to maximise its value.

Another example of that value based rationale is, the very size of the value of output created using intellectual property rights—such as licensing income—and the very size of factors adversely impacting on the value of that output, such as impairment and infringement. This again means that intellectual property is an appropriate subject for proper management, and not just another legal right to be dealt with on an ad hoc basis.

Chart 1. Intangible Assets as a % of S&P 500 Market Capitalisation



Source: Brookings Institute

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The figures set out below are estimates from the U.S. intellectual property merchant bank, ICMB Ocean Tomo:

U.S. Estimates

- Over US\$100 billion annually collected in Intellectual Property licensing income.
- Over US\$200 billion annually written off from Intellectual Property impairments.
- Over US\$300 billion annually in unpaid infringements.

Whilst these figures are large, they clearly do not take into account a whole range of other value creating activities involving the use of intellectual property, e.g. securitisation based on intellectual property rights, sale and purchases of intellectual property rights, using intellectual property rights as security for financings and the revenue earned from patented products, to name but a few. We in Australia can aspire to achieve our equivalent value of licensing income referable to the size of our economy. If the U.S. economy is 22 times larger than the Australian economy, then in simple proportional terms, Australia would expect to be earning licensing income of over US\$4.5 billion, suffering impairments of over US\$9 billion and infringements of over US\$13.6 billion. I am not aware that there are any comparable figures for Australia, but I would be very surprised if a figure of US\$4.5 billion in licensing income was being achieved. I suggest that it will not be achieved until proper IP management becomes an embedded feature of Australia's business landscape between the research and development function and the commercialisation function, and, of course, until we get better at commercialisation.

Also, separately from these very large numbers, in my view, it just makes sense because if you have a bundle of rights that the law grants you, and others want those rights, then there is clearly a greater likelihood to extract the maximum value from those rights if they are properly managed, than if they are not.

PURPOSE

The nature of IP management can vary significantly, depending upon its purpose or purposes. The three purposes that I usually encounter are the following:

Extraction of maximum value for benefit of relevant stakeholders

The nature of the value to be extracted differs depending upon the nature of the organisation being considered. Thus, at the extremes, a purely profit motivated organisation will have a different concept of value to a purely "public good" motivated organisation and as such a different concept of the value that each would seek to extract for their relevant stakeholders.

Risk management

Increasingly also organisations are thinking about intellectual property in the context of risk management. Amongst the risk areas, particularly in the United States (a market that most Australian businesses aspire to enter), licensors have been held to be liable for the activities of their licensees. Additionally, in the United States, I understand that there is a growing trend to intellectual property based class actions by shareholders. Those actions include allegations about misleading statements and prospectuses concerning patents and false claims about the exclusivity of licences.

In Australia, there is no reason why the provisions of section 180 of the Corporations Act, relating to the duties of directors, could not apply to directors of a company if those directors do not fulfill their duty concerning the management of a company's intellectual property and that company thereby sustains a loss.

There is also a growing friction between employer and employee rights in intellectual property which is illustrated by the recent Federal Court case of *Victoria University of Technology v. Wilson*. That friction could be minimised by better intellectual property management practices.

These are obviously not the only risks that need to be considered. A

hierarchy of the principal risk areas likely to affect an organisation need to be properly identified in order to deal with this purpose.

Record keeping

Finally, whilst record keeping may seem to be the simplest purpose to implement, you may be surprised to know the number of transactions that I am aware of where delay and significant additional costs were incurred because details of an organisation's intellectual property were not in order—simple things like not recording an assignment or forgetting the existence of overseas registrations can cause unnecessary problems.

Importantly, the above purposes should not be considered to be either mutually exclusive or exhaustive. Additionally, whatever purposes are identified as relevant to a particular organisation's IP management, the success or otherwise of that management should be judged against those purposes and not others.

ELEMENTS

Legal rights

A crucial component of a successful IP management strategy is the recognition that intellectual property is a bundle of legal rights and that those rights can be complex and differ from country to country. Thus, whilst an organisation may well have excellent systems in place to deal with whatever issues they are intended to deal with, if the appropriate legal input is not built into those systems, they will be of lesser or nil value depending upon the circumstances.

For example, it may be important to know and deal with the fact that co-ownership of patents is dealt with differently under the Australian law, than it is under U.S. law. It may also be important to know things such as:

(a) just because your organisation is referred to as an "exclusive licensee" under a patent licence, that will not necessarily mean that it will have the rights of an "exclusive licensee" under relevant patent legislation;

(b) an obligation to pay patent royalties which extends beyond the term of a relevant patent, will not be

enforceable in the U.S.;

(c) in Australia, the entirety of an agreement may be brought to an end if one of the patents that is licensed under it is no longer in force – and this, even though the agreement may deal with a much wider range of subject matter than just patents;

(d) in Australia, that registered trade marks cannot be assigned for a part of Australia, but patents and copyrights can be; and

(e) registered trade marks are the only form of registered intellectual property right that can have on unlimited term.

The list of these sorts of examples can literally go on forever and that is why having appropriate legal input at the appropriate time is particularly important.

Leadership

Another crucial element of a successful IP management program is that leadership of the relevant organisation participates in, endorses and champions the program, e.g. if education sessions are conducted, the relevant leaders of the organisation should be seen as active participants in those sessions.

Education

Education sessions cannot be one off, must be part of the induction program of an organisation, must be given at least equal priority to any other education programs conducted for staff in an organisation and cannot rely solely on on-line learning as its basis. The education sessions should be conducted by both internal and external personnel; the external personnel being particularly important to provide both fresh ideas and reinforce existing good practices that derive from experiences outside your organisation.

Resources

In an extensive study of U.S. industry by Petrash Williamson entitled “*Strategic and Operational Management of Intellectual Property Benchmark Report*,” in keeping with the value proposition mentioned at the outset of this talk, it was found that:

“Generally intellectual property is recognised as an important compo-

nent of [a] company’s value. There is [however] a gap between this recognition and providing the resources needed to effectively manage...IP portfolios.”

Anecdotally, in Australia that recognition of value varies from organisation to organisation. Proper resourcing will be dependent upon the extent to which the following propositions prevail:

- That measurable returns are required from an investment in IP management.

- That there is inherent merit in properly managing IP without necessarily having all the metrics to prove it.

I discuss the important issue of metrics below, but in the meantime, highlight another key point in the resources debate. The key point is that the “resources debate” appears to be based on the incorrect premise that all the relevant resources have to be made available at the one time. When viewed in that light the cost of implementation can be viewed as prohibitive. If, however, the establishment and maintenance of a proper IP management regime was viewed as an incremental exercise, the cost of resourcing it is less likely to be viewed in such extreme terms.

Alignment with organisation’s strategy/business plan

Just as all other aspects of the management of an organisation need to be aligned to that organisation’s strategy and business plan, so the management of an organisation’s intellectual property needs to be so aligned. The issue is not whether this is a correct approach to adopt, rather the issue is how best to implement that approach. The principal difficulty in such implementation, in my experience, derives from two sources. Firstly, that intellectual property has traditionally been viewed principally as a legal function; this in turn means that it has been viewed as a place where costs are incurred rather than revenue earned. Secondly, there is little in the way of management tradition and skills for dealing with it.

Before I suggest some methods for

creating the alignment sought, I give an example of the potential benefits of such alignment.

Company A identifies a market need that if met would bring about anticipated revenue on a worldwide basis of \$1 billion per annum. Patent and design searches are undertaken to determine the extent to which such a product is already covered by published patent applications, granted patents or designs.

Company B is identified as having significant coverage in this area. Investigations into Company B’s actual market activities in this area reveal that none of the relevant products are yet available on the market and further that Company B’s financial position means that it is unlikely that it would have the resources on its own to bring such products to market in the near future.

Company A considers the following options:

- Acquiring Company B;
- Acquiring the patent/design portfolio;
- Licensing the patent/design portfolio;
- Approaching Company B to form a joint venture;
- Employing the principal inventors/designer of Company B disclosed in the patents, etc.

From this example, one can see that there is an interaction between the creators of the relevant strategy/business plan and those who deal with IP management for Company A. It is that interaction between those who face the market or are responsible for an organisation’s activities in the market, and those involved in or responsible for IP management that is crucial to bringing about that alignment. How this interaction best occurs will differ from organisation to organisation. In the Australian Nuclear Science and Technology Organisation (ANSTO), a research based organisation, there is a Patent Management Committee that comprises ANSTO business development people, ANSTO intellectual property management people, ANSTO scientists, as well as qualified

persons external to ANSTO who are bound by confidentiality undertakings. ANSTO Business Development supports the patent protection costs for inventions recommended by the Patent Management Committee for up to 18 months after filing the initial patent application. During the 18 month period inventions with recognised commercial potential identified by the Patent Management Committee will progress further through the ANSTO business development process.

In other organisations, IP management reports to relevant business units; in others, there is a regular interaction with marketing departments; in others, the head of IP management sits on the body within the organisation responsible for developing strategy and business planning.

Having made it sound relatively easy to achieve this alignment, it is heartening to a certain extent to find that in the U.S. context, that alignment is also not being easily achieved. Thus, amongst the conclusions of the above mentioned Petrash Williamson study, are the following:

“Intellectual property is not very well aligned with the business strategies of the survey companies...”

“Not a lot of management processes are in place to assure alignment of intellectual property tactics and that actions are aligned with the business strategy.”

Heartening as those conclusions may be, in that they perhaps indicate we in Australia may not be that far off the pace, this is where the greatest return from IP management can be achieved, i.e. aligning the tools that can provide exclusivity and protection with where the greatest market return and market need lies, and therefore providing the necessary infrastructure between creativity and commercial success.

Inventory, valuation and audit

There are a few simple points that I would like to make in relation to the elements of inventory, valuation and audit. Firstly, you need to know what you have before you can manage it,

and as such, the need for an inventory. Secondly, you need to keep that inventory up to date otherwise it will lose its relevance. Thirdly, separately from any accounting requirements, attribution of value is a proxy for determining priorities in management, and is therefore a useful tool to have. Fourthly, by audit I mean a regular review of the inventory to determine its relevance to the organisation's strategy. Fifthly, using the opportunity presented by the introduction of the new accounting standards for intangible assets, commencing 1 January 2005, as a springboard to create an intellectual property inventory and therefore as a cost effective incremental step in developing an IP management program.

Monitoring competitors' activities

There are a number of reasons for monitoring competitors' activities in relation to intellectual property. The first is that for registrable rights such as designs, patents and trade marks, filings may be a useful pointer to the direction that competitors may be heading. The second is to prevent your competitors from obtaining certain rights, e.g. through an opposition process. The third is to determine the extent to which your competitors may be infringing your rights.

All of these are legitimate reasons and all of them should be considered in any monitoring program.

The Petrash Williamson study found that:

“Most companies routinely monitor their competitors' patent activities.”

Without in any way being exhaustive, in my experience, trade mark monitoring has been used as an early warning device by pharmaceutical companies concerned about the activities of their generic competitors and by consumer companies to determine the next line of snack food that their competitors are likely to introduce. Design registration filings have been used by shoe companies in the youth market to determine where the market leader is heading.

Separately from monitoring the filing activities of your competitors

in the actual geographic market that you compete in, monitoring the activities of market leaders in other markets can also be advantageous, particularly if you know or it is likely that those market leaders will take little interest in the Australian market or other geographic markets relevant to your interest.

Enforcement

An organisation will need to develop a mindset about enforcement that there is no such thing as the “self-enforcement of rights,” i.e. that obtaining the relevant rights is only part getting the benefit of those rights. An important part of creating that mindset within an organisation is the allocation of a budget for dealing with such contingencies. This provides a clear signpost for the organisation that some money may need to be spent and therefore some action may be required. Budgeting for such a contingency should not be viewed as other than a normal feature of an organisation's budgeting process.

The development of a policy for dealing with enforcement should preferably be characterised in terms of “protecting an organisation's assets” rather than “dealing with infringements.” The former is a characterisation which makes it an issue for the organisation as a whole, rather than an issue just for the organisation's lawyers, and as such, something removed from the organisation itself.

Whilst the policy should be uncompromising in terms of protecting an organisation's intellectual property, it should also recognise that in many instances infringements are inadvertent and that therefore they can usually be dealt with by well drafted letter from the organisation itself. If such a letter and follow up steps do not achieve the desired result, then the policy should clearly identify a process for the matter to be escalated. The policy should be appropriately disseminated within the organisation.

Three particular features of enforcement are worth commenting on. Firstly, any letter of demand that

is written should not arm the recipient with a means of attacking your organisation on the basis the letter contains what are known as “unjustified threats.” Unjustified threats are actionable in their own right in many jurisdictions, including Australia. Secondly, all your communications with your professional advisers should ideally be protected by legal professional privilege, i.e. it is preferable for advice to be obtained through your lawyers and not through other professionals such as accountants. Finally you should be prepared and factor into your attack on any alleged infringer that they may seek to counter by attacking your intellectual property rights.

In simple terms, all of the preceding means that enforcement should be thought of in proactive terms rather than reactive terms, i.e. something you control, rather than something that controls you.

Incentives

There is no IP management program that I have encountered which has not had an incentive component of some sort built into it. Incentives range from financial to non-financial and can focus anywhere along the spectrum from creation of relevant subject matter, to that subject matter encountering the market place. None of the incentive components that I have seen, however, relate to adherence to or developing improvements to the IP management process itself. I think that these latter activities are just as worthy of consideration, to the extent that they can have a positive impact on the principal focus of the incentives.

As to what the incentives should target, there are three principal areas which require consideration:

- (a) the factors that motivate the relevant constituency;
- (b) the activities that an organisation seeks to encourage; and
- (c) the impact that the relevant activities have on the business of the organisation.

Thus, using a simple example, if money is the motivating factor and the activity that is sought to be encouraged is patent filings, this is one

incentive level. The impact or value that the relevant patent filings have on the business of an organisation is another incentive level. It is this impact layer that is frequently missing from incentive programs and it is this layer which is likely to be most relevant to an organisation’s intellectual property strategy being aligned with its business strategy. It is the right mix of these three layers that should be the goal of any incentives program, and needs to be tailored for the relevant circumstances at hand.

Metrics

Metrics are perhaps the most difficult part of IP management. By metrics I mean establishing meaningful, quantifiable measures of the impact of IP management on an organisation. Amongst the difficulties in seeking such metrics are firstly, that some things are not easily susceptible to measurement, e.g. where the sale of a business goes through smoothly because the intellectual property was in order or where an organisation has detected and stopped a competitor’s infringement because of a monitoring program of competitor activities. Secondly, it may not be possible to isolate one particular activity as the cause of a certain outcome, e.g. it may not only be significant to have a patented product in the market, which derives from aligning IP strategy with business strategy, but the marketing, strategy and minimisation of manufacturing costs, amongst other things, can be equally important to a product’s success in the market place. Thirdly, it can take time for an activity to have an impact and it may be difficult to determine what time should be allowed for the success or otherwise of a component of IP management to be judged.

My caution is therefore do not become obsessed by metrics, or as Professor Tim Devinney, co-author of the Australian Graduate School of Management/Freehills Report entitled “*The Management of Intellectual Property in Australian Organisations*” (AGSM/Freehills Report) puts it:

“...fundamentally, what you find is that the firms that are very good

at IP management have an understanding that they are not going to be able to measure it perfectly and what they do is put emphasis on the processes to do it as best as they can. What we discovered in the Australian Graduate School of Management/Freehills Report is that doing it as best as your can, is a lot better than not doing it at all.”

Having said that you should not become obsessed, there are obviously some measures that may be relevant and easily identifiable, e.g. licensing income, sales revenue from patented products, cost savings in maintaining a patent or trade mark portfolio etc. It should also, however, be clearly understood there is no better way to attract the approval of an organisation’s top management than to provide it with metrics that show the positive impact that IP management is having on the drivers of that organisation.

Additionally, whilst it is easier said than done, benchmarking your organisation against comparable organisations or market leaders should be an activity that is high on the metrics agenda.

Whatever metrics you choose or, more likely, whatever metrics evolve out of your IP management, make sure that they are meaningful to your organisation’s purposes.

Integrated / unobtrusive systems

Irrespective of whether the appropriate metrics have been or are capable of being determined in relation to an IP management program, the more efficient the systems that form part of the program, the more likely the program will add value to an organisation. That value is more likely to arise if the systems do not impose a significant additional burden on those affected by it. Thus, where possible, they should be integrated into existing systems of an organisation, e.g. in the case of establishing an intellectual property inventory, this could be an element derived from the requirement of the accounting standards to have an inventory of intangible assets. They should also be unobtrusive in the

sense that they are or become a normal feature of an organisation's day to day activities. This in turn results in conduct that becomes "second nature," or "unconsciously skilled" in psychologist's jargon.

The areas where systems are needed are as follows:

- Capture/assessment/conversion of knowledge to IP rights.
- Interaction with lawyers at the right time.
- Interaction with business units at the right time.
- Interaction with strategic planners.
- Keeping intellectual property inventory current.
- Monitoring competitors' activities.
- Capturing and assessing information relevant to any metrics.
- Administration of IP portfolio.

In relation to the capture, assessment and conversion of knowledge to intellectual property rights, by way of example, some companies have their in-house patent attorneys physically located next to, or inside laboratories, where developments are likely to occur. Those patent attorneys interact with scientists and technical people both in formal and less formal social settings.

Interactions with lawyers at the right time, in my experience, usually stem from factors such as an appropriate intellectual property education program; lawyers being an appropriate sign off party in relation to certain activities, e.g. the development of a new trade mark; and lawyers taking part in the planning process of an organisation.

Each of the other areas mentioned by me are equally important, but in the time available, I will not have the opportunity to consider them in any greater detail.

IP Policy

An intellectual property policy can have either an inward looking component, an outward looking component, or both.

The inward looking component seeks to identify the entitlements of

an organisation's internal constituency to the ownership and use of IP rights created within that organisation, e.g. in a university context, students generally, Ph.D. students specifically, academics, both permanently employed and visiting scholars, part time staff who have appointments both at universities and at hospitals, etc. That policy will not only seek to identify such entitlements, but it will also seek to make the policy on those entitlements legally binding. Some people tend to forget, however, that the mere promulgation of a policy does not necessarily mean that it is automatically legally binding on the relevant constituency.

The outward looking component seeks to identify an organisation's preferred means of dealing with its IP rights and with IP rights that arise from interactions with third parties. The outward looking component may be published externally or may be purely for internal consumption. An organisation needs to very carefully consider the advantages and disadvantages that publication can bring about.

Responsibility for implementation

The final element that I consider is the person responsible for implementing any IP management program. That person must have seniority and status and must, if any metrics are determined for the IP management program, have achievement of those metrics as part of his or her key performance indicators.

The preceding may be a useful checklist of issues for you to consider in developing your own IP management program.

VARIABLES

After considering the possible purposes and elements that can comprise an IP management program, one still needs to consider other variables in order to make that program relevant to your organisation. Firstly, are the activities or business being conducted by your organisation—a financial institution has very different IP needs to a beer brewing company, which

in turn has very different needs to an organisation that licenses the manufacture of its beer products. Secondly, the industry in which an organisation conducts those activities or its business will also have a significant influence because of the behaviour of competitors regarding IP. Intellectual property may be viewed as important in an industry, but no one in the industry devotes any significant resources to its management. It may, on the other hand, be viewed as important and significant resources are devoted to its management. And finally, rightly or wrongly, intellectual property may not be viewed as important in an industry at all. Whether one does or does not conform with any industry norms concerning IP management, it is useful to undertake the exercise of determining what those norms (if any) are, because as a result you may be able to gain some advantage in either adopting largely conforming conduct or adopting non-conforming conduct regarding IP management. Such information could arise from informal enquiries; it could also arise from industry associations undertaking surveys of their members; it could also arise from surveys undertaken by IP based associations, with answers being categorised by industry. The above mentioned Petrash Williamson study is based on the latter approach, in that it resulted from a survey of the members of the U.S. Intellectual Property Owners Association. I am not aware that much industry association based or IP association based survey activity of the type referred to above actually occurs in Australia, but would suggest that it would be very useful tool to have in this context.

Thirdly, the jurisdiction in which an organisation conducts its activities or business will also be a significant determinant of the extent and nature of IP management. Conducting business in the U.S.A. is more likely to make IP management important than would be the case if business is being conducted in Russia, for instance.

Fourthly, the nature of the intellectual property itself will be a very

significant factor in determining the nature and extent of IP management. A patent based IP management program is very different to a trade secret based IP management program or a copyright based IP management program, and so on.

The final, but very important, variable that I briefly touch on is the culture of the organisation itself. Amongst the significant considerations in relation to culture are the approach of the leader—for instance, whether what the leader says goes or whether the relevant constituency within any organisation first has to buy in to an activity before it is truly implemented. The culture of an organisation must be carefully read and understood as part of the process of determining how best to initiate and maintain an IP management program.

The preceding milieu of components draws me to two conclusions: the first is that “one size does not fit all!” so far as IP management is concerned and secondly, is that IP management requires a range of skills in order for it to be properly implemented.

OBSERVATIONS

For those considering the implementation of an IP management program within their organisations, the following observations may be of some value:

- Generally speaking, IP management is probably not the most important issue for Australian organisations today, but it is likely to be more important than it is currently

appreciated by most Australian organisations. Therefore the importance of IP management should not be oversold.

- That IP management should be viewed as important for all Australian organisations that seek to conduct activities in sophisticated markets outside of Australia. I have heard too many stories of Australian businesses that attack a foreign market such as the United States and, figuratively speaking, come back with a “bloody nose” because they have not done their homework on the intellectual property landscape in the market that they are seeking to enter.

- That IP management should be viewed as important for all organisations that are creators of knowledge and that want to benefit financially from that knowledge being used in a market place.

- That the change in accounting standards to start in Australia from 1 January 2005 relating to intangible assets will provide a wonderful opportunity for Australian organisations to embark upon the development of IP management programs, and on a grander scale, intellectual asset management programs.

POLICY INITIATIVES

In a context where in the Australian Graduate School of Management/Freehills Report commented “if Australia is to develop to its full potential then the management of knowledge assets must become a high priority not just to research organisations and a few elite firms, but to the vast ma-

jority of firms throughout the country. One area where this needs to be emphasised is in the management of IP—the legally enforceable rights that create and provide protection for knowledge assets,” the following two suggested policy initiatives may assist in realising that potential sooner than would otherwise be the case.

Firstly, there needs to be a clear policy recognition by Australian governments that IP management provides the missing infrastructure between “research and development” and “commercialisation.” There are muted signs of such recognition in that, for example, the requirements of Commonwealth Government programs such as R&D Start, BIF and COMET, specifically mention the need for an IP management plan. The additional components to join the dots and complete the picture would include separate funding being provided for IP management as part of such programs, together with a much clearer statement as to why IP management, in the strategic sense discussed above, is important for commercialisation.

Secondly, that IP management should itself be identified as subject matter appropriate for a Centre of Excellence, preferably in a business school environment, where it can be separately taught and researched. Government funding for such an initiative would send a clear and resounding message that IP management should be treated as a serious and necessary discipline in backing Australia’s ability.