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## PRACTICE NOTE 2 OF 2017

### DISPUTE RESOLUTION PROCEDURES

#### OVERVIEW

The Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008) (IPR Act) came into effect on 2 August 2010. The object of the IPR Act is to make provision that intellectual property (IP) emanating from publicly financed research and development (R&D) is identified, protected, utilised and commercialised for the benefit of the people of the Republic, whether it be for a social, economic, military or any other benefit.

In line with the requirements of the Promotion of Administrative Justice Act 2000 (Act No. 3 of 2000), (PAJA) the IPR Act provides for a recipient<sup>1</sup>, **whose rights have been adversely affected by an administrative decision made by NIPMO**, to request a review or appeal of such decision.

#### OBJECTIVE

The purpose of this Practice Note is to **set out** the rules and procedures applicable in the management of disputes that may arise following an administrative decision by NIPMO, which may have adversely affected the rights of one or more recipient(s). In particular, this Practice Note sets out the procedure to be followed prior to lodging a dispute with the Dispute Panel, functions to assist in interpretation of the Dispute Panel Rules of Procedure (Annexure A; Government Gazette 40496), and further sets out the process following deliberation and delivery of the Dispute Panels decision, which decision is binding but maybe brought before a competent court.

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<sup>1</sup> Section 1 of the IPR Act: "**recipient**" means any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes an institution

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## 1. GLOSSARY OF TERMS

<b>Administrative decision of NIPMO'</b>	means any decision taken by NIPMO in the exercise of any of its powers or performance of its duties in terms of the IPR Act or IPR Regulations. Note that when considering what constitutes an administrative decision of NIPMO, regard must always be had to the definition of " <i>administrative action</i> " and " <i>decision</i> " in section 1 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), (PAJA) and any subsequent amendments thereto.
<b>Affected Recipient(s)</b>	means a recipient(s) as defined in section 1 of the IPR Act who feels aggrieved by an administrative decision taken by NIPMO
<b>Dispute Panel</b>	means the panel established by the Minister in terms of regulation 7(1) of the IPR Regulations to hear and determine Disputes relating to administrative decisions of NIPMO
<b>IP2 Form or Form IP2</b>	means the form relating to the Notice of Intention to be Heard by NIPMO
<b>IP3 Form or Form IP3</b>	means the form relating to the Dispute Panel Notice of Appeal/Review of NIPMO Decision ("Notice")

## LIST OF ACRONYMS USED

DP	Dispute Panel
DST	Department of Science and Technology
IP	Intellectual Property (see IPR Act and Guideline 1)
IPR	Intellectual Property Rights (see Guideline 1)
IPR Act	Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008)
PAJA	Promotion of Administrative Justice Act (Act No. 3 of 2000)
NIPMO	National Intellectual Property Management Office

## 2. MANDATE: DISPUTE PANEL VS ADVISORY BOARD

The IPR Act provides for the establishment, by the Minister of the Department of Science and Technology (DST), of a Dispute Panel (DP) whose function is “*to hear and determine disputes relating to administrative decisions of NIPMO*”<sup>2</sup>. The DP is accountable to the Minister for its actions and must on an annual basis provide the Minister with a report detailing a summary of its activities and decisions<sup>3</sup>.

The role of the NIPMO DP is separate and distinct from that of the NIPMO Advisory Board (AB). The AB is an independent body also appointed by the Minister to **advise** NIPMO on the “*performance of its functions, the exercise of its powers and the execution of its duties, including providing guidance and assistance to NIPMO in the implementation of the Act and these regulations*”<sup>4</sup>.

The distinction between these two bodies may best be illustrated as follows:

	DISPUTE PANEL	ADVISORY BOARD
<b>MANDATE</b>	<b>To hear and determine disputes</b> relating to administrative decisions of NIPMO.	<b>To advise NIPMO</b> on the performance of its functions, the exercise of its powers and the execution of its duties, including providing guidance and assistance to NIPMO in the implementation of the IPR Act and its regulations.
<b>SKILLS REQUIRED OF MEMBERS</b>	Experience and expertise in areas relating to, at least, IP protection and management, commercialisation, dispute resolution and business.	Expertise in research, research management, higher education environment, IP protection and management, technology licensing and commercialisation, technology transfer and business.

<sup>2</sup>Regulation 7(1) of the IPR Act: The Minister must establish a Dispute Panel to hear and determine disputes relating to administrative decisions of NIPMO.

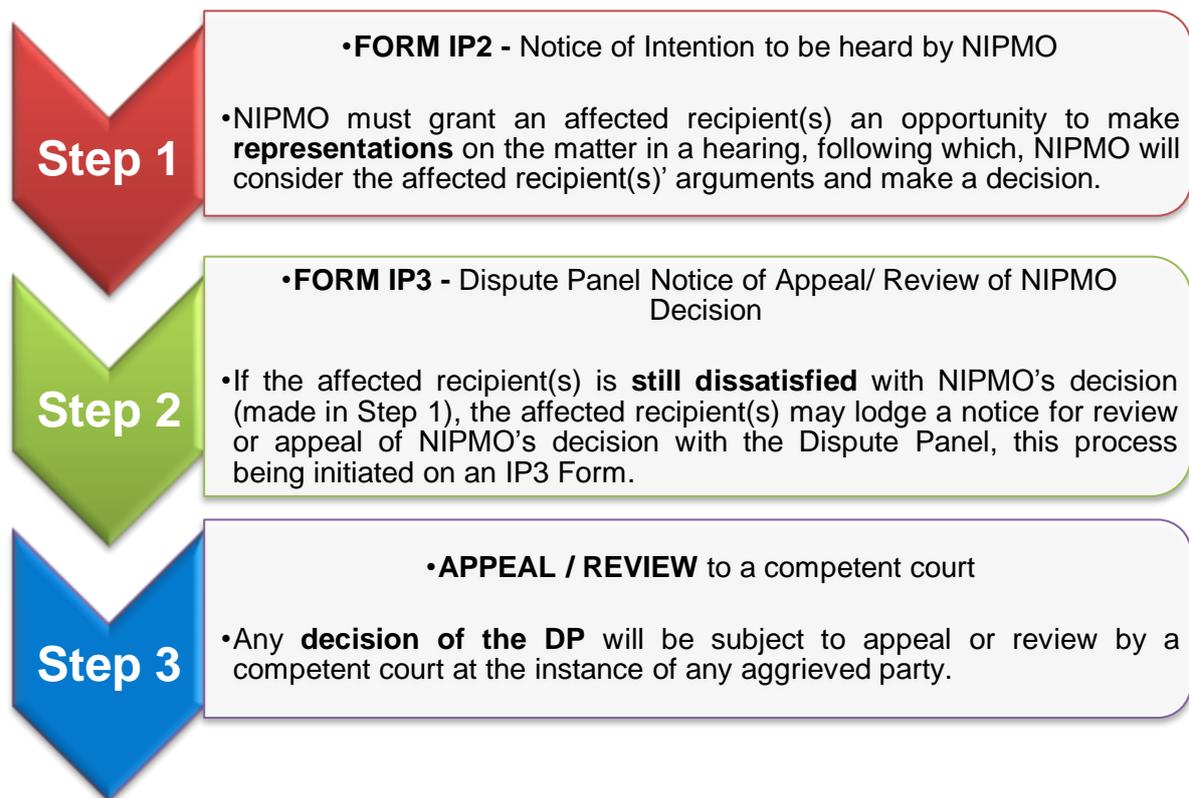
<sup>3</sup>Regulation 7(2)

<sup>4</sup>Regulation 6(1)

### 3. OVERVIEW OF DISPUTE RESOLUTION PROCESS

Regulations 5(5) to 5(8)<sup>5</sup> and 7(9)<sup>6</sup> of the IPR Act provides for a **three-step dispute resolution process** for any recipient(s) adversely affected by an administrative decision of the NIPMO.

The three-step dispute resolution process is illustrated in the flow diagram below:



<sup>5</sup>Regulation 5(5) to 5(8) of the IPR Act: Following an exercise by NIPMO of any discretionary power vested in NIPMO in terms of the Act or these regulations, the outcomes of which adversely affect the rights of a recipient, a recipient must, if the recipient intends to make representations on the matter, within 14 days of notification of a decision by NIPMO, lodge with NIPMO a notice of intention to be heard in Form IP2.

(6) Upon receipt from a recipient of the notice of intention to be heard, NIPMO must furnish the recipient with dates, times and place where such hearing could take place and the recipient must, within 7 days respond to NIPMO with a suitable date and time from the options provided by NIPMO.

(7) Any hearing in terms of this regulation must take place within 30 days of receipt by NIPMO of the notice of intention to be heard.

(8) After such hearing, should NIPMO not reverse its decision, the affected recipient may within 14 days of NIPMO's decision, lodge a notice in Form IP3 with the Dispute Panel for review or appeal of NIPMO's decision.

<sup>6</sup>Regulation 7(9) of the IPR Act: Any decision of the Dispute Panel will be subject to appeal or review by a competent court at the instance of any aggrieved party.

#### 4. STEP ONE: PROCEDURE FOR LODGING A NOTICE OF INTENTION TO BE HEARD (IP2 FORM)

In terms of the Regulations to the IPR Act, an affected recipient(s) must lodge an **IP2 Form with NIPMO within 14 days** of notification of NIPMO's decision, indicating its intention to be heard<sup>7</sup>.

The below tables set out the timelines and procedure to follow regarding Step 1 of the dispute resolution process:

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#### NIPMO DECISION

<b>Day 1</b>	NIPMO makes an administrative decision which adversely affects the rights of a recipient/recipients and notifies the recipient(s) of such decision in writing.
<b>Day 1 to 14</b>	<p>Within <b>14 days</b> of a written notification of a decision by NIPMO, the affected recipient(s) must submit an IP2 Form (Notice of intention to be heard by NIPMO), indicating the NIPMO decision being appealed/reviewed, the basis of the appeal/review and any supporting documentation.</p> <p>Documents may only be filed with NIPMO at the address listed in Annexure B within the prescribed time period. The recipient is requested to submit the IP2 Form and supporting documentation to NIPMO by hand <b>or</b> registered post <b>AND</b> by email, on or before the date of the proceedings.</p>

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#### PROCESS FOLLOWING LODGING OF IP2 FORM

<b>Day 1 to 7</b>	<p>Once an IP2 Form is lodged with NIPMO by an affected recipient, NIPMO must within <b>7 days</b> of receipt, acknowledge receipt of the IP2 Form <b>AND</b> provide the affected recipient with dates, times and place where such hearing could take place.</p> <p>In the event that more than one recipient is affected by an administrative decision of NIPMO, the IP2 Form must be signed by the affected recipient whose name is listed on the IP2 form; and the other affected recipient(s) must each confirm by way of an affidavit or written affirmation<sup>8</sup> that all declarations and statements of fact set out on the signed IP2 Form are true.</p>
<b>Day 7 to 14</b>	The affected recipient(s) must within <b>7 days</b> <sup>9</sup> of receiving NIPMO's response, respond (via email or registered post) to NIPMO by confirming a suitable date,

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<sup>7</sup>Regulation 5(5): Following an exercise by NIPMO of any discretionary power vested in NIPMO in terms of the Act or these regulations, the outcomes of which adversely affect the rights of a recipient, a recipient must, if the recipient intends to make representations on the matter, within 14 days of notification of a decision by NIPMO, lodge with NIPMO a notice of intention to be heard in Form IP2.

<sup>8</sup>A statement or proposition that is declared to be true. A solemn declaration accepted instead of a statement under oath.

<sup>9</sup>Regulation 5(6)

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time and place for the hearing to take place from the options provided by NIPMO.

**Day 15 to 18** NIPMO will send an acknowledgement letter, confirming all the selected details of the hearing.

**Day 19 to 30** Regulation 5(7) states that “*Any hearing in terms of this regulation must take place within **30 days** of receipt by NIPMO of the notice of intention to be heard.*”

Such hearing will be presided over by the Head of NIPMO or alternatively the DST’s Deputy Director-General of Programme 2: Technology Innovation or his/her authorised delegate.

Following the hearing and **within 30 days** of receipt of the IP2 Form a decision will be communicated to the affected recipient(s).

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## **5. STEP TWO: DISPUTE PANEL REVIEW OR APPEAL OF NIPMO’S DECISION (IP3 FORM)**

Step two **to the dispute resolution process** comes into effect after NIPMO elects not to reverse its original decision after an IP2 Form has been submitted by a recipient(s).<sup>10</sup>

Should NIPMO not reverse its decision following the hearing in Step one, the recipient(s) may, **within 14 days** of receiving NIPMO’s communication not to reverse its decision, lodge a notice on an **IP3 Form** with the NIPMO DP requesting an appeal or review of NIPMO’s decision.

The NIPMO DP Rules of Procedure (Annexure A) sets out the necessary documentation and action required from the affected recipient(s) and NIPMO.

## **6. STEP THREE: PROCEDURE FOR JUDICIAL REVIEW**

Section 33(1) of the Constitution of the Republic of South Africa, 1996 guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. Any decision of the DP is subject to appeal or review by a competent court at the instance of any aggrieved party<sup>11</sup>. This procedure must be done in accordance with the provisions of PAJA.

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<sup>10</sup> Regulation 5(8): After such hearing, should NIPMO not reverse its decision, the affected recipient may within 14 days of NIPMO’s decision, lodge a notice in Form IP3 with the Dispute Panel for review or appeal of NIPMO’s decision.

<sup>11</sup>Regulation 7(9) of the IPR Act

Proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date of receiving the DP's decision<sup>12</sup>.

Please do not hesitate to contact NIPMO (Jetane Weyers; [Jetane.weyers@nipmo.org.za](mailto:Jetane.weyers@nipmo.org.za); 012 844 0228) should you have any questions with regards to any matter in this Practice Note.

A handwritten signature in black ink, appearing to read 'Kerry Faul', with a stylized flourish at the end.

Dr Kerry Faul  
Head: NIPMO  
Date: 7 March 2017

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<sup>12</sup> Section 7(1) of PAJA

**ANNEXURE A (Published NIPMO DP Rules of Procedure)**

## **ANNEXTURE B**

For purposes of this Practice Note, all documents are to be served to the following address

**Physical address:** NIPMO  
Suite 15, The Enterprise Building  
6 Mark Shuttleworth Street  
The Innovation Hub  
Persequor Ext 10  
  
Attention: Director: Regulatory & Compliance

**Email address:** [info@nipmo.org.za](mailto:info@nipmo.org.za)

**Postal address:** Department of Science and Technology  
Private Bag X894  
Pretoria  
  
Attention: Director: NIPMO, Regulatory & Compliance