GOVERNMENT NOTICE

DEPARTMENT OF SCIENCE AND TECHNOLOGY

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GUIDELINE 1 OF 2012: INTERPRETATION OF THE SCOPE OF THE INTELLECTUAL PROPERTY RIGHTS FROM PUBLICLY FINANCED RESEARCH AND DEVELOPMENT ACT (ACT 51 OF 2008): SETTING THE SCENE

In accordance with the provisions of Regulation 3 of the Intellectual Property Rights from Publicly Financed Research and Development Act (Act no 51 or 2008), I, Derek Hanekom, Minister of Science and Technology, hereby publish Guideline 1 of 2012: Interpretation of the Scope of the Intellectual Property Rights from Publicly Financed Research and Development Act (Act 51 of 2008): Setting the Scene.

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GUIDELINE 1 OF 2012

INTERPRETATION OF THE SCOPE OF THE INTELLECTUAL PROPERTY RIGHTS FROM PUBLICLY FINANCED RESEARCH AND DEVELOPMENT ACT (ACT 51 of 2008): SETTING THE SCENE

SUMMARY

Guideline 1 of 2012 entitled *"Interpretation of the Scope of the Intellectual Property Rights from Publicly Financed Research and Development (IPR-PFRD) Act (Act 51 of 2008) – Setting the Scene"* is the first in a series of guidelines to be released by the National Intellectual Property Management Office (NIPMO) to assist in interpreting and applying the IPR-PFRD Act in your particular environment.

In particular, this guideline "*sets the scene*" for the subsequent guidelines required in terms of the IPR-PFRD Act and the Regulations pertaining thereto, and aims to answer the questions:

i) *"To what does the IPR-PFRD Act apply"; and*

ii) *"To whom does the IPR-PFRD Act apply?".*

These questions will be answered in these guidelines by providing interpretations of a number of terms and their associated definitions as they appear in the IPR-PFRD Act.

Furthermore, the issue of retrospective application of the IPR-PFRD Act will be discussed. This will largely be achieved via a number of pictorial scenarios, in order to clarify whether a particular research and development project, and the associated intellectual property generated, as well as any subsequent intellectual property transactions are subject to the prescriptive obligations and reporting requirements of the IPR-PFRD Act.

Guideline 1 of 2012 is issued in terms of Regulation 3 of the IPR-PFRD Regulations (dated 2 August 2010).

science & technology
Department:

TABLE OF CONTENTS

LIST OF TABLES

GLOSSARY OF TERMS AND CONTEXT IN WHICH TERMS ARE USED

"Commencement of the IPR-PFRD Act"	The date the IPR-PFRD Act came into force with the Proclamation of its commencement on **2 August 2010**.
"confidential information"	This term refers to any non-public information and, for example, would be the form an invention would take at the outset before it has been placed in the public domain. Should the confidential information never be placed in the public domain, and provided it has value to a party, it may be regarded as a trade secret.
"disclosure of intellectual property"	This refers to a disclosure by a person involved in the conception of intellectual property. The disclosure should indicate the date(s) or the time period when the creation of the mind (see Table 1) took place.
"include(s)"	This word, typically precedes a list, and provides a number of examples or scenarios that apply to the topic at hand. This is an open list and should not be regarded as exhaustive.
"IP"	Intellectual Property.
"IPR"	Intellectual Property Rights.
"IPR-PFRD Act"	Intellectual Property Rights from Publicly Financed Research and Development Act, Act No 51 of 2008.
"NIPMO"	National Intellectual Property Management Office.
"not exhaustive"	This term is used to indicate that the list of examples provided is not a complete list and further examples may exist that are equally applicable.
"OTT"	Office of Technology Transfer.
"Promulgation of the IPR-PFRD Act"	Following assention by the President of the Republic of South Africa to the IPR-PFRD Act on 17 December 2008, the IPR-PFRD Act was published in the Government Gazette on **22 December 2008**.
"R&D"	Research and Development.
"such as"	This term may be used interchangeable with the term "for example" and indicates that the terms that follow are mere examples and are not exhaustive.

1. PREAMBLE: THE IPR-PFRD ACT IN CONTEXT

The National Research and Development (R&D) Strategy of 2002 identified "*inadequate intellectual property legislation and infrastructure*" as one of several factors that require addressing in South Africa's R&D strategy going forward. In particular, "*inventions and innovations from publicly financed research* (are) *not effectively protected and managed*".

Against this background the IPR-PFRD Act (Act 51 of 2008) was promulgated on 22 December 2008 and put into operation on 2 August 2010 with the publication of Proclamation for the commencement of the IPR-PFRD Act.

The long title of the IPR-PFRD Act reads as follows:

> "*To provide for more effective utilisation of intellectual property emanating from publicly financed research and development; to establish the National Intellectual Property Management Office and the Intellectual Property Fund; to provide for the establishment of offices of technology transfer at institutions; and to provide for matters connected therewith.*"

In particular, the objects of the IPR-PFRD Act (Section 2(1)) are to:

> "*make provision that intellectual property emanating from publicly financed research and development is identified, protected, utilised and commercialised for the benefit of the people of the Republic, whether it be for social, economic, military or any other benefit.*"

The IPR-PFRD Act and its overriding objects are by no means unique to South Africa. In fact, the IPR-PFRD Act is loosely based on its United States equivalent, namely the Bayh-Dole Act which was incorporated by amendment into the Patent and Trademark Laws Amendments of 1980 (Pub. L. No. 96-517). Similar legislation has since been enacted in, for example, Germany, Taiwan, Korea and Brazil or systems put in place to achieve the same goals in, for example, Switzerland, the United Kingdom and Turkey.

2. PROSPECTIVE APPLICATION

2.1 LEGISLATION AND CASE LAW – "*PRESUMPTION AGAINST RETROSPECTIVITY*"

Section 81 of the Constitution of the Republic of South Africa, 1996 states:

> "*A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.*"

The Act then becomes applicable or effective on the enactment date (in other words, the date on which it is published in the *Government Gazette*) or on the commencement date (in other words, a specific date identified by the Act and typically by proclamation in the *Government Gazette*). Unless specifically provided for, the Act applies prospectively.

The Appellate Division (Jockey Club of SA v Transvaal Racing Club, 1959 (2) 54) held that:

> *"The general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.*"

2.2 APPLICATION TO THE IPR-PFRD ACT

The IPR-PFRD Act was promulgated on **22 December 2008** and commenced on **2 August 2010** following the publication of a Proclamation for its commencement in the *Government Gazette*. Furthermore, no provision was made in the IPR-PFRD Act indicating that the IPR-PFRD Act has retrospective application. Therefore, in the absence of such provision, a presumption against retrospectivity exists and one can assume that the IPR-PFRD Act applies prospectively.

The scope of the IPR-PFRD Act should thus be interpreted as being prospective.

3. SCOPE OF THE IPR-PFRD ACT

3.1 TO WHAT DOES THE IPR-PFRD ACT APPLY?

According to Section 3 of the IPR-PFRD Act:

> "*This Act applies to* ***intellectual property emanating*** *from* ***publicly financed research and development***." [emphasis added]

Turning to each of the emphasised terms:

3.1.1 INTELLECTUAL PROPERTY

3.1.1.1 DEFINITION

"*Intellectual Property*" (IP) is defined in Section 1 of the IPR-PFRD Act as:

> "***any creation of the mind*** *that is capable of being* ***protected by law*** *from use by any other person, whether in terms of South African law or foreign intellectual property law,* ***and includes any rights*** *in such creation,*
> *but* ***excludes copyrighted works*** *such as a thesis, dissertation, article, handbook or any other publication which, in the ordinary course of business,* ***is associated with conventional academic work***." [emphasis added]

Turning further to each of the emphasised terms within the definition of IP:

a) "any creation of the mind that is capable of being protected by law"

The term "*any creation of the mind*" is very broad and so this term is qualified by "*that is capable of being protected by law from use by any other person, whether in terms of South African law of foreign intellectual property law*".

Table 1 below provides a non-exhaustive list of the different types of creations of the mind that may constitute IP, indicates whether they qualify for statutory protection or protection in terms of common law and, in the case of statutory protection, the relevant legislation is provided.

Please note that all forms of IP which may find protection in terms of statutory law, only qualify for such statutory protection provided the creation of the mind meets a number of inherent requirements. For example, an invention must be novel, involve an inventive step and be capable

of use in trade, industry or agriculture before the invention will qualify for patent protection.

TABLE 1: EXAMPLES OF CREATIONS OF THE MIND, THE FORM OF LEGAL PROTECTION AFFORDED AND THE CORRESPONDING STATUTE (WHERE APPLICABLE)

Creation of the mind	Example(s)	Possible IP Right and associated legal protection afforded	Statute (where applicable)
Confidential information	Invention	Patent (statutory) or trade secret (common law)	Patents Act No. 57 of 1978 (as amended)
	Functional or aesthetic design	Design (statutory)	Designs Act No. 195 of 1993 (as amended)
	Plant variety	Plant Breeders' Right (statutory) and patent (in the case of, for example, a genetically modified variety; statutory)	Plant Breeders' Rights Act No 15 of 1976; and Patents Act No. 57 of 1978 (as amended)
	Mark	Trade mark (statutory or common law through use)	Trade Marks Act No. 194 of 1993
Copyrighted work	Literary works Musical works Artistic works Cinematograph films Sound recordings Broadcasts Programme-carrying signals Published editions Computer programs	Copyright (statutory; or common law through use)	Copyright Act No. 98 of 1978 (as amended); and Registration of Copyright in Cinematograph Films Act, No. 67 of 1977

b) "and includes any rights in such creation"

Within the definition of IP, the legislature has included the creation of the mind as well as the right, in other words the intellectual property right (IPR).

Consider, for example, where the creation of the mind is an invention, and the IPR is the patent which is granted as an exclusionary right to protect the underlying invention. In practice, the IP is created as confidential information during the step of R&D. Unless it is a common law right, statutory IPRs are only obtained once the particular right has been granted. Furthermore, these granted rights are then maintained following payment of renewal fees (also known as maintenance fees or annuities).

Depending on the type of IPR obtained, the duration of the right will vary (subject to the payment of renewal fees). Consult the various statutes to determine what the duration of the particular right will be.

c) "excludes copyrighted works....is associated with conventional academic work"

This proviso should be interpreted within the scope in which it was intended and using the non-exhaustive list introduced by the term "*such as*" as an indication as to which copyrighted works fall outside the scope of the IPR-PFRD Act.

The key to understanding the scope of this proviso lies in the term "*conventional academic work*".

"*Academia(c)*" may be defined, according to the Concise Oxford English Dictionary (11th edition) as:

> "*relating to education and scholarship*".

The aim of this proviso in the IPR-PFRD Act was to provide that the actual thesis, dissertation or article does not fall within the scope of the IPR-PFRD Act because, for example, the underlying invention would already have been disclosed and protected (where applicable) before the thesis, dissertation or article was put into the public domain via its publication.

A further aim of this proviso is to exclude academic works such as lecture notes or handbooks (in hard or soft copy and will include e-learning material) which are generated and distributed to learners during the course of their studies.

3.1.1.2 SUMMARY

The definition of IP in the IPR-PFRD Act is thus broad enough to include **ALL** creations of the mind which are capable of protection by law via either statute or common law.

3.1.2 EMANATING

3.1.2.1 DEFINITION

The IPR-PFRD Act does not provide a definition for the term "*emanating*".

Turning to the definition in the Concise Oxford English Dictionary (11th edition), the word "*emanate*" is defined as:

> "*issue or spread out from a source*"; or "*to give out or emit*".

3.1.2.2 SUMMARY

Considering the provided definition it is clear that the scope of the IPR-PFRD Act only extends to IP that arises from R&D activities undertaken using public funds. The definition of "*publicly financed*" and "*R&D*" are thus key to further understanding the scope of the IPR-PFRD Act (see sections 3.1.3 and 3.1.4, respectively, below)

3.1.3 PUBLICLY FINANCED

3.1.3.1 DEFINITION

"*Publicly financed research and development*" is defined in Section 1 of the IPR-PFRD Act as:

> "*research and development undertaken using* ***any funds allocated by a funding agency*** *but* ***excludes funds allocated for scholarships and bursaries***" [emphasis added]

Turning further to each of the emphasised terms within the definition of publicly financed R&D:

a) any funds allocated by a "funding agency"

A funding agency is defined in Section 1 of the IPR-PFRD Act as:

> "*the* ***State*** *or an* ***organ of state*** *or a* ***state agency*** *that funds research and development.*"

[emphasis added]

The IPR-PFRD Act does not provide definitions for these emphasised terms.

The definition of the "*State*" typically depends on the context in which the word is used. It appears to NIPMO that in the context of the IPR-PFRD Act the State should be interpreted as

> "*government and any of its departments, agencies or components.*"

An "*organ of state*" is defined in the Constitution of the Republic of South Africa (Act 108 of 1996) as:

> *"(a) any department of state or administration in the national, provincial or local sphere of government; or*
> *(b) any other functionary or institution*
> *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation,*
> *but does not include a court or a judicial officer."*

The term "*state agency*" is understood by NIPMO to mean:

> "*a permanent or semi-permanent organisation of government, responsible for overseeing and performing a number of administration functions.*"

Bearing these definitions in mind, table 2 provides examples of the State, organs of state or state agencies that allocate funds for R&D.

Please note that this list is not exhaustive and may be amended and updated from time to time. Furthermore, **if funding is received from the State, an organ of state or a state agency, which is then used to perform an R&D function,** which is not indicated in the table below, the recipient of the funding (which was used for an R&D activity) remains a recipient in terms of the IPR-PFRD Act and all the prescriptive requirements and obligations of the IPR-PFRD Act apply strictly.

TABLE 2: EXAMPLES OF THE STATE, ORGANS OF STATE OR STATE AGENCIES WHICH ALLOCATE PUBLIC FUNDS FOR R&D

NO.	STATE, ORGAN OF STATE OR STATE AGENCY
1	All institutions as per the definition provided in Section 1 of the IPR-PFRD Act
2	Department of Agriculture, Forestry and Fisheries
3	Department of Arts and Culture
4	Department of Basic Education
5	Department of Communications
6	Department of Defence
7	Department of Energy
8	Department of Environmental Affairs
9	Department of Health
10	Department of Higher Education and Training
11	Department of Home Affairs
12	Department of Human Settlements
13	Department of Labour
14	Department of Mineral Resources
15	Department of Police Services
16	Department of Public Enterprises
17	Department of Public Service and Administration
18	Department of Public Works
19	Department of Rural Development and Land Reform
20	Department of Science and Technology
21	Department of Social Development
22	Department of Sport and Recreation
23	Department of Trade and Industry
24	Department of Transport
25	Department of Water Affairs
26	Local Government
27	National Research Foundation (NRF)
28	Provincial Government
29	Safety in Mining Research (SIMRAC)
30	Small Enterprise Development Agency (SEDA)
31	Support Program for Industrial Innovation (SPII)
32	Technology Innovation Agency (TIA)
33	The Technology and Human Resources for Industry Program (THRIP)

The IPR-PFRD Act does not provide a definition for the term "*allocated*".

Turning to the definition in the Concise Oxford English Dictionary (11th edition), the word "*allocate*" is defined as:

"to assign or distribute."

The key to determining whether funding received by a recipient constitutes public funding lies in the word "*allocate*". In other words, if the money was a) allocated by National Treasury for R&D (directly or via a third party) or b) was allocated within the budget of a funding body for R&D or c) was allocated within the budget of a recipient or d) utilised for R&D, then the funding constitutes public funding for R&D. In the latter instance, it becomes clear that public funding is not limited to monies received for R&D, but will most certainly include indirect contributions in the form of salaries, facilities, overhead costs *etcetera*, which are typically the overhead costs borne by the recipient, and in particular, the institution.

CONSIDER THE FOLLOWING THREE EXAMPLES:

Schedule 2 Major Public Entities of the Public Finance Management Act (No. 1 of 1999)
ESKOM conducts R&D in their environment and further fund R&D at institutions (as per the definition of the IPR-PFRD Act). Currently, ESKOM fund all R&D at institutions from income received from electricity sales and not from public funds received from National Treasury. Thus, despite ESKOM being recorded as a public entity, when ESKOM funds R&D using income received from electricity sales, this does not constitute public funding. In terms of section 15(5) of the IPR-PFRD Act, ESKOM are regarded as a private entity or organisation.

Similarly, the Industrial Development Corporation (IDC) invests in a number of R&D programmes. These investments are largely made by the IDC *per se* as a result of income received from previous investments. As this source of R&D funding does not constitute public funds, the default position is that the IDC is not a public funding agency.

In contrast, the Support Program for Industrial Innovation (SPII), which is managed by the IDC, allocates public funds for R&D. SPII funding constitutes public funding and the recipient of these funds must comply with the requirements of the IPR-PFRD Act.

The Research and Development Tax Incentive
Section 11D of the Income Tax Act of 1962 (No. 58 of 1962) was amended in 2006 to provide a tax incentive of 150% deduction on eligible R&D activities in the previous financial period. Thus this

provision operates on a deduction basis. No public funds have been allocated to a particular recipient for a particular financial period. Thus a recipient of a deduction in terms of Section 11D of the Income Tax Act is not a recipient of public funds in terms of the IPR-PFRD Act.

The Technology and Human Resources for Industry Program (THRIP)

THRIP is designed and managed by the National Research Foundation (NRF) and the Department of Trade and Industry (the dti). It is a funding scheme in which THRIP and industry jointly invest in research programmes. THRIP funding is thus a source of public funding for R&D and any recipient of THRIP funding is a recipient in terms of the IPR-PFRD Act and must comply with the requirements of the IPR-PFRD Act.

b) excludes funds allocated for scholarships and bursaries

Scholarships and bursaries are not regarded as public funding for the purposes of determining public funding in terms of the IPR-PFRD Act. However, these costs are unlikely to be the only costs in the R&D project and thus must be taken into account.

3.1.3.2 SUMMARY

The State and all government organs of state or state agencies which provide funding which is allocated or used for R&D activities qualify as a public funding agency and thus the funds received are public funds. Any recipient of these funds is a recipient in terms of the IPR-PFRD Act and must comply with the obligations imposed by the IPR-PFRD Act. Furthermore, the contribution by a publicly-funded recipient or institution towards R&D costs (direct or indirect) constitutes public funds.

3.1.4 RESEARCH AND DEVELOPMENT (R&D)

3.1.4.1 DEFINITION

A definition for R&D is not provided in the IPR-PFRD Act.

Turning to the Organisation for Economic Co-operation and Development (OECD), in an extract taken from the *Frascati Manual* entitled *Proposed Standard Practice for Surveys on Research and Experimental Development, Paris, 2002),* R&D comprises:

"*creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications.*"

Furthermore, R&D is, in principle, generally defined as being the sum of three exhaustive and mutually exclusive activities; namely basic research, applied research and experimental development. These activities may be defined as follows:

*"**Basic Research** is experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any particular application or use in view.*

***Applied Research** is also original investigation undertaken in order to acquire new knowledge. It is, however, directed primarily towards a specific practical aim or objective.*

***Experimental Development** is systematic work, drawing on existing knowledge gained from research and/or practical experience, which is directed to producing new materials, products or devices, to installing new processes, systems and services, or to improving substantially those already produced or installed.*"

A difficulty remains in determining whether or not an activity may be regarded as an R&D activity. An R&D activity can be distinguished from a non-R&D activity by an element of **novelty** and the provision of a **solution to a problem** which was **not obvious** to a person with a basic common knowledge of the field in question.

The *Frascati Manual* (2002) goes on to exclude a number of activities which are very closely linked to R&D but, as far as possible, should be excluded when determining is an activity is a R&D activity. These activities are set out in table 3 and include:

i. Education and training; and
ii. Administration and other supporting activities.

Table 3 provides an expanded list of the activities that should be excluded from falling within the definition of R&D, as well as nuances of the activities which should be regarded as R&D.

For further reference please refer directly to the *Frascati Manual* (2002) available at: http://www.uis.unesco.org/Library/Documents/OECDFrascatiManual02_en.pdf

TABLE 3: ACTIVITIES THAT SHOULD BE EXCLUDED FROM THE DEFINITION OF R&D, SPECIFIC EXAMPLES WHERE POSSIBLE AND EXAMPLES WHICH DO NOT FALL WITHIN THE SPECIFIC EXCLUSION

ACTIVITY CATEGORY	SPECIFIC EXCLUSION	WHAT DOES NOT FALL WITHIN THIS EXCLUSION?
1. EDUCATION AND TRAINING	All education and training of personnel in the natural sciences, engineering, medicine, agriculture, social sciences and the humanities at higher education institutions should be excluded.	Post-graduate research by students should be regarded as R&D (especially that conducted by a PhD student).
2. OTHER RELATED SCIENTIFIC AND TECHNOLOGICAL ACTIVITIES	The following activities should be excluded from R&D unless carried out solely or primarily for the purposes of an R&D programme:	
	2.1 Scientific and technical information services: The routine activities, not part of an R&D programme, of collecting, coding, recording, classifying, disseminating, translating, analysing; and evaluating, which are carried out by scientific and technical personnel, bibliographic services, patent services, scientific and technical extension and advisory services and at scientific conferences.	If these activities are conducted primarily for the purpose of R&D support, they should be regarded as R&D.
	2.2 General purpose data collection: Routine activities, not part of an R&D programme, carried out by government agencies to record natural, biological or social phenomena, which are of general public interest or which only the government has the resources to record, for example routine topographical mapping, routine geological, hydrological, oceanographic and meteorological surveying and should thus be excluded.	Data collected, processed and interpreted as part of the R&D process should be regarded as R&D; and similarly the processing and interpretation of the data. Data which is collected or processed for the social sciences which is for the purpose of scientific research should be regarded as such.

2. OTHER RELATED SCIENTIFIC AND TECHNOLOGICAL ACTIVITIES (CONT.)	Similarly, the collection of data as an accurate record of facts relating to society (for example a census, sample surveys *etcetera*) are excluded. Market reviews will also be excluded.	
	2.3 Testing and standardisation: Routine activities, not part of an R&D programme, including the maintenance of national standards, the calibration of secondary standards and routine testing and analysis of a variety of materials, components, products and processes *etcetera*.	The process of devising new or substantially improved methods of testing are regarded as R&D.
	2.4 Feasibility studies: Routine studies, not part of an R&D programme, such as the use of known methods to decide whether, for example, an engineering project should be implemented. In the social sciences, feasibility studies are regarded as investigation of the socio-economic characteristics and implications of specific situations and are to be excluded.	Feasibility studies on research projects constitutes R&D.
	2.5 Specialised health care: Routine investigation and normal application of specialised medical knowledge, not part of an R&D programme.	If these activities are carried out for research purposes in a university or hospital, they should be regarded as R&D and is typically referred to as "specialised health care".
	2.6 Patent and licence work: All administrative and legal work associated with patents and licences are not regarded as R&D.	Patent work connected directly with R&D projects is R&D.

2. OTHER RELATED SCIENTIFIC AND TECHNOLOGICAL ACTIVITIES (CONT.)	***2.7 Policy-related studies:*** Routine national, regional and local policies and those of business enterprises, not part of an R&D programme.	-
	2.8 Routine software development: Routine software activities, not part of an R&D programme, for example, system-specific or programme-specific advances which were in the public domain, routine computer maintenance and technical solutions to problems encountered in previous projects on the same operating system, are excluded.	The development of new theorems or algorithms, information technology at the level of operating systems and software, internet technology, software development, experimental development to address a gap in technology knowledge, should be regarded as R&D.
3. OTHER INDUSTRIAL ACTIVITIES	***3.1 Other innovation activities:*** Routine activities, not part of an R&D programme, which are necessary for the implementation of any product or service or the commercial use of any process, and typically include the acquisition of technology, tooling up, production start-up, and marketing of such processes.	Typically prototypes and the pilot plant will be regarded as an R&D activity if the principal purpose of the activity is to obtain experience and compile data. Industrial design, industrial engineering and tooling up and trial production insofar as they relate to the R&D and not the production process will be regarded as R&D.
	3.2 Production and related technical activities: Routine activities, not part of an R&D programme, including industrial preproduction and the subsequent production and distribution of goods and services and any associated social science disciplines such as market research.	Clinical trial phases 1, 2 and 3 can be treated as R&D. Phase 4 of clinical trials wherein the drug is tested after approval and manufacture should only be regarded as R&D if a further scientific or technological advance is made.

4. ADMINISTRATION AND OTHER SUPPORTING ACTIVITIES	***4.1 Purely R&D-financing activities:*** The activities of raising, managing and distributing funds for R&D are excluded.	-
	4.2 Indirect supporting activities: Examples include transportation, storage, cleaning, repair, maintenance and security activities, as well as administrative and clerical activities not undertake exclusively for R&D.	-

3.1.4.2 SUMMARY

The decision as to whether IP generated falls within the scope of the IPR-PFRD Act must be taken relative to the definition of R&D. If the activity that generated the IP does not fall within the definition of R&D, then the IP can be said to have arisen from a non-R&D activity and as a result the IP does not fall within the scope of the IPR-PFRD Act, regardless of whether or not public funds have been allocated for the activity.

3.2 TO WHOM DOES THE IPR-PFRD ACT APPLY?

3.2.1 RECIPIENTS INCLUDING INSTITUTIONS

The IPR-PFRD Act applies to **recipients** of public funds which are intended for R&D.

A recipient is defined in Section 1 of the IPR-PFRD Act to mean:

> "***any person***, *juristic or non-juristic, that undertakes research and development using funding from a funding agency* ***and includes an institution***"

Section 1 further defines an institution as:

> *"(a) any higher education institution contemplated in the definition of "higher education institution" contained in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);*
> *(b) any statutory institution listed in Schedule 1; and*
> *(c) any institution identified as such by the Minister (of the Department of Science and Technology) under section 3(2)."*

The higher education institutions are indicated in the table below:

TABLE 4: HIGHER EDUCATION INSTITUTIONS AS PER SECTION 1 OF THE IPR-PFRD ACT

NO.	INSTITUTION
1	Cape Peninsula University of Technology (CPUT)
2	Central University of Technology (CUT)
3	Durban University of Technology (DUT)
4	Mangosuthu University of Technology (MUT)
5	Nelson Mandela Metropolitan University (NMMU)
6	North-West University (NWU)
7	Rhodes University (RU)
8	Stellenbosch University (SU)
9	Tshwane University of Technology (TUT)
10	University of Cape Town (UCT)
11	University of Fort Hare (UFH)
12	University of Johannesburg (UJ)
13	University of KwaZulu-Natal (UKZN)
14	University of Limpopo (UL)

NO.	INSTITUTION
15	University of Pretoria (UP)
16	University of South Africa (UNISA)
17	University of the Free State (UFS)
18	University of the Western Cape (UWC)
19	University of the Witwatersrand (WITS)
20	University of Venda for Science and Technology (UV)
21	University of Zululand (UZ)
22	Vaal University of Technology (VUT)
23	Walter Sisulu University (WSU)

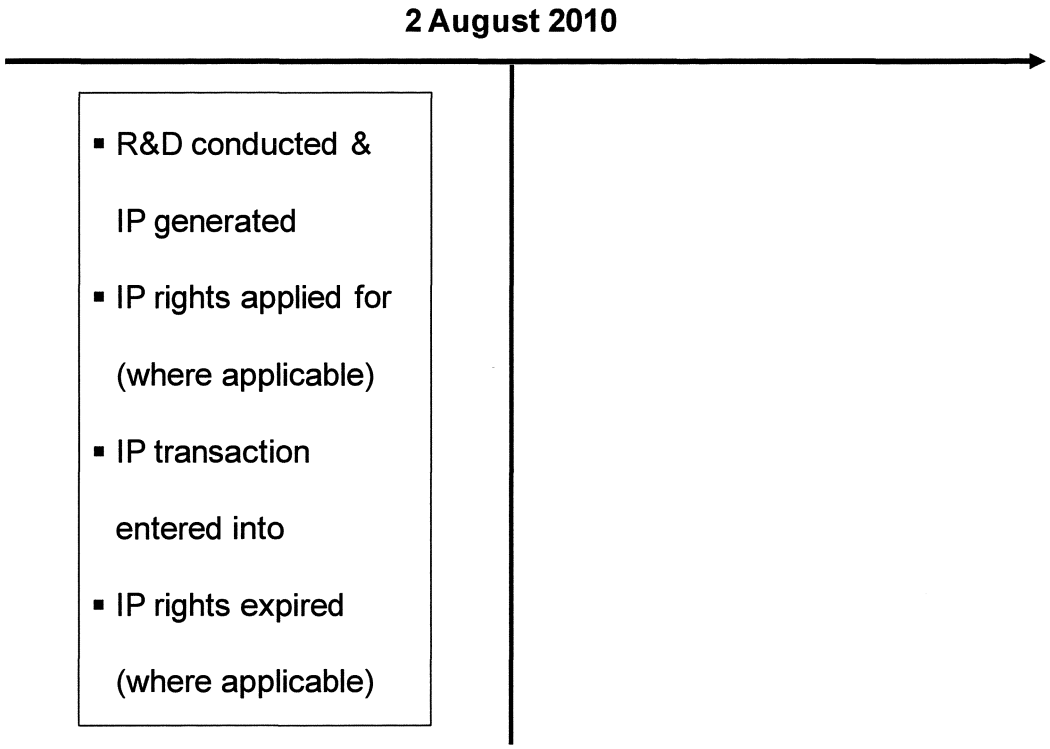
The statutory institutions as per Schedule 1 are indicated in the table below:

TABLE 5: STATUTORY INSTITUTIONS AS PER SCHEDULE 1 OF THE IPR-PFRD ACT

NO.	INSTITUTION
1	Agricultural Research Council (ARC)
2	Council for Geoscience (CG)
3	Council for Mineral Technology (MINTEK)
4	Council for Scientific and Industrial Research (CSIR)
5	Human Science Research Council (HSRC)
6	National Research Foundation (NRF)
7	South African Bureau of Standards (SABS)
8	South African Medical Research Council (MRC)
9	South African Nuclear Energy Corporation (NECSA)
10	Water Research Commission (WRC)

3.3 APPLICATION OF THE DEFINITIONS TO VARIOUS SCENARIOS

SCENARIO 1



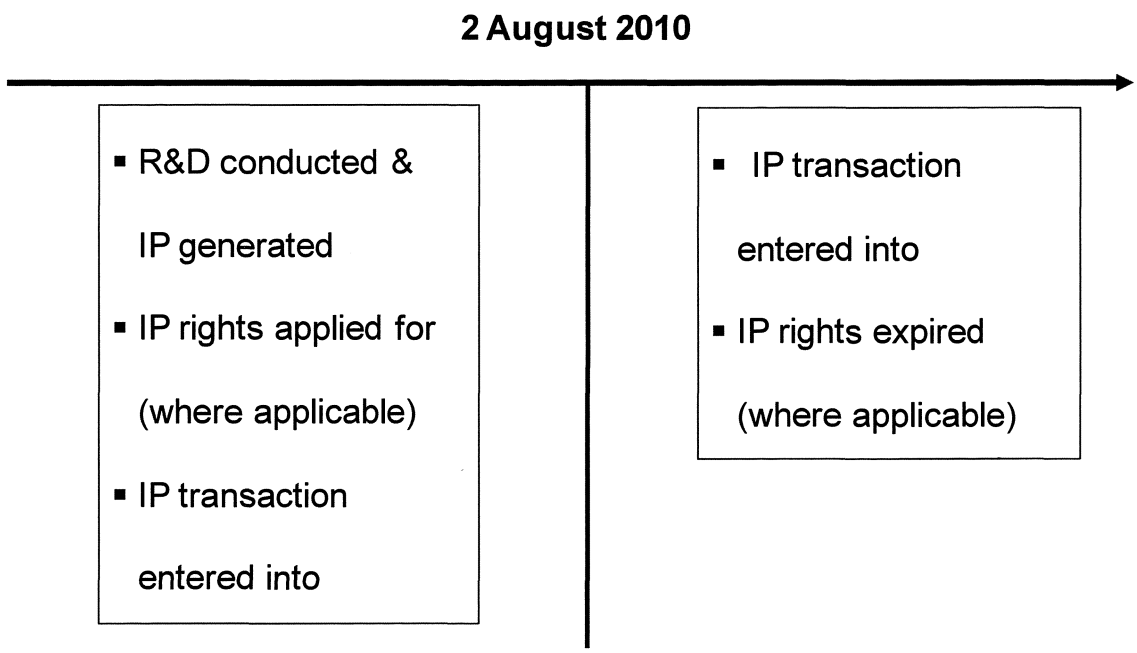
In Scenario 1, public funds were provided for R&D. R&D was performed and IP was generated. The office of technology transfer (OTT) will determine when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained), an IP transaction (for example, a licensing agreement, assignment of the IP *etcetera*) was entered into and the IP rights expired (where applicable).

Although all activities fell into the period **PRIOR** to 2 August 2010, the factor for determining whether the IPR-PFRD Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 1, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR-PFRD Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR-PFRD Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR-PFRD Act. The OTT must make a clear distinction between the two categories of IP.

SCENARIO 2



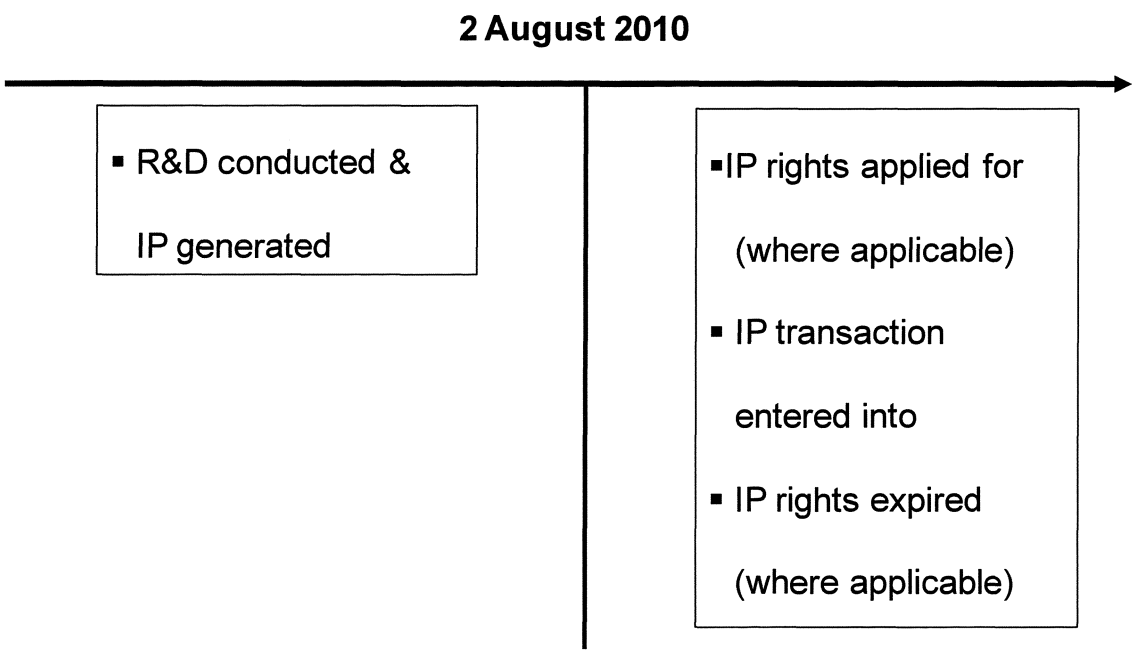
In Scenario 2, public funds were provided for R&D. R&D was performed and IP was generated. The OTT will determine when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained). An IP transaction (for example, a licensing agreement, assignment of the IP etcetera) was entered into **PRIOR** or **POST** 2 August 2010.

The factor for determining whether the IPR-PFRD Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 2, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR-PFRD Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR-PFRD Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR-PFRD Act. The OTT must make a clear distinction between the two categories of IP.

SCENARIO 3



In Scenario 3, public funds were provided for R&D. R&D was performed and IP was generated. The OTT will determine when the IP was generated. These activities were conducted **PRIOR** to 2 August 2010.

The IP was subsequently protected (where applicable; i.e. the priority date was obtained) and an IP transaction (for example, a licensing agreement, assignment of the IP *etcetera*) was entered into **POST** to 2 August 2010.

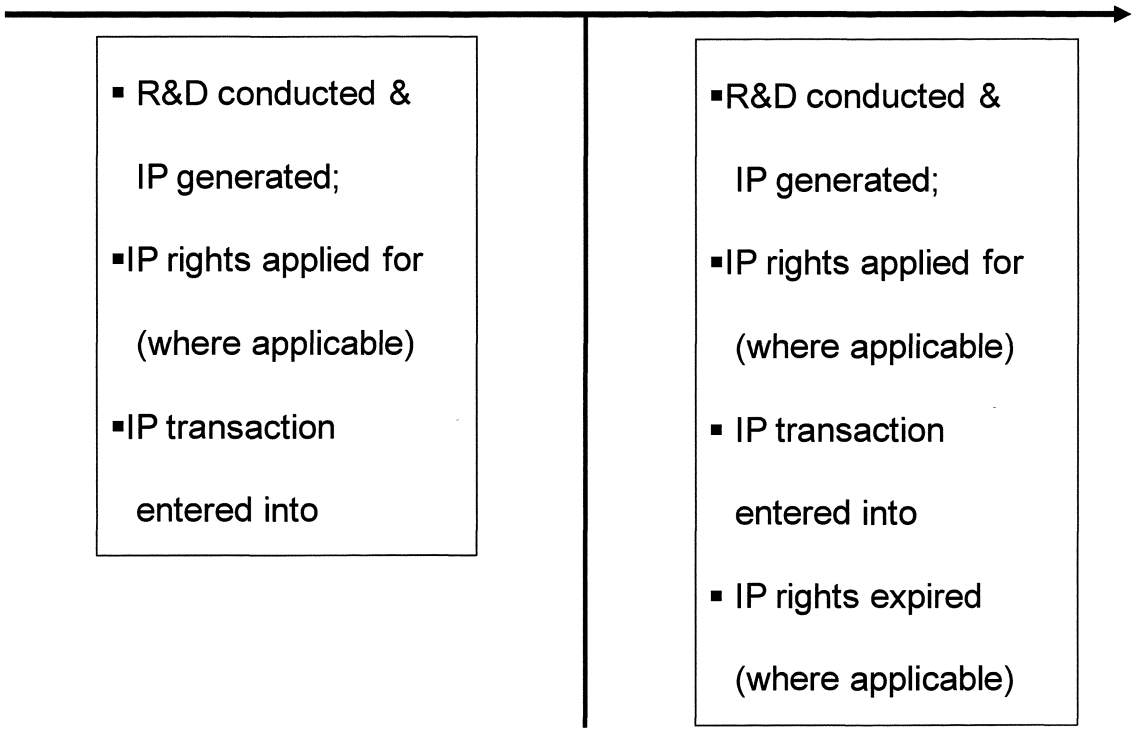
The factor for determining whether the IPR-PFRD Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 3, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR-PFRD Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR-PFRD Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR-PFRD Act. The OTT must make a clear distinction between the two categories of IP.

SCENARIO 4

2 August 2010



In Scenario 4, public funds were provided for R&D. R&D was performed and IP was generated. These activities were conducted **PRIOR to 2 August 2010** and **POST 2 August 2010**. The OTT will determine when the IP was generated.

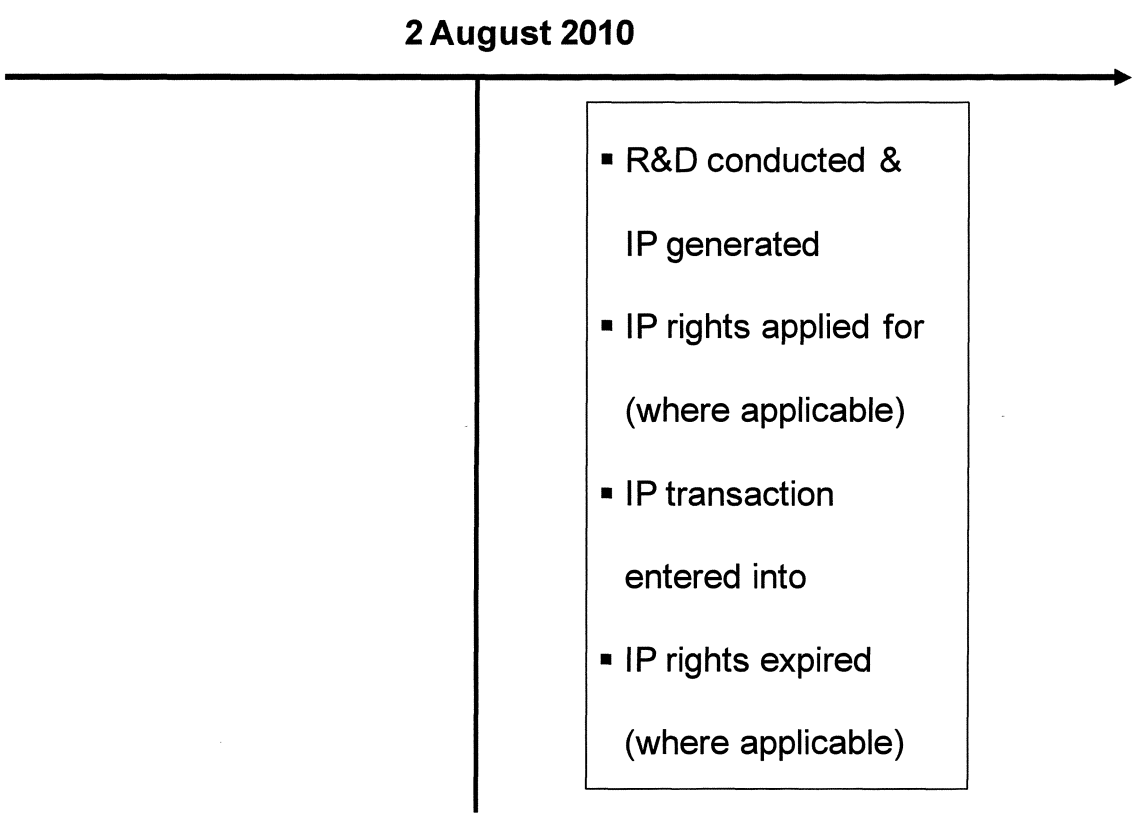
The IP was subsequently protected **PRIOR to 2 August 2010** and/or **POST 2 August 2010** (where applicable; i.e. the priority date was obtained) and an IP transaction (for example, a licensing agreement, assignment of the IP *etcetera*) was entered into **PRIOR to 2 August 2010** and/or **POST 2 August 2010**.

The factor for determining whether the IPR-PFRD Act applies is the **DATE OF CREATION OF THE IP**.

For the portion of the IP that was created **PRIOR** to 2 August 2010, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR-PFRD Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR-PFRD Act.

For the portion of the IP that was created **POST** to 2 August 2010, the IP generated and subsequent IP transaction(s) fall **WITHIN** the scope of the IPR-PFRD Act and there is a strict requirement to report on these activities and to observe the obligations of the IPR-PFRD Act. The OTT must make a clear distinction between the two categories of IP.

SCENARIO 5



In Scenario 5, public funds were provided for R&D. R&D was performed and IP was generated. The OTT will determine when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained), an IP transaction (for example, a licensing agreement, assignment of the IP *etcetera*) was entered into and the IP rights expired (where applicable).

The factor for determining whether the IPR-PFRD Act applies is the **DATE OF CREATION OF THE IP**.

All activities effectively fell into the period **POST** 2 August 2010.

Therefore the R&D conducted, IP generated and subsequent IP transaction(s) fall **WITHIN** the scope of the IPR-PFRD Act and there is a strict requirement to report on these activities and to observe the obligations of the IPR-PFRD Act.

Please do not hesitate to contact NIPMO (info@nipmo.org.za; 012 844 0222) should you have any questions with regards to any matter in this guideline.

DEREK HANEKOM, MP
MINISTER OF SCIENCE AND TECHNOLOGY

DATE: 19 November 2012