STRUCTURING A CRC

OPTIONS FOR CORPORATE STRUCTURE, INTELLECTUAL PROPERTY, TAX AND WINDING UP

HWL Ebsworth Lawyers and Consulting & Implementation Services
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OPTIONS FOR COOPERATIVE RESEARCH CENTRE STRUCTURES

Current rules require each CRC to be run by a company limited by guarantee.

This means that the CRC company must be incorporated with the Australian Securities and Investments Commission and have members (not shareholders- there are no 'shares' in a company limited by guarantee), each of which have a capped liability of $10. Companies limited by guarantee cannot pay dividends.

Grant funding is generally treated as 'assessable income' meaning that income tax is payable by a CRC company on funding received from the Commonwealth of Australia, unless an exemption is available.

Despite this limitation, there are still different ways of approaching intellectual property and tax arrangements- and those approaches will in turn have implications for the winding up of the CRC at the end of its funding term, as is generally expected.

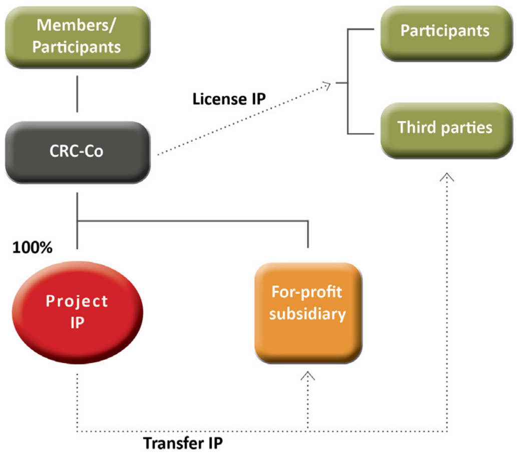
It is important to consider these approaches carefully at the outset of establishing a CRC company. A failure to do so may result in restrictions on IP access by partners- or an unexpected, and potentially significant, tax bill.

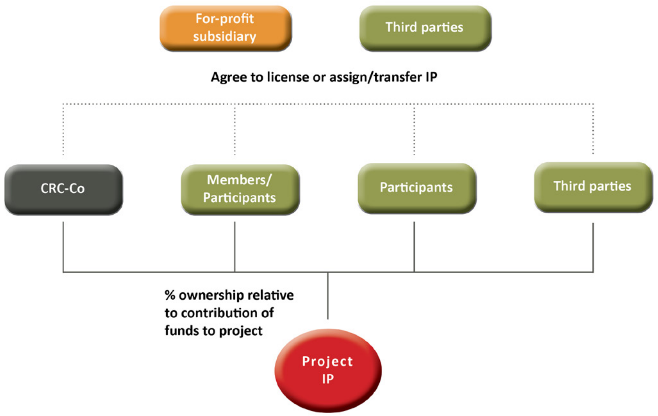
The table below sets out the main options for structuring a CRC and the key implications of each option on operations and winding up. As each CRC company's particular circumstances need to be considered, tailored legal and financial advice should be sought before making a final structuring decision.

OPTIONS

(A) INCOME TAX EXEMPTION

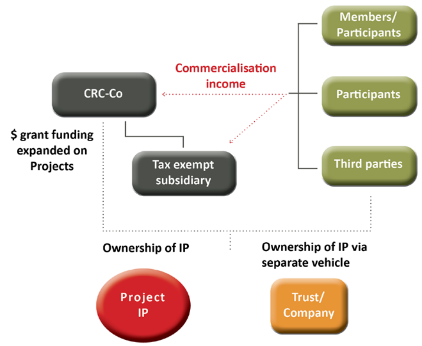
Taxation structure	Intellectual property approach	Implications for winding up
A CRC company may obtain exemption from income tax either via Division 50 of the Income T*ax Assessment Act 1997* (Cth) (**ITAA**) or by registration as a charity.	A CRC company relying on an income tax exemption must apply its income and assets solely for the purposes for which the company is established. This means the CRC company may not assign IP to partners for less than market value. There are two main IP approaches to address this issue and maintain income tax exemption: 1. CRC company owns 100% of IP; or 2. CRC company and partners share IP ownership proportionately to their respective contributions to the IP. The second approach is higher risk, in that the Australian Taxation Office may determine that the CRC company is providing material benefits to its members and as such does not satisfy the requirements for income tax exemption. In either case, IP can be commercialised by way of licence to partners or assignment to a for-profit subsidiary or third party.	IP may not be assigned by the CRC company, including to members of or partners in the CRC, except for consideration at market value. 'Market value' is a context-specific and uncertain concept. In order to effectively move IP out of the CRC company (as opposed to another NFP entity), IP may be assigned to a partner or third party at market value. Alternatively, IP could be assigned to a for-profit subsidiary of the CRC company (not necessarily at market value, depending on the structure of the subsidiary and transaction), and subsequently that IP can be acquired at market value from the subsidiary by a partner or third party. Further, where the CRC company receives consideration for that assignment, those proceeds must only be used for the advancement of the company's objects. If upon receiving that consideration the company proceeds to wind up those proceeds can only be distributed to a similar entity (eg scientific institution).

Taxation structure	Intellectual property approach	Implications for winding up
Income tax exempt entity The CRC company may seek to rely on an income tax exemption under Division 50 of the ITAA. The income of the CRC company will be income tax exempt provided the relevant requirements are satisfied, in particular: • It fits into one of the relevant categories, most relevantly that the CRC company is a ‘scientific institution’ (ie, its sole or dominant purpose is the enlargement of scientific knowledge); • It is a not-for-profit (**NFP**); and • It applies its income and assets solely for the purposes for which the CRC company is established. While the CRC company may self-assess its eligibility for exemption, it is advisable for the CRC company to apply for an ATO private ruling to conclude and confirm the ownership of IP and its qualification as a tax exempt entity.	**CRC company owns 100% of IP**  Advantages include: • Low risk of ATO determining income tax is assessable; • Simplified dealings with IP (ie only one owner); and • Commercialisation profits can be applied to further CRC-Co’s objects and purposes. Disadvantages include: • In some CRCs, partners may expect to have a share of ownership of IP from the outset.	As above.

Taxation structure	Intellectual property approach	Implications for winding up
Registration as a charity with the ACNC Charities registered with the ACNC are also eligible for income tax exemption. To successfully register with the ACNC as a charity, amongst other things, the CRC company must establish that. A CRC company may register as a charity provided the relevant requirements are satisfied, in particular: • It only has charitable purposes that are for the public benefit; • It is a NFP; and • It applies its income and assets solely for the purposes for which the CRC company is established.	**CRC company and partners share IP ownership**  Advantages include: • IP can still be commercialised albeit with the agreement of all owners; • Partners can have an ownership interest in the IP; and • CRC company continues to receive proceeds from the commercialisation of its portion of the IP. Disadvantages include: • Many owners mean that negotiations to deal with the management and/or commercialisation of the IP may be complicated; and • This approach has the potential to jeopardise income-tax exempt status, particularly where partners are also CRC company members and/or ownership is shared otherwise than proportionately to contribution to development of the IP.	As above.

OPTIONS

(B) TAXABLE STRUCTURE

Taxation structure	Intellectual property approach	Implications for winding up
If the CRC company is not tax exempt, it will be taxed as a company at the applicable rate. The taxable income of the CRC company is determined as assessable income less allowable deductions. Once the CRC company is established, it will be regarded as carrying on a business for tax purposes. Therefore, the business will involve the receipt and expenditure of the grant funds, the management of research projects, the receipt and use or expenditure of contributions from project participants and the commercialisation or oversight of the commercialisation of the results. Exposure to tax liabilities may be mitigated through management of cash flow, by ensuring that expenditure gives rise to income tax deductions which effectively offset any assessable income in each tax year. However, CRCs should be mindful of the challenge of closely aligning research spend against partner contributions.	Either of the IP options for exempt structures can be used under a taxable structure, however this structure also opens up the option to allow partners to own 100% of IP from the outset, or for the CRC company to own IP on trust for partners and/or via a subsidiary.  Advantages include: • It accommodates partners who wish to own the IP; and • The CRC company's IP-related risk exposure is reduced. Disadvantages include: • The CRC company will be subject to additional taxation administrative and compliance obligations; • Given the purpose of a CRC is to maximise the scope of the R&D conducted, taxing Commonwealth and partner contributions is likely to be considered counterintuitive; and • Any commercialisation income paid to CRC-Co will be subject to tax at the relevant company tax rate.	A CRC company is unrestricted in how it handles IP on winding up.

HOW CAN I FIND OUT MORE?

HWL Ebsworth Lawyers

HWL Ebsworth is a large national law firm providing expertise across all practice areas. We have leading experts in corporate law, intellectual property, technology R&D and commercialisation, privacy and data protection, not-for-profits, employment and taxation, along with recent experience in CRC establishment.

We apply a tailored approach to CRC establishment, and partner with each bid team to prepare documentation that fits the specific needs of their partners. We also have the expertise to support protection and maintenance of formal IP protection going forward.

For a discussion or quote, please reach out to one of the authors.

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Consulting & Implementation Services

CIS is the dominant provider of CRC bid coordination services in the country having supported bids that have secured around $1.7 billion in cash from the industry partners and the Commonwealth and almost $4 billion when in-kind contributions are considered.

CIS has deep experience in assisting research organisations and industry leaders move through the phases of developing a CRC concept, coordinating the contributions of potential participants to produce high quality stage 1 and stage 2 applications and to prepare for the Commonwealth interview.

Contact us for a discussion or a quote.

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