

**SUBMISSION**  
**BY**  
**THE LICENSING EXECUTIVES SOCIETY**  
**OF**  
**SOUTH AFRICA**  
**ON**  
**THE TECHNOLOGY INNOVATION AGENCY BILL**

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**TECHNOLOGY INNOVATION AGENCY BILL**  
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**OF**  
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**Introduction**

The Licensing Executive Society of South Africa (“LES SA”) hereby submits its comments on the Technology Innovation Agency Bill (the “Bill”) for your consideration.

Given the diversity of the Society’s membership, the submission is directed at the law and business of licensing in its broadest sense, without regard to the views of any particular interest group.

LES SA generally welcomes and supports the objectives of the Bill. More particularly, LES SA welcomes and supports the establishment of the Technology Innovation Agency (the “TIA”) as a new public entity that is aimed at stimulating and intensifying innovation and inventions in order to improve economic growth as well as enhance the quality of life of all South Africans by developing and exploiting technological innovations and inventions and creating an enabling environment wherein these could be commercialised.

There are aspects of the Bill, however, which LES SA considers potentially problematic, and in some instances counter-productive, if it is passed into law in its present form. The Society’s concerns are set out below under corresponding sub-headings.

**Executive Summary**

The Bill goes a significant way towards ensuring the establishment of the TIA as a new public entity that is aimed at stimulating and intensifying innovation and inventions. Whilst the introduction of the Bill is welcomed, there are issues which we believe require clarification or that could be dealt with in more detail.

These issues relate primarily, to the apparent conflict of interest vesting in the duality of the proposed enabling-and-competing nature of the TIA, the scope of the innovations and inventions to be dealt with by the TIA and the transition from the then South African Inventions Development Corporation (“SAIDCOR”) to the TIA and, secondary, to some definitions and ambiguities in the provisions of the Bill.

The issues include the following:

1. The apparent conflict of interest vesting in the duality of the proposed enabling-and-competing nature of the TIA is seen in the enabling nature of some of the powers and duties as well as functions of the TIA versus the competing nature of other powers, duties and functions, respectively as set out in the Bill.

2. The scope of the innovations and inventions to be dealt with by the TIA appears generally to be limited to innovations and inventions of a technological nature only, while in at least one instance the Bill appears to provide for the protection and exploitation of intellectual property derived from publicly financed research only. LES SA therefore deems it necessary not only to consider the actual scope of the innovations and inventions to be dealt with by the TIA, but also to consider the Intellectual Property Rights From Publicly Funded Research Bill (the “IPRFPFR Bill”) to the extent it is relevant to the present submission.

In fact, LES SA believes that it is essential that both this Bill and the IPRFPFR Bill be finalised with due consideration of each other, though not necessarily concurrently. Justification for the need of such consideration is found for example in the apparent conflict in and/or overlapping of mandates between that of the so-called National Intellectual Property Management Office (‘NIPMO’), as provided for in the IPRFPFR Bill, and the TIA, as provided for in terms of this Bill, particularly in terms of the protection and exploitation of intellectual property derived from publicly financed research.

In addition, although the IPRFPFR Bill explicitly provides for publicly financed research, it is clear in our opinion that the IPRFPFR Bill in fact provides for research as well as development that are financed with public funds. Clarification as to the differentiation between research and development for the purposes not only of the IPRFPFR Bill, but also this Bill, is therefore essential.

3. The transition from SAIDCOR, established in terms of the Inventions Development Act, No. 31 of 1962, as amended (the “Inventions Development Act”), to be disestablished in terms of the Bill, requires prior consideration of two aspects, namely firstly, the potential transfer of assets, including intellectual property and intellectual property rights, between SAIDCOR and the TIA and, secondly, the need to deregister SAIDCOR in terms of the Companies Act, No. 61 of 1973, as amended (the “Companies Act”).
4. Certain definitions and ambiguities require attention so as to ensure clarity, including the following:
  - a. The so-called functions of the TIA are undefined but the term is used across the Bill. The actual functions preferably need to be spelt out for purposes of clarity;
  - b. The definition of innovation is believed to relate rather to the exploitation of innovations and inventions that to innovation per se;
  - c. The terms “research” and/or “development” and the use thereof in the Bill are inconsistent with similar terms in the IPRFPFR Bill as well as with similar terms and their use in the academic/research fraternity, the accounting & auditing profession and the law of taxation;
  - d. The definition of “invention” and therefore its legal basis is inconsistent with the term as defined in the South African Patents Act, No. 57 of 1978, as amended (the “Patents Act”).

- e. In addition, both the terms innovation and invention are used either as verbs or as nouns throughout the Bill with potentially material interpretation implications; and
- f. Additional terms and concepts, such as “intellectual property”, “exploitation”, “commercialisation”, “technological”, “incubation”, “diffusion” and “publicly funded research” ought to be defined formally so as to ensure clarity of interpretation.

This submission addresses the above issues and makes recommendations in respect thereof as well as in respect of tertiary issues.

### **The Apparent Conflict of Interest vesting in the Duality of the TIA**

The apparent conflict of interest vesting in the duality of the proposed enabling-and-competing nature of the TIA is seen in the general, enabling nature of the powers, duties and functions of the TIA, such as those as set out in sections 4(1)(a)(i), (iv) & (v) and 4(1)(h) respectively, versus the specific, participating nature of the powers, duties and functions, such as those as set out respectively in sections 4(1)(a)(ii), (iii) and 4(1)(b) to 4(g) inclusively as well as sections 4(2) and 4(3).

The Bill therefore preferably has to address the potentially negative perceptions in the market place due to the involvement of the TIA when participating in enabling and/or competing activities in the execution of its object, powers, duties and functions as provided for in the Bill.

More particularly, LES SA believes that the market place might perceive the TIA as a potential competitor in the development and commercialisation of valuable intellectual property, with its own agenda and competing interests. Such perception could lead to a potential mistrust also of its potentially useful enabling endeavours and hence could have a substantial detrimental effect on the objective of the TIA.

### **The Scope of the Innovations and Inventions to be dealt with by the TIA and the related terms and definitions**

The scope of the innovations and inventions to be dealt with by the TIA appears generally to be limited to innovations and inventions of a technological nature, while the Bill provides in section 4(1)(a)(v) for the development of the national capacity and infrastructure to protect and exploit intellectual property derived from publicly financed research only.

LES SA therefore deems it necessary not only to consider the actual scope of the innovations and inventions to be dealt with by the TIA, but also to consider the Intellectual Property Rights From Publicly Funded Research Bill (the “IPRFPR Bill”) to the extent it is relevant to the present submission. In fact, LES SA submits that it is essential that both this Bill and the IPRFPR Bill be finalised with due consideration of each other, though not necessarily concurrently.

Justification for the need of such consideration is found for example in the apparent conflict in and/or overlapping of mandates between that of the so-called National Intellectual Property Management Office (“NIPMO”), as provided for in the IPRFPFR Bill, and the TIA, as provided for in terms of this Bill, particularly in terms of the protection and exploitation of intellectual property derived from publicly financed research.

In addition, although the IPRFPFR Bill explicitly provides for publicly financed research, it is clear in our opinion that the IPRFPFR Bill in fact provides for research and/or development that are financed with public funds. Clarification as to the differentiation between research and development for the purposes not only of the IPRFPFR Bill, but also this Bill, is therefore essential.

Further, the term innovation as defined in the Bill is believed to relate rather to the exploitation of innovations and inventions than to innovation per se.

At the same time, the term innovation per se is inherently not a clearly defined term, particularly when considered from an intellectual property law perspective.

Also, the terms innovation and invention are believed to be conflicting and overlapping, with invention being a legally defined term and with innovation being a more generic term.

With regard to the term invention, we wish to point out that although the Bill by reference incorporates terms such as inventions and patents in material provisions, the very definition of invention in the Bill is, by its inclusion of discoveries, in direct conflict with the definition of invention as provided for in section 2 of the Patents Act.

Based on the above, LES SA wishes to propose the use of generic terms, such as innovation, and more classical terms and definitions, such as invention typically as used in the IPRFPFR Bill, separately and apart from each other. More particularly, the use of legally defined terms such as invention and intellectual property, respectively as used in the IPRFPFR Bill, is preferred over that of more generic innovation as used in this Bill.

Obviously, it is paramount to ensure that the scope of the intellectual property to be provided for in this Bill is in accordance with the wishes of the legislature, as the incorporation of limitations such as technological, discoveries, research, etc., reduces the scope of such intellectual property accordingly. LES SA therefore wishes to propose that the intended scope of the intellectual property to be provided for in this Bill is clarified and the terminology is amended accordingly.

### **The Transition from SAIDCOR to TIA**

The transition from SAIDCOR to the TIA and the subsequent disestablishment of SAIDCOR in terms of the Bill, requires prior consideration of two aspects, namely firstly, the potential transfer of assets, including intellectual property and intellectual property rights, between SAIDCOR and the TIA and, secondly, the need to deregister SAIDCOR in terms of the Companies Act.

Due consideration of the potential transfer of intellectual property and intellectual property rights are necessarily to be preceded by proper consideration of the roles and

interests of NIMPO and the TIA, respectively as set out in the IPRFPFR Bill and this Bill, as well as that of existing publicly funded Institutions such as the CSIR, the various universities and other bodies such as the Innovation Fund.

LES SA therefore proposes that prior to disestablishment of SAIDCOR, the relevant authorities consider the apportionment and allocation of intellectual property and intellectual property rights in terms of research, development, ownership, protection and exploitation between the various institutions and bodies.

In addition, LES SA proposes that SAIDCOR, rather than merely being disestablished in terms of the Bill upon promulgation, be disestablished subsequently and after proper apportionment and the complete transfer of the above assets and winding down of the business operations and related interests.

### **Commercialisation of Innovations and Inventions**

In line with our proposal as set out herein above, LES SA herewith submits that substantial expertise is required to commercialise innovations and inventions successfully and that such expertise is not freely available in general and in South Africa in particular.

LES SA therefore wishes to express its support for the development of the national capacity and infrastructure to protect and exploit intellectual property as provided for in section 4(1)(a)(v) of the Bill.

LES SA however also wishes to caution against the apportionment, transfer and/or decentralisation of research and development activities and/or the resultant intellectual property and intellectual property right portfolios from existing Institutions in favour of newly established statutory bodies in the light of the limited technical, commercial and/or legal expertise relating to the protection and exploitation of intellectual property without due consideration.

LES SA therefore proposes that as part of the development of the national capacity and infrastructure to protect and exploit intellectual property as well as the disestablishment of the SAIDCOR, due consideration is also given firstly, to the relevant research and development activities, secondly, to the resultant intellectual property and intellectual property right portfolios and, thirdly, to the existing technical, commercial and/or legal expertise for such protection and commercialisation at the various institutions and statutory bodies.

### **Other Terminology and Tertiary issues**

The Bill, substantially as discussed in terms of the scope of innovations and inventions herein above, contains certain terms, which look problematic, if written into our law in their present form. LES SA therefore considered it beneficial to address these terms specifically and separately hereunder:

## Functions

Although the so-called functions of the TIA are referred to throughout the Bill, these functions, unlike the object and the powers and duties of the TIA, are not in our opinion adequately defined or set out in terms of the Bill.

LES SA therefore proposes that the functions of the TIA be set out explicitly in the Bill, alternatively, that the term functions be substituted with the term duties as provided for in section 4.

## Assignment

The provision of section 4(3) could be interpreted as contrary to the law for the transfer of rights in terms of the Patents Act and the benefit of this provision escapes us.

LES SA therefore wishes to propose that the removal of this provision be considered in its entirety.

## Board Members and the Chief Executive Officer

It is unclear to LES SA as to how many members, inclusive of the chairperson and the Chief Executive Officer, are to be appointed.

LES SA therefore proposes that section 5(1)(b) be amended to include reference to the chairperson and the Chief Executive Officer.

The list of knowledge and experience expected of the members could be regarded as somewhat contrived and LES SA wishes to suggest that the Bill rather makes provision that the Minister from time to time may require.

## Consecutive Terms

It is unclear to LES SA as to how many years in toto a member may hold office. More particularly, there is potential uncertainty as to whether a member can serve 8 years, 12 years or even 16 years consecutively.

LES SA therefore proposes that sections 8(1) and 8(2) be amended to clarify the matter.

## **Conclusion**

While LES SA welcomes the broad intention of the Bill, its members strongly urge the Minister of Science and Technology to consider the submissions made herein prior to moving the Bill to legislation.

If the Minister believes that a more comprehensive discussion or oral presentation on any of the concerns would be helpful, LES SA would gladly make one or more of our members available for such participation or presentation.

Dated: 11 January 2008