



# Legal briefing

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## UWA V GRAY: RIGHTS TO INVENTIONS MADE BY EMPLOYEES

In *University of Western Australia v Gray (No 20)* [2008] FCA 498 (17 April 2008) (*UWA v Gray*), the Federal Court delivered a judgment which surprised the Australian academic community and alerted Australian research institutions to the fact that they may not have a claim over inventions developed by their employees in the course of their research activities.

The lengthy judgment of French J (as French CJ then was), which was handed down on 17 April 2008, has significant implications for ownership and management of rights to inventions by employers—particularly academic and research institutions—in Australia. His Honour dismissed all claims by the University of Western Australia (UWA) and held that ‘absent express agreement to the contrary, rights in relation to inventions made by academic staff in the course of research and whether or not they are using university resources, will ordinarily belong to academic staff as the inventors under the *Patents Act 1990* (Cth)’ (*UWA v Gray* at [12]).

### Introduction

*UWA v Gray* concerned claims made by UWA against Dr Bruce Gray, who was employed by UWA as a Professor of Surgery between 1985 and 1997.

UWA’s key claims can be summarised as follows:

1. There existed an implied term of Dr Gray’s contract to the effect that rights to any inventions developed in the course of his employment belonged to UWA.
2. Dr Gray breached his employment contract by failing to comply with UWA’s *Patents Regulations* and *Intellectual Property Regulations*, which were incorporated by reference into his terms and conditions of employment.
3. Dr Gray had breached his fiduciary duties to UWA as his employer—in particular, his duty to deal with the property rights and interests of UWA so as to protect and preserve that property and those rights and interests for UWA—by applying for the patents in his own name and in the name of Sirtex Medical Limited (Sirtex) (a research and development public company, of which Dr Gray is a director) (at [323], [1333]).
4. The UWA claimed against Sirtex regarding its alleged knowledge of Dr Gray’s breach of his fiduciary duties.



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There were also some cross-claims, most notably a claim by Sirtex against Dr Gray for alleged breach of his director's duties for non-disclosure of UWA's claim of ownership in the technologies.

In his judgment, French J:

- (i) rejected the claim that there was an implied term in Dr Gray's contract assigning rights in relation to inventions to UWA (at [1363])
- (ii) rejected the claim that Dr Gray was in breach of his employment contract by failing to comply with UWA's *Patents Regulations* and *Intellectual Property Regulations* because those regulations were invalid as being beyond the power of their enabling legislation, the *University of Western Australia Act 1911* (WA) (the UWA Act) (at [13])
- (iii) rejected the claim that Dr Gray breached his fiduciary duties on the basis that Dr Gray was not dealing for his own benefit with rights in relation to various inventions which UWA owned or in which UWA had an interest (at [1567])
- (iv) rejected the claim against Sirtex because there was no breach of fiduciary duties by Dr Gray (at [1567]).

His Honour also found for Sirtex in its claim that Dr Gray had breached his director's duties and engaged in misleading or deceptive conduct in contravention of the *Fair Trading Act 1987* (WA) because he failed to disclose correspondence between himself and the Vice-Chancellor of UWA in 1999 to Sirtex (at [1612]). French J held that this correspondence would have alerted Sirtex to the risk of a claim against its intellectual property (IP) rights by UWA (at [16]).

Whilst the outcome was at least in part dependent upon the unique circumstances of the case, French J's judgment has substantial implications for ownership and management of rights to inventions by employers in Australia, particularly academic institutions and agencies involved in research activities.

The first two findings above are considered in more detail in the discussion below.

## Factual background

Dr Gray is a successful academic in the field of the treatment of liver cancer with the assistance of microspheres, which are spherical particles composed of various natural and synthetic materials. He conducted research in this area at various hospitals and research institutions in Victoria before being appointed as a Professor of Surgery at UWA in 1985.

Dr Gray pursued this line of research at UWA, along with other researchers, focusing on three main microsphere technologies: 'SIR-Spheres', 'DOX-Spheres' and 'Thermo-Spheres'. Over the years, a number of patent applications were made in relation to these technologies but none in the name of UWA. Dr Gray ceased full-time employment with UWA in March 1997 and converted to a fractional appointment of 30%. He resigned from UWA in November 1997.

From the mid-1980s, Dr Gray had also been involved in a company called Paragon Medical Ltd, which became Sirtex. In 1997, Sirtex acquired IP rights arising out of the inventions said to be associated with the technologies

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and extensively developed and commercialised these. Sirtex was floated as a public company in 2000.

In 2004, UWA's solicitors issued a letter of demand to Sirtex, alleging, among other things, that 'all of the property in the technologies belonged to UWA'. UWA also demanded that Sirtex amend its share register to record UWA's beneficial entitlement. In December 2004, UWA commenced proceedings against Dr Gray.

### **First finding: no implied term**

The first finding relevant to the ownership and management of rights to inventions was French J's rejection of UWA's claim that there was an implied term in Dr Gray's contract assigning to UWA rights in relation to inventions developed in the course of his employment (at [1363]).

### ***Implied term of employment contract***

French J remarked that UWA's case was 'critically dependent upon the proposition that it was an implied term of Dr Gray's contract of employment that IP developed in the course of his employment belonged to it' (at [12]).

Prior to *UWA v Gray*, there appeared to have been a general assumption that a university owned the rights to IP developed by its academic staff. French J dismissed this assumption and stated that the only 'secure way for UWA to acquire property rights from its academic staff in respect of IP developed by them in the course of research at UWA is by express provision in their contracts of employment' (at [14]). However, French J noted that, according to British common law authorities, an express term conferring an employee inventor's rights on an employer may be unenforceable as an 'unreasonable restraint of trade' if it is too broadly expressed (at [130]).

The circumstances of this case are unusual in that no express terms as to IP were included in the employment contract. French J did not rule out the possibility that there could be an implied term of an employment contract as asserted by UWA. However, his Honour specifically noted that whether this is the case in a contract between a university and its staff must be 'assessed by reference to its particular circumstances and the terms and conditions of employment of its staff' (at [164]).

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### ***'Hired to invent' v 'hired to research'***

French J noted that such a term may be implied where an employee is under a contractual duty to produce inventions and not just to research. To explain this distinction, French J undertook a detailed analysis of the common law regarding inventions in the course of employment in Australia, with comparisons drawn to the British, United States, Canadian and New Zealand positions on this issue (at [131]–[143]).

International cases referred to by his Honour show that the terms sought to be implied by UWA into Dr Gray's contract have been applied in practice in some cases. However, courts will imply such terms only under certain circumstances. For example, if a person is employed specifically for the purpose of solving a technical problem or improving the employer's technology or to make inventions—in other words, where it can be shown that they were hired to invent, not simply to research—there will be an implied term (at [130]).

Furthermore, a position of seniority that carries with it an associated duty to advance the interests of the employer may generally also give rise to an implied term that an invention made by the employee relevant to the employer's business will belong to the employer, even if made outside working hours (at [120]).

In the present case, French J found that Dr Gray's responsibilities according to his employment contract were:

- (i) to teach, conduct examinations and to direct and supervise the work in his field in accordance with the statutes and regulations of UWA and the directions of the UWA Senate
- (ii) to undertake research and to organise and generally stimulate research among the staff and students
- (iii) to perform such other appropriate work as the UWA Senate from time to time determines (at [1359]).

Dr Gray contended, and his Honour accepted, that he was not under a duty to invent. Furthermore, his Honour identified a 'striking feature of this case' as being the 'significant amount of time and effort devoted by Dr Gray and those researching with him in applying for research grants to a myriad of funding and grant bodies and agencies' (at [161]). This fact made it even less likely that there was an implied term that all rights to inventions developed by Dr Gray would vest in UWA.

*Dr Gray contended, and his Honour accepted, that he was not under a duty to invent.*

French J suggested that, to avoid the difficulties associated with similar claims in the future, universities should consider offering their academic staff commercialisation services in exchange for an interest in the IP. This, he said, would offer 'benefits in terms of incentives, harmony and certainty that are not available through the enforcement of legal rights unlikely to be capable of precise definition' (at [14]).

### *Universities v the private sector*

French J noted that the international cases did not deal with the field of academia and should be approached with caution. Throughout his judgment, his Honour made distinctions between universities and the private sector. His Honour showed strong support (at 158) for the view of Ann Monotti and Sam Ricketson, who observed that:

... in the absence of an express or implied duty to invent and to hold any information secret, the principles that operate in industrial settings seem to have no application to the creation of inventions in the performance of normal academic duties of teaching, research and administration.'

French J noted that Dr Gray was not only an employee of UWA but also a 'member of it and linked historically by that definition to the idea of UWA as a community of teachers and scholars' (at [1361]).

His Honour expressly referred to the 'public purpose' of universities and underlined that there is no basis for implying into the contracts a duty not to disclose the results of research. This is so, 'even if such disclosure could destroy the patentability of an invention' (at [160]).

It follows that the implications of this judgment for the private sector may be limited and another court may well be more likely to find an implied term in the contract if these kinds of events occurred within the private sector rather than within the scope of a university's research functions.

The position in relation to other public sector bodies such as Commonwealth agencies is less clear. For example, it is unclear as to whether:

- a technical IT specialist hired to undertake complex design or development has been hired to invent
- a performance manager hired to undertake management, liaison and technical work has been hired simply to analyse data and accordingly whether any resulting data analysis device is produced in the course of his or her duties
- an agency which advertises a ‘research position’ for a scientist to conduct regional scale studies is advertising a position requiring the scientist to invent.

To avoid any doubt about whether or not public sector agencies fall within French J’s ‘public purpose’ test, it will be essential that agencies ensure that they have adequate measures in place to protect IP (and rights to inventions) over which they wish to claim ownership—including by use of express terms in their employment contracts.

#### *Date of invention outside scope of employment*

Despite finding to the contrary, French J went on to consider what the case would have been if there were an implied term in Dr Gray’s contract that UWA owned IP in any invention developed by Dr Gray during his time at the university (at [1419] onward). If there was such an implied term, it would only apply to the extent that an invention was made during the relevant period.

In this context, his Honour differentiated the ‘invention’ from the ‘idea’ and ‘discovery’ on which it is based and from the reduction of the idea into practice (at [1410]–[1427]). The distinction between a discovery and invention finds its basis in the idea that an invention arises only when a discovery is applied to a useful end.<sup>2</sup> The distinction cannot be precise, as the High Court noted in *National Research Development Corp v Commissioner of Patents* (1959) 102 CLR 252 at 265, nor is the definition of ‘invention’ itself certain.<sup>3</sup>

His Honour concluded that the time at which the invention was developed must be determined by reference to the inventive concept as a ‘boundary between invention and verification’.<sup>4</sup> The notion of ‘inventive concept’ will not be affected by the subsequent process of reduction to practice (at [1443]). In adopting this approach, his Honour recognised that there may be more than one contributor to an inventive concept and more than one inventive concept involved in the invention (at [1442]).

His Honour referred to Australian, Canadian and United States jurisprudence to support the following approach advocated by Sirtex as the correct approach to identify the relevant invention in each case (at [1418], [1442]–[1443]):

1. Identify the ‘inventive concept’ of each relevant invention as defined by the claims in the relevant patent applications.<sup>5</sup>
2. Determine inventorship including the person responsible for the inventive concept and the time of conception as distinct from its verification and reduction into practice.

*To avoid any doubt about whether or not public sector agencies fall within French J’s ‘public purpose’ test, it will be essential that agencies ensure that they have adequate measures in place to protect their IP ...*

3. Determine how many contractual or fiduciary relationships between UWA and the inventors at the time of the inventorship gave rise to the proprietary rights claimed by UWA.

In applying this approach, his Honour had to examine each microsphere technology to identify the relevant inventive concept and at what point it was made.

Critically, his Honour concluded that all but one of the relevant inventions were made at times that were outside the dates of Dr Gray's employment with UWA.<sup>6</sup> As such, even if there had been an implied term in Dr Gray's contract assigning proprietary rights to UWA, it would have operated in relation to only one of the microsphere inventions (at [1562]).

*Critically, his Honour concluded that all but one of the relevant inventions were made at times that were outside the dates of Dr Gray's employment with UWA.*

### **Second finding: no breach of contract because regulations invalid**

The second finding relevant to the ownership and management of IP rights was French J's rejection of UWA's claim that Dr Gray breached his employment contract by failing to comply with UWA's *Patents Regulations* and *Intellectual Property Regulations*. French J held that the incorporation of the regulations into Dr Gray's employment contract depended on their validity; therefore, there could be no breach of contract where, in this case, the regulations were invalid as beyond the power of their enabling legislation, the UWA Act (at [13], [90]).

#### ***UWA Act and regulations***

The history of UWA's IP policy as reflected in its regulations is convoluted (at [165]–[238]). There was much debate about the delegated legislative powers under which UWA made the regulations and which regulations were in force at which time. There were two sets of regulations in issue—the earlier *Patents Regulations* and the later *Intellectual Property Regulations*.

The *Patents Regulations* came into effect around 1975 without any accompanying formal policy document. The regulations established a Patents Committee and provided for the notification of inventions to the Vice-Chancellor. The regulations also mandated assignment of rights in relation to inventions to UWA.

The *Intellectual Property Regulations* came into effect in late 1997<sup>7</sup> accompanied by a formal IP policy document entitled *A Guide to the Intellectual Property Policy*. The policy document essentially set out the aims of and rights and obligations under the *Intellectual Property Regulations* (at [221]–[227]). The *Intellectual Property Regulations* established an Intellectual Property Committee with the power to create guidelines for reporting the creation of patentable inventions to the Vice-Chancellor. The *Intellectual Property Regulations* also asserted ownership of IP created by employees.

The terms of the UWA Act and regulations were incorporated by reference into Dr Gray's contract of employment (at [1331]). The particular regulations the subject of UWA's claim against Dr Gray for breach of contract are set out below.

#### ***Ownership and assignment***

Regulation 4(4) of the *Intellectual Property Regulations* asserted ownership over all IP (other than copyright) generated by an 'originator' in the course

of the originator's employment with UWA. Prior to the enactment of the *Intellectual Property Regulations*, UWA, by regulation 6(3) of its *Patents Regulations*, had mandated assignment of rights to UWA in any invention made or developed wholly or in part during the course of a person's duties or while using UWA's research facilities. UWA did not rely on the *Patents Regulations* as a source of its property rights (at [93]).

The reason UWA was unsuccessful in relying on the regulations was that French J found that regulations purporting to acquire property from others or interfere with their rights were outside the regulation-making power of UWA (at [13], [84]–[94]). The UWA Act gave the Senate of the UWA power, including under s 16E, to make regulations relating to the 'control and management of its property'.

French J held that the regulations did not authorise UWA to acquire that which it did not own. Authority to make regulations about the control and management of property did not extend to an authority to make regulations acquiring property from others or interfering with their rights. To the extent that the regulations purported to alienate or otherwise interfere with IP rights of its academic staff, they were invalid.

French J found that the invalid regulations could not be validated by incorporation into individual employment contracts. His Honour said that the incorporation of the regulations of the university into staff contracts was based on their assumed validity. If the regulations were invalid (as his Honour concluded they were) then neither party could have intended that compliance with them could be a binding contractual obligation (at [90]).

#### *Prompt notification*

Regulation 6(1) of the *Patents Regulations* required an employee to immediately inform the Vice-Chancellor of any patentable invention made or developed wholly or in part during the course of their duties or whilst using UWA's research facilities. French J held that the regulation was based on the premise that UWA would have property rights in connection with such an invention. Because that assumption was incorrect, the notification condition could have no application to an invention in which UWA had no rights (at [1552]–[1556]).

Even if the regulations had been valid so as to give UWA rights in the inventions, his Honour found that, because UWA had abandoned the system of notification for which the *Patents Regulations* provided, that system was not binding (at [11], [167], [247]–[257]). His Honour found that UWA decided after 1988 not to appoint a Patents Committee at all or to establish administrative processes for notification of inventions to the Vice-Chancellor as provided for in the *Patents Regulations*. Instead, UWA established alternative mechanisms for assessing inventions for commercial development. Academic staff were therefore unable to comply with the obligations set out in the *Patents Regulations* in relation to any invention conceived during the time the *Patents Regulations* were in force (at [248]–[257]). His Honour held that the obligation imposed by regulation 6(1) was dependent upon the existence of the Patents Committee; absent the Patents Committee, the obligation ceased to be binding (at [257]).

#### *Prompt reporting*

Regulation 6(1) of the *Intellectual Property Regulations* required prompt reporting of the creation of patentable inventions or any other IP rights which might be commercially significant. His Honour held that this regulation had no application because UWA had no relevant IP interest.

*If the [UWA's Intellectual Property Regulations] were invalid (as his Honour concluded they were) then neither party could have intended that compliance with them could be a binding contractual obligation.*

French J found that, under the *Intellectual Property Regulations*, UWA did not put in place any procedures for the enforcement of this notification obligation (at [1560]).

#### **Restraint**

Regulation 4(11) of the *Intellectual Property Regulations* prohibited ‘an originator’ from applying for any form of protection for, or commercially exploit or otherwise deal with, any IP or do any act or thing in a manner inconsistent with UWA’s rights under the *Intellectual Property Regulations* or otherwise. His Honour held that this regulation was ineffective because UWA could not validly acquire, by regulation, rights in relation to inventions (at [1557]–[1558]).

#### **Naming**

Regulation 4(13) of the *Intellectual Property Regulations* prohibited any application (whether in Australia or overseas) for the registration of IP otherwise than in the name of UWA, unless otherwise determined by UWA. French J held that the regulation had no valid foundation because it depended on UWA’s assertion of ownership—and UWA could not by regulation acquire that which it did not own (at [1559]).

#### **Cooperation**

Regulation 4(8) of the *Intellectual Property Regulations* imposed a duty to execute any document or do anything reasonably required by UWA in relation to any IP created by such person to demonstrate or prove UWA’s ownership to third parties or to assist UWA to commercialise the IP. His Honour held that the regulation was ineffective, as UWA had no property interest in the inventions (at [1561]).

#### **Invalidity and incorporation**

French J’s finding that there was no breach of contract depended on the finding that the regulations were invalid. His Honour held that invalid regulations could not be validated by incorporation into individual employment contracts (at [90]).

His Honour noted that there was nothing to prevent UWA, or any other body corporate, from engaging an employee subject to an express term in their contract to assign to UWA any IP rights arising out of the person’s employment.

On this basis, an express provision in Dr Gray’s contract that UWA would acquire IP in relation to inventions developed during the course of his employment should have been effective. Also, if the content of the relevant regulations had been reflected as express terms in the contract, that may also have been sufficient for UWA to acquire the IP.

French J concluded that, in this case, only express provision in staff employment contracts would be sufficient for UWA to acquire, or interfere with, property rights of its academic staff (at [14], [89]–[91]).

The situation may have been different if the regulations relating to the acquisition of property (including IP rights) had been within the power of the UWA Act. In that case, the regulations as incorporated by reference into Dr Gray’s employment contract should have been binding—subject to other vitiating factors. However, in the case of the *Patents Regulations*, French J noted that, even if the regulations relating to the notification obligations had been validly made under the UWA Act, they would still not

*His Honour held that invalid regulations could not be validated by incorporation into individual employment contracts.*

have been binding because UWA had itself abandoned the mechanisms provided for in the regulations (see discussion under 'Prompt notification' above). French J also referred to the presumption against construing legislation as interfering with vested proprietary interests<sup>8</sup> and concluded that rights deriving from the *Patents Act 1990* (Cth) attracted that presumption.

### What does this mean for employers?

1. If a person is not employed to invent, it is unlikely that a court will find an implied term in their employment contract vesting rights to inventions in their employer.
2. Where appropriate, employers should ensure that they include express terms in their employment contracts dealing with ownership of rights to inventions (or other forms of IP) or obtain separate assignments of IP rights. Where employees are engaged without a written contract (as is often the case with ongoing Australian Public Service employees), then prospective employees should be notified that it is a condition of their engagement that they agree to their IP rights being vested in the employer, and the employee should sign a document that does vest those rights. This 'safety net' (at [14]) is particularly relevant if employers are concerned about ownership of IP which arises incidentally as a result of their employees' activities.
3. The terms surrounding the vesting of an employee's IP rights in an employer should not be so broad that they constitute an unreasonable restraint of trade in all of the relevant circumstances.
4. Where employers incorporate into their employment contracts, or impose upon appointment, obligations to comply with their IP policies, it is essential that such policies are clear, up to date and enforceable. In such circumstances, defunct policies or processes that are no longer followed (or no longer able to be followed), or invalid IP policies that go beyond the scope of an employer's legislative and policy framework, pose a risk to employers when managing their IP because the corresponding terms may not be upheld by a court.
5. Employers should be circumspect about incorporating documents by reference in their employment contracts or in their engagement processes. Express provisions or statements of IP rights in employment contracts or engagement papers are preferred in order to decrease the chances of a contractual or engagement provision being read down by the courts where there is some doubt about the validity of the referenced document.
6. Employers considering unilaterally imposing a new term relating to vesting of IP into an existing contract or employment arrangement should take legal advice before they do so.

## Appeal

On 8 May 2008, UWA appealed the decision of French J to the Full Federal Court. The appeal is listed for hearing in November before Lindgren, Finn and Bennett JJ and it appears that UWA will have a substantial hurdle to overcome. French J came to the conclusion that only one of the patentable 'inventions' was made within the course of Dr Gray's employment with UWA (at [1550]). Even if the Full Federal Court found that French J erred in his findings regarding the implied term of the contract and/or the *Intellectual Property Regulations* and *Patents Regulations*, UWA will have to show that the inventions were indeed created during the period of Dr Gray's employment.

A full text of the judgment is available at [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2008/498.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/498.html)

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## Notes

- 1 A Monotti and S Ricketson, *Universities and Intellectual Property: Ownership and Exploitation* (Oxford University Press, 2003) at 6.59; *UWA v Gray* at [159].
- 2 *Lane Fox v Kensington & Knightsbridge Electric Lighting Co* [1892] 9 RPC 413 at 416 (Lindley LJ); *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (1998) 194 CLR 171.
- 3 *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1.
- 4 At [1426], citing as an example *Burroughs Wellcome Co v Barr Laboratories Inc* (1994) 40 F 3d 1223.
- 5 Provisional applications for various patents and international applications under the *Patent Cooperation Treaty* were made in respect of inventions over a period of years (at [4]).
- 6 At [1468]–[1470], [1486], [1499]–[1507], [1515]–[1537] and [1546]–[1550].
- 7 UWA adopted the regulations in 1996 but there was some debate about when they came into effect. In the upshot, his Honour held they did not come into effect until they were promulgated on 30 November 1997 (at [64]–[83]).
- 8 *Newcastle Breweries Ltd v R* [1920] 1 KB 854; *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 per Kitto J at 460.

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