



**Stellenbosch**

UNIVERSITY  
IYUNIVESITHI  
UNIVERSITEIT

**INNOVUS**

Innovation and Commercialisation  
Ukusungulwa kwezinto ezintsha nokurhweba  
Innovasie en Kommersialisering

# *Spin-out Information Guide*

Engagement terms for Stellenbosch University  
technology transfer of employees, students  
and researchers



# Table of Contents

<b>1. Introduction</b>	<b>3</b>
1.1. Who is Innovus?	4
1.2. Why spin out companies?	4
1.3. Overview of the TTO process	5
1.4. What's in it for you?	6
<b>2. Before we start</b>	<b>9</b>
2.1. Your intellectual property (IP)	10
2.2. Options for protecting your IP	12
2.3. Your business plan	16
2.4. Funding	17
<b>3. Establishing the company</b>	<b>20</b>
3.1. Spin-out process	21
3.2. What we require from you	24
3.3. Ownership and governance	25
<b>4. Our legal structure</b>	<b>27</b>
4.1. Typical legal framework	29
4.2. Disclaimers	32
<b>5. What happens next?</b>	<b>33</b>
5.1. Reach out to Innovus	34
5.2. Speak to previous spin-out founders	34
5.3. Useful links	35

## 1. Introduction

Congratulations! You are reading this document because you are about to embark on an entrepreneurial journey, growing a business from your innovation whilst with Stellenbosch University (SU).

This is an exciting opportunity and in this guide you will find some information on how the University Technology Transfer Office, Innovus, can help you to achieve your dream through your participation in a business to commercialise your innovation through a spin-out company.

# 1. Introduction

## Did you know?

Only Innovus is mandated to commercialise Intellectual Property (IP) emanating from the University, being it a license or the spinning out of a company. In addition the University has created a wholly owned subsidiary, the University of Stellenbosch Enterprises (Pty) Ltd (Registration Number 1998/021073/07) as equity partner in any Stellenbosch University start-up company.

For the purposes of this guideline, “USE” refers to the entity; and Innovus to the division. Shares may also be issued to management and/or investors. Researchers do not have to resign from the university to establish a company with Innovus, but they will not be able to work in a full-time capacity or in an executive management role in the start-up company. Investors may not establish their own companies to commercialise university technology, unless they have approval from Innovus to do so.

## 1.1 Who is Innovus?

*Innovus is a division of Stellenbosch University which was established to commercialise university assets. This division is home to the University’s Technology Transfer Office (TTO), the University’s Short Courses, Copyright and Trade Mark division, and SunCom, and Innovus manages a wide range of commercial services for the University.*

In South Africa, the commercialisation of publicly funded research is governed by the IP Rights from Publicly Funded Research and Development Act Nr 51 of 2008 (IPR Act) and its Regulations which came into effect in 2010.

This Act requires the establishment of a Technology Transfer Office (TTO) at all publicly funded research institutions. Stellenbosch University created its TTO in Innovus, more than a decade before the Act was promulgated, with the aim to provide excellent support for researchers and students to bring their IP and business ideas to the market.

Stellenbosch University has an IP Policy which is aligned to the IPR Act and gives clear guidance on the management of IP emanating from the institution.

As the TTO of Stellenbosch University, Innovus is responsible for technology transfer, entrepreneurial support and development, and innovation. As one of the continent’s leading technology transfer offices, Innovus has been instrumental in spinning out about 30 companies since 1999.

The commercialisation of the University’s innovation and IP portfolio is done through patenting, licensing and the formation of spin-out companies.

*Our ultimate mission is to make Stellenbosch University innovation matter.*

## 1.2. Why spin out companies?

*As the TTO, we want to maximise Stellenbosch University’s impact on South Africa and its people and the world. By using the output of the University’s research to promote entrepreneurship, create new jobs, products and services which address the needs of all of South Africa’s citizens, we do exactly that.*

If IP or other business opportunities (which we will refer to as ‘IP’) are developed by employees, students or other researchers at SU in line with their work or studies, the University will, in general, make this IP available to a prospective spin-out company (legally, and also in line with the university’s IP Policy, this IP belongs to the University). This is subject to the University IP Policy and the IPR Act.

In this document, when we refer to spin-out or start-up it entails the company that is formed from research at the SU and incorporated in the company.

## Watch this video

to learn more about a typical tech transfer process at universities.

[youtube.com/watch?v=TRY\\_p-59\\_bY](https://www.youtube.com/watch?v=TRY_p-59_bY)

“  
Before commercialising the technology, verify the potential of converting the innovation into a product or service. This often requires substantial investment into the technology.”

## 1.3. Overview of the TTO process

The Technology Transfer process involves converting scientific findings from research into marketable products. Basic research results often require further development to be recognisable as a product of service that is economically relevant and to be of use to industry and the general public. This process usually requires large amounts of investment and a long-term commitment from all stakeholders.

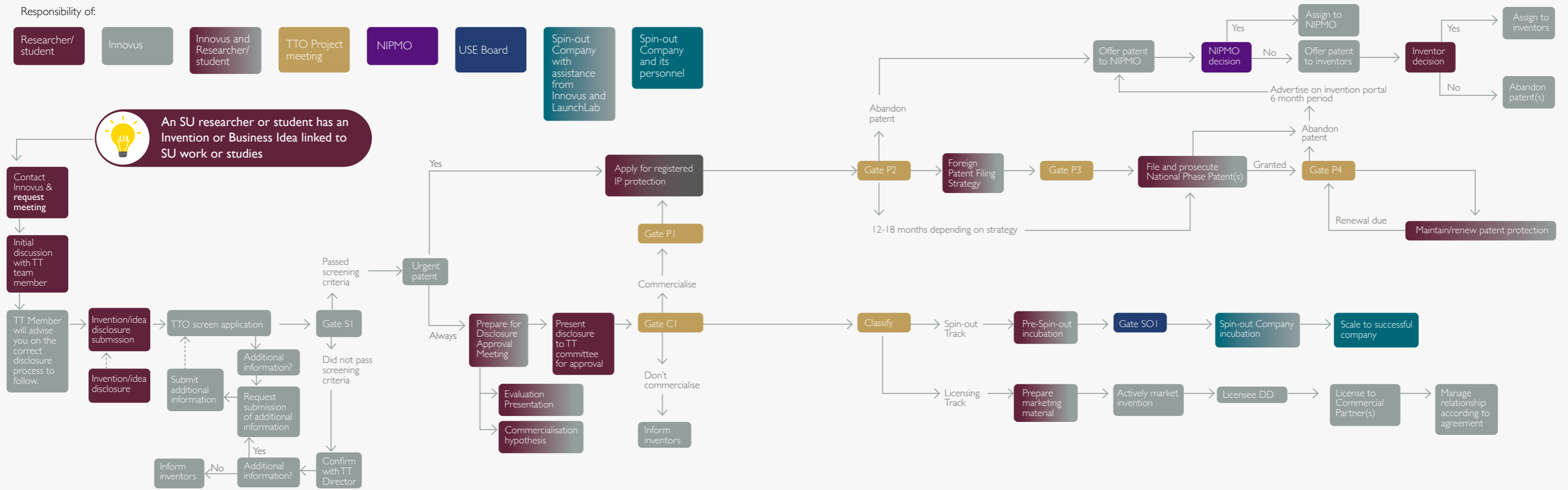
The technology transfer process usually involves making the IP available to industry through licensing, or the establishment of new companies (spin-out companies/ start-ups) to take the technology or service to the market. Licensing is a business arrangement in which the University grants a company or public entity permission to manufacture, use and sell its innovative technology for a specified payment, called a royalty. In the case of a licensing contract, the IP remains the property of the university. In the case of a spin-out company, the university will create a start-up company to commercialise the IP, and will grant a licence to that company.

Before commercialising the technology, verify the potential of converting the innovation into a product or service. This often requires substantial investment into the technology.

The TTO is continuously in search of funding for projects, technology development or investment into the young start-up companies.

## Development funding is typically required for

- Initial proof of concept
- Product, Process (comprehensive technology package) and Prototype development
- Sourcing of IP/legal opinions
- Production of market samples and/or associated testing, analytical data and method development and specification sheet development
- Refining and implementing designs
- Conducting field trial studies
- Piloting and scale-up and techno-economic evaluation
- Detailed primary market research, or specialist consulting
- Business Plan Development
- Purchase of project-specific equipment only, up to R30 000 in value, provided that the Chief Director of Innovus has approved it upon the motivation provided by the project leader.
- Remuneration of students and technicians who work on the development aspects of the technology.
- Raising Capital from Investors



**Figure 1.** The TTO facilitates and actively seeks fund-raising activities of venture capital, private equity and similar alternative investment funds. The Innovus TTO detailed process is shown above.

## 1.4. What's in it for you?

Innovus adds tremendous value to the “cradle to commercial” process taking the IP you, as university graduate or staff, have developed to the market. Our support will save you time and we will take care of a number of the administrative and governance related processes and help you to focus on the technology development. We will work in partnership with you to raise funding for the process and we will also pay for some of the expenses. We will oversee the incorporation of the entity, open the bank account on behalf of the business and facilitate access to our LaunchLab business incubator.

Section 3 of this guideline provides the specifics of the service offering which in summary involves:

- Funding
- Expertise, time and admin
- Association with the University
- Access to the Instant Start-up platform

“  
With your admin and corporate governance structures in place, your company will be lower risk and therefore much more attractive to investors.”

### Funding

Conservatively speaking, the cumulative monetary value of our support can be significant. Initially IP protection (application, prosecution and maintenance for international portfolios) are fully funded by Innovus. These expenses are substantial in nature. The cost for start-up, legal and consultation fees, drafting of a MOI and shareholder’s agreement are carried by Innovus.

Additionally, spin-outs have access to Innovus’ networks of investors and financiers, and we can assist with funding applications (we have access to special funding vehicles aimed solely at University start-ups).

### Expertise, time and admin

It is rare that spin-out ‘founders’ have the time, expertise or skills to set up the basic elements required to demonstrate and manage a corporate structure. So, not only do we finance these services, we action them too. This is specifically aimed at freeing up as much of your time as possible to build the business. If we secure your tenancy at SU LaunchLab, this value increases. The service offering of SU LaunchLab is complimentary for some services, and others are available at competitive rates. However, the actual monetary value of these services simplifies their true value – Innovus contributes the expertise, time and human resources required to build the fundamental elements of the business.

With your admin and corporate governance structures in place, your company will have a lower risk profile and will therefore be much more attractive to investors.



**R3.07 billion**

The SU brand was valued at R3.07 billion by external brand valuers in 2019

“

The services provided through the SU LaunchLab are at world-class level and incredibly valuable to ensure the best possible environment for successful growth of the company.

### *Expertise, time and admin (continued)*

Innovus offers the staff and students the following services in respect of the utilisation of inventions, plant varieties, designs, business concepts and other IP developed by staff and students:

- a preliminary IP evaluation and technical assessment on feasibility to protect the IP.
- estimating its commercial potential
- investigating the commercial and licensing possibilities.
- undertaking the protection of an invention through registered means such as patents and designs.
- a preliminary market analysis, assisting with the establishment of a business plan, investigation of exploitation routes (whether through licensing, sale of rights, or the establishment of spin-off companies).
- investigating sources of financing, the formation of partnerships and the finding of buyers.
- assist with negotiating business contracts with commercial partners.
- protection, monitoring and providing ongoing support for IP after contract conclusion with a partner.
- managing relationships with commercial partners and the flow of revenue arising from commercial exploitation.
- liaising with and reporting to NIPMO; and obtaining NIPMO approvals if required.

### *Association with the University*

The ability to build a new company on University-background IP is an amazing privilege, and we share in this by nurturing the entrepreneurship of our researchers and protecting the interests of both the inventors and the faculty and department where the innovation was born. Although the role of Innovus will become less prominent over time, the value of the association with SU is not an insignificant connection – the SU brand was valued at R3.07 billion by external brand valuers in 2019. You will, after all, have access to the USE Group of Companies plug-in and SU brand logo on your website.

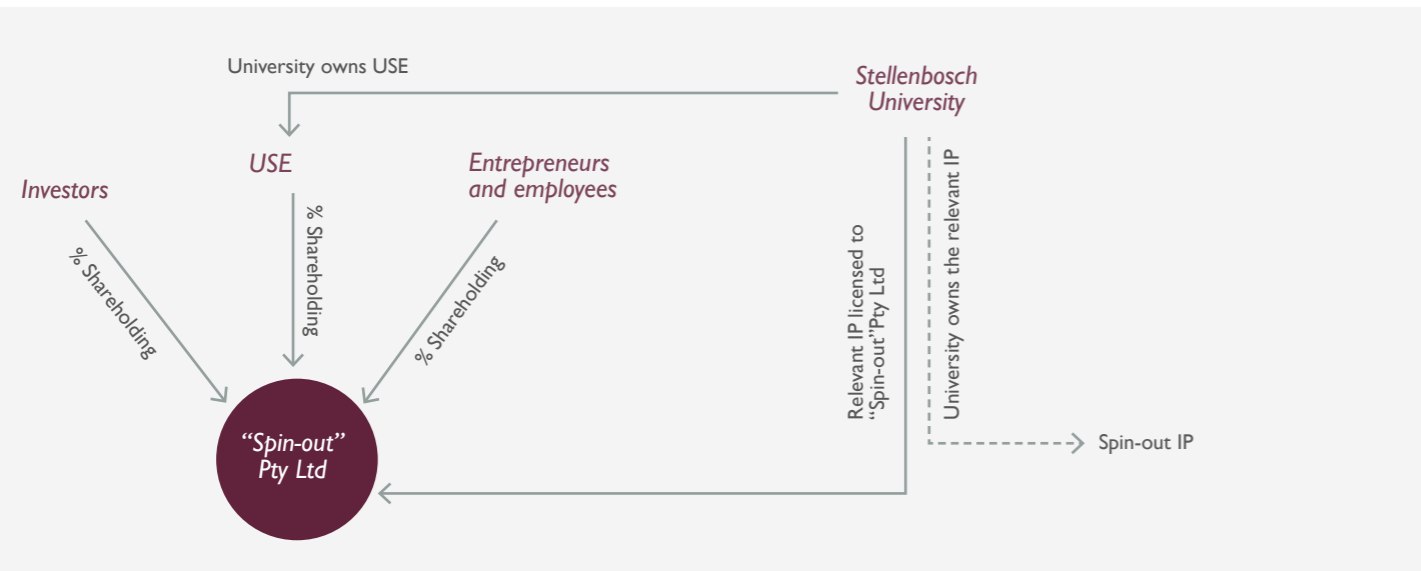
The association also means that you will get exclusive access to start-up support, to legal and corporate assistance and to networks, funds (inclusive of the newly established UTF) and facilities. The services provided through the SU LaunchLab are at world-class level and incredibly valuable to ensure the best possible environment for successful growth of the company.

### *Access to Instant Start-up platform*

Innovus provides ongoing support through its Instant Start-up platform. As an automatic member of Instant Start-up, you will have access to a starter pack that includes some templates, videos, forms and corporate governance advice to help you navigate the start of your business.

## *2. Before we start*

# 2. Before we start



**Figure 2.** A typical initial structure of a SU spin-out is shown above. In this scenario, an extra investor is involved as a shareholder.

## 2.1 Your intellectual property (IP)

### What is IP?

IP encompasses registrable and non-registrable innovations, expertise, trade marks, trade secrets, copyrights, designs and plant breeders' rights which have come about through the mental efforts, insight, imagination, knowledge and creativity of humans.

According to the Act "intellectual property" means "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 IP 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 or business, is associated with conventional academic work."

Legal protection of IP is crucial to prevent others from making unauthorised use thereof to the detriment of the true owner, and to ensure that the true owner enjoys the full commercial benefit of his or her creative efforts. Innovus not only has in-house expertise to ensure optimal management of SU's IP, but we have access to brilliant patent attorneys who assist us with this important task.

### Testing your IP viability

Together we will analyse the business opportunity to determine whether your IP is commercially viable. This means determining whether there is a product that can be viably manufactured or a service that can be viably rendered, meeting a commercial demand locally, or internationally. SU LaunchLab normally assists us in this process. If it is clear that there is a viable business opportunity, Innovus will help you to build a business model for the spin-out company. This will assist you to better understand the commitment required to make the spin-out company a success.



Wondering about the legal framework that governs IP?

Have a look at [Section 4](#).

### The importance of IP for a spin-out company

IP is an important tool for the successful establishment of a spin-out company. The risk involved in commercialising early-stage technology into commercially viable businesses is high and usually requires a significant investment. IP is one of the key resources a spin-out can leverage to ensure they retain a competitive position in the market to enable a return on investment.

As an example, consider a business opportunity without a strong IP position, e.g. the information to provide the solution is available in the public domain, the question of whether it would be a successful business is primarily related to whether the market would pay for the product or service and whether a spin-out could offer the product or service at a profit. Once the spin-out proves the business concept, nothing stops a competitor or an existing large player to offer the same product or service, usually at a more competitive price point, as they don't have to spend money on derisking the business upfront or can leverage the size and networks to compete on price. Most investors won't be willing to take this risk. Having strong IP to differentiate from the market and prevent competitors from offering the solution ensures that a spin-out can exploit the opportunity and provide a return on investment for the shareholders.

Keep in mind that not only patents or formally protected IP can be leveraged in this way, know-how protected by keeping certain aspects out of the public domain as trade secrets are just as effective.

### IP ownership and access

An important question in terms of IP is, whether it is necessary to own or just have access to the IP. Intuitively, most people start from a position where they consider IP ownership as a key enabler to spin-out. Although IP ownership may be more attractive to potential investors and funders, the risk of a newly spun-out company owning the IP initially outweighs the advantages.

Owning the IP provides the spin-out with full control over who may and may not use the IP. A big risk associated with a spin-out owning the IP before it is mature is that the IP could be lost if the spin-out fails. As IP is a non-tangible asset, should a spin-out fail and be forced into liquidation, the IP will be sold to pay company creditors towards paying off the company's creditors.

Even if the start-up survives, IP ownership comes with the responsibility of the company to pay all the costs associated with obtaining and maintaining the IP, which is expensive, especially in the case of patents. Effectively managing an IP portfolio also requires specialised expertise, which spin-outs usually doesn't have available.

Investors are much more likely to consider your start-up as suitable for investment if you have an intellectual property strategy in place. This doesn't mean that you have to own the IP, just have an exclusive right to the IP and a strategy to build onto the licensed-in IP to develop own proprietary IP.

If it is viable for the spin-out to retain its competitive position without an exclusive license, the best option is usually to start with a non-exclusive license. The royalties on a non-exclusive license are less than on an exclusive license, and because multiple licenses may be issued, it is usually not a requirement for the licensee to contribute to the cost of obtaining and maintaining IP protection.

*In the case of a license, the risk associated with losing the IP if the spin-out fails is mitigated. This is a big advantage. Initially gaining access to the IP through a license is usually sufficient to ensure a return on investment, while mitigating the risk of losing the IP if the spin-out fails. As the spin-out*

matures, assigning the IP to the company becomes a more viable option.

## Licensing IP from the University

Gaining access to the initial IP entails obtaining a license to use the IP from the University. Licenses can be exclusive or non-exclusive. An exclusive license ensures only the spin-out company may use the technology (similar as in the case of IP ownership). The downside of an exclusive agreement from the point of view of the inventors and IP owner(s), is that all the eggs are essentially put in one basket. If the spin-out is unsuccessful in commercialising the IP, the window of opportunity for commercialising the IP may pass. The higher risk taken on by the IP owner in granting an exclusive license is offset by requiring higher royalties, or in some instances, repayment of the costs associated with protecting and maintaining the IP. To manage this risk and the increased cost for the spin-out, exclusivity can be specified in terms of territories and applications. For example, if the spin-out works only in the Agriculture industry but the IP applies to multiple industries, it could obtain an exclusive license to the IP for use in agricultural applications, but the IP can still be licensed to other companies for use in other industries. The inventors benefit from the royalties on the other license agreements as per the University's IP Policy.

As licenses are linked to gross revenue, and start-ups need the first few years of income to build a business and developing the technology to commercial scale, more often than not, the initial year(s) may include a zero-rated royalty licence. This is determined on a case-per-case basis and with approval from NIPMO in terms of the IPR Act. The intention is to allow the company to reach operational maturity and financial security.

The background IP forms the basis of the license and is not assigned, however any improvements made to licensed IP may be owned by the business, provided that the inventors are no longer employees of the University (an employee's IP is assigned to the University in terms of IP Policy and national legislation). Use of improvements that cannot be used without dependence on the licensed (background) IP will, although owned by the business, require a royalty payment. Only completely independent IP will be free from royalty payment obligations to the University.

The exclusive licence comes with the right to a sub-licence, and Innovus receives royalties for the sublicense too. Audit provisions and reporting are included in the licence. In a case where there may be broader opportunities to commercialise the IP, a non-exclusive licence has more advantages as the other parties will pay royalties, which benefits all inventors through the royalty-sharing IP Policy of the University.

### Does the University ever transfer ownership of the IP to the spin-out company?

Potentially, yes. It is possible for the University to assign the IP to the spin-out company (and it has, in fact, done so successfully on occasion) as soon as the spin-out company has developed into a mature business – this is often indicated by earning revenue and/or raising investment. In this case, Innovus will manage the assignment process free of charge and obtain the necessary approvals from NIPMO, but the IP will be assigned at value, which often is zero, or at cost, which could be payable over time and as set out in a formal agreement. Do bear in mind that where any exclusive licences or IP assignments concern an offshore transaction, special NIPMO approval as well as South African Reserve Bank Approval from the Financial Surveillance Department is required. We will also take care of this for you.

### Why does the University take equity in its spin-out companies and charge a licence fee?

Start-ups can (and often do) shift strategies at 180 degrees, and might never sell a product with university IP. Still, the licence is a key contributor to the birth of the start-up. Structuring the deal with equity and a licence for the Institution is standard practice globally. Have a look at the difference between royalty and equity in the sidebar.

## Royalty vs Equity

Royalty on Sales and Equity serve very different purposes and are not trade-offs against each other:

- *Royalties* capture the contribution of the IP of the University to the value-added of the spin-out's product.
- *Equity* captures the value of the exclusive licence to the spin-out's ability to obtain financing.

### Read more about patents

<https://www.innovus.co.za/patents-1.html>

“  
Having a patent does not necessarily give the patentee the right to make, use and import the patented invention.”

## 2.2. Options for protecting your IP

### A. Patents

Patents in South Africa are governed by the Patents Act 57 of 1978 as Amended. They can be useful in attracting investors by showing the invention to be worthwhile and protected from copying by competitors. It can also act as an enabler to entering discussions/investment talks by providing recourse should ideas be stolen as well as clearly defining IP ownership going into the discussions/investment talks.

A patent is a trade-off, in that the invention has to be described to a sufficient degree such that it may be performed by anyone else. Consider also that patent protection expires after 20 years - because of this, a strategy may be to rather keep their invention a trade secret (for example, when famous recipes are kept as trade secrets, the recipe can be exploited indefinitely). A patent grants the negative right of exclusion. Having a patent does not give the patentee the right to make, use and import the patented invention. For example, the making and using of an invention of a granted patent might actually infringe a third party's granted patent.

Generally, inventions protect technical concepts and could be in the form of new articles or devices, equipment, methods, processes for producing or manufacturing a product, chemical substances and formulations. Mathematical methods, scientific discoveries, business methods or methods of playing games, computer software and the presentation of information are specifically excluded from patent protection *per se*. Penicillin, a discovery, would not have been patentable, while the use of penicillin as an antibiotic to cure bacterial infections would've been a patentable invention. Similarly, computer code as such is not patentable, whereas a server configured to perform various functions and interact with various systems or devices could constitute a patentable invention.

### The criteria

A patent may be granted for any invention which is new, involves an inventive step and is capable of being used or applied in trade, industry or agriculture.

- An invention is deemed to be new if it does not form part of the state of the art immediately before the date on which an application for a patent was filed. The state of the art comprises all matter available to the public, anywhere in the world, whether by written or oral description, or by use, sale or any other way. It is therefore imperative that an inventor does not make any public disclosures before filing a patent application. Public disclosures include publishing in journals, presenting at conferences and displaying information about the invention on a website.
- In addition to being new, an invention must be inventive. This means that, when all relevant matter in the state of the art is considered, the invention cannot be seen as being obvious to a person skilled in the art if it is to be considered inventive. It should produce a 'synergistic' (or unexpected) effect.
- Finally, the invention has to be useful and not frivolous or contrary to any well-established natural laws.

If these criteria are met, an application for a patent may be made by the inventor, by a person who acquired the right to apply from the inventor, or by both of them. Joint inventors are also allowed to apply. A patent application may be filed in the name of an assignee (e.g. a natural person or a company), who has obtained a written assignment of the invention from the inventor. For example, Prof X from Microbiology is the inventor, but Stellenbosch University is the assignee/applicant/patentee.

## Read more about registered designs

<https://www.innovus.co.za/registered-designs.html>

## B. Registered designs

A registered design protects a design applied to an article, i.e. the appearance of the article as it is judged by the eye. Registered Designs in South Africa are governed by the Designs Act 195 of 1993 as amended.

Designs can be registered for a wide variety of articles including car wheels, containers (e.g. milk bottles), jewellery, furniture, a pattern printed on a fabric, tread pattern on a car tyre, design of a cell phone, layout of an electronic circuit board, etc.

In addition to this, designs can also be registered for graphical user interfaces or layouts of websites, for example. Furthermore, the Act explicitly provides protection for integrated circuit topographies and mask works' as functional designs.

The ambit of protection is determined by the novelty of the design. If there exists a large difference between the new design and the prior art, then the scope of protection of the new design will be broad. If there is a small difference between the new design and the prior art, the scope of protection of the new design will be narrow.

### Types of design:

- An *aesthetic* design may be any design which is applied to any article, by whatever means it is applied, which has features which appeal to and are judged solely by the eye. The design may be for the shape, configuration, ornamentation or pattern applied to the article (or two or more of these purposes).
- A *functional* design may be any design which is applied to any article, by whatever means it is applied, which has features which are necessitated by the function of the article to which the design is applied, is to perform. The design may be for the shape, configuration, or pattern applied to the article (or two or more of these purposes).

### The criteria

In terms of the Act, a design may be registered as a functional and/or aesthetic design if it is new and original (in the case of an aesthetic design) or new and not commonplace (in the case of a functional design).

- A design is deemed to be *new* if it is different from or if it does not form part of the state of the art immediately before the date application for registration thereof or the release date thereof, whichever is the earlier.
- An *aesthetic* design is original if it is the designer's own work.
- A *functional* design is commonplace if it does not excite the interest of a person skilled in the art.

If the design meets the above criteria, an application for registration may be lodged by the proprietor of the design. The proprietor may be the author; a person for whom the author executed the design or any other person to whom ownership of the design has passed. An application for a registered design must be accompanied by line drawings and should indicate whether the design is functional or aesthetic. Furthermore, the design should be classified according to subject matter.

## Read more about trade marks

<https://www.innovus.co.za/trademark.html>



We prefer that every start-up owns its own trade marks, and will refer you to a local attorney for assistance.

[Learn more about this in 3.2.](#)

## C. Trade marks

Registered trade marks ® are governed by the South African Trade Marks Act 194 of 1993. Unregistered trade marks ™ are protected by the common law, but these rights are harder to prove and do not provide the same degree of protection as a registered trade mark.

The effect of a registered trade mark is that other people may not use a confusingly similar mark in relation to goods or services identical or similar to those for which the trade mark is registered.

Assessments of confusion under the Act compare the two trade marks only, and not the broader get-ups of the competing goods or services.

Certain trade marks that are known to a substantial number of people in an industry may acquire the status of a well-known mark. In certain situations, the proprietor of a registered well-known mark may be able to prevent others from using the well-known mark in relation to unrelated goods or services where there is no prospect of confusion.

A registered trade mark is considered to be an asset, as a result it can be hypothecated (for security); licensed; and/or attached (in court proceedings).

Only registered trade marks may be identified by ®. It is a criminal offence to mislead the public as to the registration of a mark. Unregistered marks, or common law trade marks are indicated by ™.

### Certification and collective marks

- A *certification mark* can be filed by any person who does not conduct business in the industry that the certification mark is used in relation to. Certification marks are usually used to certify that particular goods or services have particular characteristics, e.g. the halal mark or genuine leather mark.
- A *collective mark* can be filed by an association whose members form part of a particular industry. Collective marks are often used to show that particular goods are from a particular region.

As with ordinary marks, the marks need to be capable of distinguishing, but in these cases, the distinction is from offerings not certified or part of the particular collective.

### The criteria

- By definition, a trade mark must be capable of distinguishing the goods or services of one person from the goods or services of another person. This "distinguishing function" is a key element of trade mark law.

A mark can be a combination of letters, numbers and images. So-called non-traditional marks may also be registrable on condition that they are capable of distinguishing and that their appearance does not serve a functional purpose (in which case a design or patent may be the more appropriate form of protection).

*Many non-traditional marks are unable to meet these criteria. Examples of non-traditional marks include sounds, containers for goods, colours, shapes and patterns.*



## Read more about copyright

<https://www.innovus.co.za/copyright.html>



**Copyright is conferred automatically in terms of the Act when certain basic requirements are met, and no registration is therefore necessary.**

## D. Copyright

Copyright in South Africa is governed by the Copyright Act 98 of 1978 (the “Act”).

Copyright protects original works, and allows the owner of copyright to prohibit others from making unauthorised copies, reproductions or adaptations of the work, and/or offering these infringing copies for sale.

Copyright is conferred automatically in terms of the Act when certain basic requirements are met, and no registration is therefore necessary. In fact, registration is not possible in South Africa (and most countries), except in the case of cinematograph films, which can, but do not have to be, registered.

Although not a requirement, a warning to third parties of the protected nature of the work, such as “© 2013 Stellenbosch University All Rights Reserved”, is recommended. This may be relevant in the case of a damage claim for infringement of copyright.

As a general rule, the author or creator of a work is also the first owner of copyright. The major exceptions to the rule are where the work was made in the course of employment (the employer is the automatic owner), or where certain types of work are commissioned.

Where paintings, photographs, portraits, films, or sound recordings are commissioned, the commissioning party is automatically the owner. For all other commissioned works (e.g. computer programmes, logos, website copy), the parties should govern ownership by agreement, failing which, the first owner is still the author/creator, even though the work has been commissioned.

### The criteria

1. The author must be resident in South Africa or a member state of the Berne Convention;
2. The work must be reduced to a tangible form – copyright does not protect the idea, but rather its physical embodiment;
3. The work must have been published (i.e. made available in sufficient quantities to the target market);
4. The work must be original; and
5. The work should not be immoral or against public policy.

*The major point for debate in most cases will be the originality of the work. South African case law sets a fairly low threshold for what “original” means, with our courts saying original does not have to mean “good” or meritorious”. Relevant considerations include the level and type of effort applied, as well as the extent to which existing material was used in creating the work.*

## Learn more about IP

The IP ownership and user rights of spin-outs are governed by the University’s IP Policy (find it [here](#)), which is aligned with the South African IPR Act. Have a look at the IPR Act (the Intellectual Property Rights from Publicly Financed Research and Development Act 2008 of 2010) and its regulations [here](#). Compliance with the IPR Act is monitored by the National Intellectual Property Management Organisation (NIPMO).

## Read more about PBRs

<https://www.innovus.co.za/plant-breeders-rights.html>



## 25 years

The term of a plant breeders’ right is 25 years in the case of vines and trees.

## 20 years

The term of a plant breeders’ right is 20 years in the case of everything other than vines and trees.

The term is calculated from the date on which a certificate of registration is issued and an annual renewal fee is payable on or before 1 January of each year during the currency of the plant breeders’ right.

## E. Plant breeders’ rights (PBR)

Plant breeders’ rights in South Africa are governed by the Plant Breeders’ Rights Act 15 of 1976 as amended (“the Act”).

Plant breeders’ rights prevent third parties from propagating certain new varieties of plants developed by a plant breeder. The Act defines “variety” as any plant grouping within a single botanical taxon of the lowest known classification which can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by the expression of at least one of the said characteristics; and considered as a unit with regard to its suitability for being propagated unchanged.

### The criteria

In order for a variety to qualify for plant breeders’ rights, it must be:

- 1. New**  
Propagations/harvested material from it has not been sold or otherwise disposed of by the breeder in SA for more than a year or in a country signatory to the Berne Convention for more than 6 years for vines and trees and 4 years for other varieties.
- 2. Distinct**  
It is clearly distinguishable from any other variety of the same kind of plant of which the existence on the date is a matter of common knowledge.
- 3. Uniform**  
It is sufficiently uniform with regard to the characteristics of the variety in question, subject to the variation that may be expected from the particular features of the propagation thereof.
- 4. Stable**  
The characteristics of the variety remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of such cycle.
- 5. Only a breeder may apply for PBR**  
A breeder is the person who bred or discovered and developed the variety; the employer of an employee who bred, or discovered and developed, the variety, if the employee did so in the scope of his/her employment; or the successor in title of these parties.

In order to register plant breeders’ rights an application for registration must be made to the Department of Agriculture, Forestry and Fisheries (“DAFF”) together with the prescribed application fees and documents. The application is examined by the authorities and samples of the plant will generally be required for testing. The examination process normally takes between three and five years.

After registration of a plant breeders’ right, propagating material of the relevant variety sold for the purposes of propagation must clearly and legibly indicate the denomination of the variety on a label which is attached thereto. If it is packed in a container, the denomination of the variety must be indicated on the container.

*Before propagating material of certain kinds of plants can be sold in South Africa, the relevant variety must be placed on the Variety List which is compiled in terms of the Plant Improvement Act (2) and maintained by DAFF. The variety list includes the most economically important agricultural, vegetable and fruit crops. In order to do this, an application must be made to the Registrar for Plant Improvement.*

“

*An average idea with a good business plan has a better chance of succeeding than a brilliant patent without a business plan.*

## 2.3. Your business plan

Now that you have a good understanding of IP, let's get down to business. Approved disclosed ideas are sophisticated by the TTO in close co-operation with the inventor, and strategies are developed to exploit the invention. This step also involves the development of a business plan, market research, financing alternatives and product refinement, but is not limited to this list. While Innovus will never write your business plan for you, we will give you ample support and resources to guide you through the process.

When you supplement your idea with a good business plan, it has a much better chance of succeeding. If you want to patent your idea and develop it commercially, a business plan is very important to help you to get the support of other people and to unlock the resources needed in order to make your idea a business. Financing or venture capital are typical examples of such resources and the people who make these decisions about the allocation of venture capital have strict requirements to convince them that your idea might possibly be a commercial success.

A complete, professional business plan will give you a big advantage, especially considering that you will most probably be competing with other entrepreneurs for the same resources. Remember: An average idea with a good business plan has a better chance of succeeding than a brilliant patent without a business plan.

*A good business plan will include at least the following:*

1. Introduction
2. The technology, product or service (this will be the heart of the business)
3. Description of business (overview of industry, products, production processes)
4. The market (competition, size, clients, market trends)
5. The team (the ones who are going to turn the idea into a sustainable business)
6. Finances (income statement, expenses, cash flow statement if available and well thought through financial projections, break even assessments)
7. SWOT analyses
8. Supporting documentation (marketing plans, etc.)

It will be to your advantage if your projections are realistic and if you have tested your idea against a number of potential clients who gave you their feedback and suggestions. This is important, because the people who will analyse your business plan are experienced business people, and will immediately recognise unrealistic submissions. Even if you do not require the assistance of any other person or institution, it is still important to draw up such a plan to guide your own planning and thoughts. This exercise compels you to approach the whole idea strategically and consider all the options before you attempt something that may not be feasible.

*Very good software is available which can assist you to draw up business plans. The advantage of these programmes is that input values can be adjusted continuously to take different scenarios into consideration.*



## 2.4. Funding

*A company generally funds itself in three ways:*

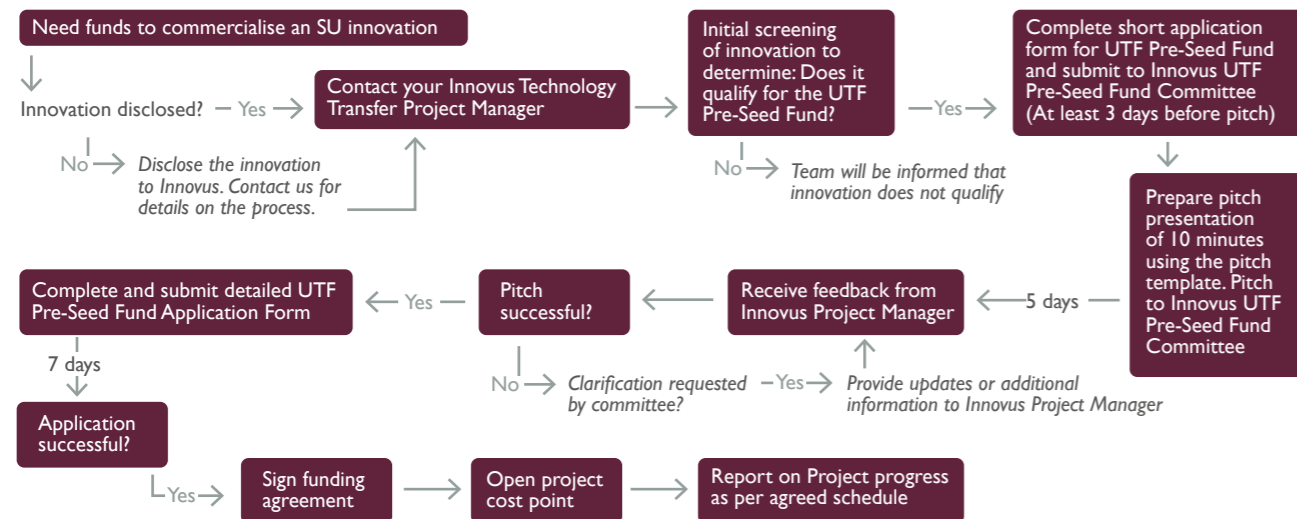
- *Firstly, it can sell shares to new investors* – this is most common. As it sells more shares, the relative size of the shareholding by its existing owners decreases ('dilutes') unless they agree to issue more share capital.
- *Secondly, it can borrow money from its shareholders*, seek loan funding from banks or acquire third-party loans.
- *Thirdly, it can fund itself through the income of selling its products or services.* Funding can also be a hybrid model involving two or more mechanisms.

When you create your business plan, it is important to understand how much funding you will need and support it through the financial model of the business.

It is also very important to thoroughly research the investors you want to approach. Investors normally have a mandate within which they operate and this mandate determines at which stage of the business they may get involved as well as the typical industries or markets they invest in. You do not want to waste time pursuing investors who will not be able to invest in your business.

Remember, however, that nothing is free. All of these sources of finance will likely want something in return, for example, interest, equity or products. Innovus can help you decide which investors are worthwhile and with putting together applications for funding.

*Innovus can also help with funding applications to entities like the UTF and TIA – read more about these below – and will work with the LaunchLab staff to teach you how to pitch your business effectively to gain interest from investors.*



**Figure 3.** The UTF process is shown in the diagram above.

## A. The University Technology Fund (UTF)

The UTF is a venture fund specifically focussed on commercialising technology, IP, and research originating from South African Universities. The UTF aims to bridge the gap between technology ideation, research and IP development and the commercialisation thereof. The UTF represents a unique opportunity to catalyse and commercialise IP emanating from universities in South Africa.

### Background

Stellenbosch University (SU), through Innovus, was the driving force behind the establishment of the UTF. The two primary challenges addressed by the fund are:

1. Adequate pre-seed and seed funding (this is currently only available to SU and UCT, who are the founder universities and who co-invests in the fund to unlock very early stage funding)
2. Series seed and Series A funding (commercialisation capital and follow-on venture capital).

### Types of investment by UTF:

**Pre-seed investments:** UTF pre-seed funding of up to R500 000 is made available to and from Innovus at SU, which has the overarching goal of removing early barriers to commercialisation for technologies emerging from SU. Only projects that have at least a level of TRL3 and have been disclosed to Innovus will qualify for UTF pre-seed funding. Please work through your Technology Transfer project manager to apply for the funding.

**Seed investments** are projects or entities with a target value of at least R500 000 but not more than R1 500 000 per opportunity on a cumulative basis that require funding for technology development and pre-commercialisation support. Seed investment is currently available for SU and the University of Cape Town and may be extended to other universities once additional funds can be secured by the UTF.

**Series seed investments** are projects or entities that are ready for and require the first round of equity (or equity-like) funding.

**Series A investments** are projects or entities in the post-revenue growth phase which target traditional venture capital investors.

Learn more about UTF

<https://utfund.co.za/>

## B. Technology Innovation Agency (TIA)

TIA is a national public entity that serves as the key institutional intervention to bridge the innovation chasm between research and development from higher education institutions, science councils, public entities, and private sector, and commercialisation.

### Their funding instruments include:

- **Seed fund**

This fund assists High Education Institutions and Small Micro Medium Enterprises in bridging financing requirements to translate research outputs into fundable ideas for commercialisation. To qualify, your project must be beyond the basic research stage.

- **Technology development fund**

This fund supports the development of technologies from proof of concept to the product prototype and ultimately the demonstration thereof in an operating environment. Your proof of concept needs to be established to qualify.

- **Pre-commercialisation support fund**

This fund prepares innovators for follow-on funding through support for market testing and validation. The qualifying criteria for this are to have an off-take agreement or third-party follow-on funding commitment in place.

To apply, you'll need to submit a funding application via their online investment system. The funding applications are assessed against prescribed assessment criteria. Once the full application has been submitted, there will be an assessment conducted to determine whether the application has submitted all the necessary information to proceed with the full assessment.

Each of the funding options has different application processes. Have a look at the Seed Fund Application process below.

### The Seed Fund application process:

#### 1. Pipeline and Pre-investment Support

1. Close calls issues through the TTOs and RDA
2. Source opportunities from TTOs (researcher) and RDA (SMMEs)
3. Proactive opportunity generation
4. Applications sources from TTOs and RDA

#### 2. Assessment

Application assessment: technical viability, IP, team and budget.

#### 3. Approval and Contracting

1. Deal presentation to approving Committee
2. Issue Award Letter

#### 4. Post-investment

1. Ongoing performance management
2. Corrective action and interventions

#### 5. Exploitation

1. Technology transfer
2. Technology commercialisation
3. New businesses

## 3. Establishing the company

### 3.1. Spin-out process

We will do all that is necessary to incorporate and register a South African private (RF) company – this will be the spin-out company in which you may hold equity and/or an employment or a consulting relationship. Initially, Innovus takes care of all the administration and risk! Once your application to spin out has been approved by the USE Board and agreement has been reached on shareholding, our lawyers will draft the Memorandum of Incorporation (MOI) and the shareholder agreement. After signing these documents, the formal CIPC filings will be done and the company will be incorporated. We generally kick off by reserving your company name at the Companies and IP Commission (CIPC).

If you also want a registered trade mark, we will conduct the initial searches for you and will facilitate access to trade mark attorneys for filing your marks at a special rate negotiated for the university spin-out companies..

#### *Innovus assists with corporate administration*

This includes:

- All the set-up administration (incorporation of a company, name reservation and registration, and incorporation documents such as the MOI and the shareholder agreement).
- All the ongoing company secretarial and related administration, such as the following:
  - Appointment and resignation of directors inclusive of CIPC filings related thereto.
  - Set-up and maintenance of share registers and issue of share certificates.
  - Director and shareholder resolutions.
  - CIPC annual return submissions on behalf of the company.
  - ATTO member to serve as director on the company board.

#### *Innovus offers business support services*

This includes:

- Setting up bank account.
- Reserving a website domain for you.
- Marketing kick-off, which can include trade mark search and registration.
- Registrations for value-added tax (VAT), pay as you earn (PAYE), Tax Clearance Certificate and Broad-based Black Economic Empowerment (BBBEE) certificate applications.
- Where necessary we provide access to – and, on an *ad hoc* basis, fund – training for our directors to ensure they are aware of what their role and responsibility is within the spin-out company.
- In some cases, we will pay to send you (and sometimes members of your team) for entrepreneurial governance training, helping you to understand your management role in the spin-out company and teaching you about corporate governance, or we will provide you with a mentor or coach to assist you in making business decisions.
- We source experienced, independent directors on the board of the spin-out to assist with the governance and decision-making processes, and sometimes they even bring opportunities to our companies.
- We give you access to our resource portal, Instant Start-up. Here, you will find templates, forms and documentation to assist you with setting up your corporate governance structure, among many other useful assets to help make your business stand out to investors.



Researchers may also appoint one or more director(s) to the board.



We help with the appointment of service providers at a negotiated reduced rate for SU spin-outs.



We have internal and external legal advisors in an array of different areas (commercial, corporate, IP, etc.) at a reduced rate.

### *Innovus assists with accounting services*

*This includes:*

- Appointment of external accounting service providers (at a negotiated reduced rate for University spin-outs). The spin-out company will manage the relationship and remain accountable for payment of these services.
- Set-up of an accounting system in Xero or Sage Pastel, including in-house training on these systems with the cost of software licences being for the business' own account.
- Appointment of accountants to set up financial processes including authorisation of payments, processing of transactions weekly or monthly, calculation of VAT submissions, submission of annual provisional tax and compilation of management accounts and/or financial statements.

### *Innovus offers marketing services*

*This includes:*

- Assistance with the development of a media strategy and plan.
- Advice with website, logo development and the design of marketing material.
- Press releases will be distributed through SU's media channels whenever your spin-out has a newsworthy story.

### *Innovus TTO takes care of technology commercialisation*

*This includes:*

- Ensuring that a licence agreement to the IP is in place between SU and your start-up for access and use of the IP.
- Assistance with fund applications and industry leads.
- Taking care of initial legal services and providing you with free advisory services on IP matters.
- Management of the application, prosecution, registration and maintenance of related IP rights such as patents, designs or trade marks and any business or product registrations (e.g. in the case of medical products).

*NOTE:* The costs for these are for your account (at reduced rates) if you exclusively license the IP from the University. The licence agreement may include terms that SU will carry the patent costs until such time the business is profitable, at which time the University shall invoice the start-up for settlement of patent cost within the first year of the business being profitable, provided that all historical costs are covered within five years from becoming profitable.

### *Innovus offers one year free access to the SU LaunchLab*

You'll have access to the SU LaunchLab incubator – a creative, 'protected' environment in which to build a foundation. As an SU start-up, you will gain free entry to many of



**In most cases, unless otherwise stated, all costs associated with these activities are invested by the University upfront, with no risk to you or the entrepreneurial team.**

This is treated as part of the investment by the University (along with its contribution to the creation of the IP) in the spin-out company with the understanding that exclusive access to the IP will be at the cost of maintaining the licensed portfolio and your undertaking to successfully commercialise the technology. Once you are in the business, many costs are for your own pocket and you should early on include these costs in your budget. We can assist you with identifying what these costs are, or may be.

LaunchLab's offerings, which include hot desk seats for your team, enrolment into an SU LaunchLab programme (University Start-up Lab), mentoring sessions and access to the SU LaunchLab community and its network, events, shared services platform (fundraising and talent support) and Fellows Programme.

These services are paid for by Innovus and are free to you for a period of 12 months from the effective date of spin-out. After that period, you may work directly with SU LaunchLab to secure additional business building services for a fee (cash or equity). You will have to pay rent if you decide to take up an office in the LaunchLab. You can also continue to access the university's resources and infrastructure, such as laboratories, at a nominal charge.

### *Innovus assists with funding applications and will introduce you to investors in our wide network*

- **UTF & TIA:** We have access to special funding vehicles aimed solely at University start-ups, such as the Technology Innovation Agency (TIA) and the University Technology Fund (UTF).  
For information on the TIA, look at this information sheet.  
We have set out the terms and conditions of UTF investment in Annexure A, attached hereto, for you to become familiar with the structure of the investment. Refer to 2.4. SU, through Innovus, was the driving force behind UTF and is a founding member. For information on the UTF, look at this information sheet.  
**Loan funding:** Innovus may facilitate some loan funding to the spin-out company to assist with other early-stage costs or to make small investments in the company.
- **Fundraising:** We assist spin-outs with raising funding from development funds and investors. We have been successful in attracting investments for a large number of our companies.
- **Investor negotiations:** We take care of negotiations with investors and the drafting of associated legal documents if an investment is raised as part of spinning out the company. Innovus networks include a vast business pool, and we may introduce spin-out companies to potential clients or customers.

### *Participate in the Translational Fellow Programme*

Stellenbosch University (SU) established the Translational Fellow Programme (TFP) to tap into the pool of talent and innovation resulting from the world-class research at the institution to empower recent graduates to become entrepreneurs while translating research outputs into innovative new businesses.

The objectives of the programme are:

- Enable recent graduates to pursue an entrepreneurial career upon graduation while developing entrepreneurial, technology transfer and commercialisation skills.
- Translate the world-class research performed at SU into innovative products and services that positively impact society.

The programme provides one year of funding to cover the living expenses of the Fellow in the amount of R325,000. This funding is an ideal mechanism to give recent graduates the opportunity to focus on building a business as part of the process of incubation and spinning out a company.

A call for TFP applications is usually released in October of every year. For more information, please see the [Innovus website](#).

## Conflicts of interest

Researchers may not compete with the business of the spin-out company or its subsidiaries or acquire any interests in any business that competes. They may not solicit or entice employees, customers or suppliers of the spin-out company. Start-ups may not compete with research already underway at the university.

Normally, nothing will restrict USE' rights to hold shares in other spin-out companies. This is because the University is bound by the principle of academic freedom to assist all academics to commercialise their ideas. However, Innovus will always manage this by internally segregating the personnel who work with the spin-out companies.

Also see "Employment by University" in section 4 and the Conflict of Interest policy [here](#).

## Different rewards for different roles

Participants in spin-out companies are generally compensated for their contributions in one or more ways:

1. If a patent generates royalty income, a portion of the income goes to the researchers who made the invention for their role as inventors.
2. If a spin-out company is established, the founders receive equity and any dividend payments and other income associated with their shareholding serve as reward for their role as entrepreneurs.
3. The employees of the spin-out company receive salaries and sometimes bonus payments to reward them for their role in managing the company.
4. A fourth possible reward may be paid to researchers who consult to a spin-out company as reward for contributing to the success of the company through transferring their knowledge.

## 3.2. What we require from you

We will fully commit to assisting in building the business vision, at least during the initial phases of its development, but you will be responsible for growing and commercialising the business. This means, effectively, developing and implementing a business plan and putting in place the initial commercial structures (this can include production, sales/marketing, financial management and human relations management).

### Your responsibilities may include the following:

- **Declare any conflicts of interest** in terms of University Policies and manage any conflicts together with the board and Conflict of Interest Committee.
- **We request that you provide feedback to USE board regularly** (quarterly) specifically with respect to the financial condition of the company, typically by way of management accounts and a short report about the company's progress and challenges in the past quarter. Annual financial statements will be prepared but may not need to be formally audited (in which case the accounts will be 'reviewed' by an accountant).
- **You will likely need to grow your entrepreneurial skills and attend training.** Innovus and LaunchLab provide access to training on managing a spin-out company. This will help you to manage its budget responsibly and to ensure that its funds are used for the intended purposes only.
- **Appoint suitably skilled and experienced executives** once the business reaches a level of maturity that justifies it. You will be expected to collaborate with and, where appropriate, support the appointed management team. In our experience, the appointment of an experienced CEO at the right time is critical to increasing the spin-out's chance of success.

This phase of the spin-out usually requires a lot of technical input and, at the same time, business development, negotiating and closing deals, and raising funds. It is unrealistic to expect an inexperienced CEO to manage both the business aspects and play a critical role in translating the underlying technology innovation into a product and service. Appointing an experienced CEO ensures the founder(s) can focus on making the technology work, while at the same time receiving mentorship and learning from an experienced CEO to ensure they are set up to successfully take over the CEO position at a later stage (if they want to).

- **We prefer that the start-up owns its own trade marks** (read more about trade marks in 2.2). We will refer you to a local attorney who takes care of all our start-up trade marks at a reduced rate, and you can negotiate a deal with them. We will manage the process and instructions, but you will be invoiced for these costs. It is important that the company builds its own brand and goodwill, and therefore ownership of trade marks by the company is advisable. There is the option that the University can own the trade mark and later assign it to the start-up, but this is not preferred as there are tax and cost implications.

Given the commitments which the University will make to the company, at both shareholder (through USE) and director level, and the related reputational and other risks to the University by being directly involved in a private company and associated with independent parties, the University expects *transparency and honesty* from the entrepreneurs, investors and other shareholders of the company. To manage this risk, each of the shareholders will be required to disclose whether they have been convicted or found guilty of a criminal offence, been declared ineligible or disqualified as a director, been declared an unrehabilitated insolvent, or any other past event which might reasonably cause reputational harm or damage to the University.



*Slicing Pie: Funding Your Company Without Funds* by Mike Moyer.



It is never a wise idea to divide the entrepreneurs' shareholding pool into equal parts to avoid conflict.

We strongly advise inventors/entrepreneurs to consider this very seriously and to have the difficult discussions upfront. We often see how relationships are affected adversely down the line when inventors and enablers receive equity that does not reflect the role that they really played in the invention and commercialisation of the technology.



Often, researchers choose not to become involved in the business at all and merely share in royalties on the inventor incentive basis.

In this case, the university will also share a proportion of its income through its shareholding in the company with such non-shareholder staff member(s).

## 3.3 Ownership and governance

A person's ownership of a company is measured by fractions called 'shares' (or equity). The size of your ownership in the spin-out company will be defined by the percentage of the shares that you own.

In general, USE leaves the decision-making and day-to-day operations of the spin-out company to the discretion of the company's management, supported by the company's board. The only exception is that Innovus and USE must be consulted and must also consent before the spin-out company makes any decisions that could have an impact on the reputation of the University. This is also the reason why the start-up is registered as a Ring Fenced (RF) company. Sometimes, the shareholders may choose to restrict the power of the board to take certain decisions unless a minimum percentage of the shareholders agree, this is specifically set out in your companies MOI and SHA.

### A. Shareholders

The spin-out company may be jointly owned by the founding researcher(s), USE and others like investors, for example. The value of a spin-out company is reflected by the amount that someone will pay for all its shares. When shareholders 'exit', they agree to sell their shares in the spin-out company. Any such exit will depend on the company MOI and SHA provisions.

The amount of shareholding to be held by USE is based on the mandate that it holds with SU and is set out in an agreement with you, recognising the contribution of the University to the creation of the underlying IP (funding of researchers' salaries, research grants and subsidised tuition fees as well as the infrastructure and environment in which the IP was created) and the continued business support, access to funding and Innovus networks.

There is not a set amount of shareholding that is required by USE, but it will be negotiated with the founders of the business. Various factors affect the percentage of USE shareholding. Often, this is influenced by the stage of maturity of the technology and its potential and the amount of further funding required to develop the technology and the operational success of the business. The more funding required from future investor shareholders, the greater the dilution of everyone's shareholding. However, Innovus has an interest in ensuring that the researchers also retain a significant shareholding even after future funding investments to incentivise them to make a success of the business. Other factors may include support and funding made available to the company through Innovus (this may include, for example, TIA and UTF funding raised for the project), patent and other expenses and usage of University infrastructure, provided there is no conflict of interest.

Spin-outs in South Africa (and many other parts of the world) have less access to venture capital and start-up advisors than those in Silicon Valley, making them more reliant on the support of universities, which command a greater share of the equity as a result – up to 50% plus royalty income in the case of Oxford University. By comparison, Stanford and MIT tend to only take 5-10% equity, however, the volume of spin-outs is greater.

The proportionate shareholding that is allocated among entrepreneurs is generally quite complex and should also consider not only the contribution already made by each founder but also the expected future contributions (potentially including time, skills, networks and money). Your entrepreneurial team should discuss the future expectations and the consequences for shareholding if one of you should contribute more (or less) than expected amongst yourselves. In this regard, we refer our entrepreneurs to books such as *Slicing Pie: Funding Your Company Without Funds* by Mike Moyer.

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### *Did you know?*

One of the main statutory responsibilities falling on directors is the preparation of the accounts and the report of the directors. It is the responsibility of the directors to ensure that the company maintains full and accurate accounting records. This includes the preparation of a balance sheet and a profit and loss account for each financial period of the company, and the presentation of these to shareholders and, subject to various exemptions, the filing of the accounts and report of the directors with the Registrar of Companies.

## ***B. Governance***

A company is governed by a board of directors on behalf of the shareholders. The fiduciary role of the board, in terms of the Companies Act 71 of 2008, is so crucial that the board has a personal obligation to the shareholders, creditors and even employees of the spin-out company. Innovus provides you with access to training and has created a governance framework to assist you to understand and comply with director obligations.

Typically, directors are responsible for the day-to-day management of the company and give feedback to the shareholders. Types of directors include:

*a) Executive directors*

They have specific roles and responsibilities – e.g. a Chief Executive or Financial Director. Still, they are responsible for overseeing all company matters.

*b) Non-executive director*

This type of director is often a generalist with extensive experience in business, and will sometimes be chosen to augment the skills of the rest of the board.

*c) Shadow directors*

A shadow director may have the same liabilities and obligations as a director, even if he/she is not officially appointed as one.

*d) Board Committees*

The board may appoint committees to oversee certain specialised tasks such as an advisory committee on specific or general matters, a remuneration committee, or an audit committee.

### *The typical duties of a director:*

Directors need to be aware that they are personally liable and subject to statutory duties in their capacity as directors of a company. In addition, the company as a separate legal entity is subject to statutory controls and the directors are responsible for ensuring that the company complies with such statutory controls.

*The Companies Act 2006 codified certain common law and equitable duties of directors for the first time. The act sets out the general duties of directors, which include:*

- to act within powers in accordance with the company's constitution and to use those powers only for the purposes for which they were conferred
- to promote the success of the company for the benefit of its members
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid conflicts of interest
- not to accept benefits from third parties
- to declare an interest in a proposed transaction or arrangement

The company secretary as chief administrative officer will be responsible for the performance of many of the administrative duties imposed under the Companies Act 2006. A private company is not required to appoint a company secretary and where no company secretary is appointed the duties and responsibilities of the company secretary will fall on the directors.

Directors may be personally liable to penalties if the company fails to carry out its statutory duties. However, they may have a defence if they had reasonable grounds to believe that a competent person had been given the duty to see that the statutory provisions were complied with.

## *4. Our legal structure*

Our goal will be to use the simplest possible legal structure and to ensure that we are all aligned as to the legal terms of our relationship. To manage the University's risk, Innovus is exclusively mandated by SU to set up start-up companies for the commercialisation of its IP. Only in very rare instances will we enter as a shareholder into a company that was not set up by Innovus. This is simply a risk management strategy.



# 4. Our legal structure

The following will need to be addressed:



### 1. Ownership:

A person's ownership of a company is measured by fractions called 'shares' (or equity). The size of your ownership in the spin-out company will be defined by the percentage of the shares that you own.



### 2. Governance:

A company is run and governed by a board of directors on behalf of the shareholders. The fiduciary role of the board, in terms of the Companies Act 71 of 2008, is so crucial that the board has a personal obligation to the shareholders, creditors and even employees of the spin-out company. Innovus TTO provides you with access to training and has created a governance framework to assist you to understand and comply with director obligations.



### 3. Funding:

A company that is not sustainable yet or that is in need of funding normally funds itself in two ways. Firstly, it can sell shares to new investors – this is most common. As it sells more shares, the relative size of the shareholding by its existing owners decreases ('dilutes') unless they agree to issue more share capital. Secondly, it can borrow money from its shareholders, seek funding from investors or acquire third-party loans.



### 4. Value and exit:

The value of a spin-out company is reflected by the amount that someone will pay for all its shares. When shareholders 'exit', they agree to sell their shares in the spin-out company because they have achieved their target.

## 4.1 Typical legal framework

Below we will expand on these four principles, illustrating the legal framework of a typical spin-out company. Obviously, this is only a (nonbinding) summary, which will be formalised in detailed legal documents and probably tailored to your unique spin-out company's circumstances.

### Shareholding

- You and the University will agree on the respective shareholding for the University through USE and the team of researchers in discussion.
- If you are part of a team of researchers who will all be joining the spin-out company, you should agree on your own shareholding split among each other.
- If an outside investor is to be involved from the beginning, the investor's shareholding will also be set up by agreement.
- Lastly, sometimes shares are offered to employees as incentives. If this is your intention, we suggest planning this to understand the 'dilutive' effect on all other shareholders.

### IP

- IP generated through the University is carefully regulated, and the Government<sup>1</sup> requires the University to own, manage and commercialise it. The University also has an IP policy in this regard.
- We will most likely make IP available to the spin-out company immediately in terms of a long-term licence – often initially at zero-rated royalty.
- Once the spin-out company is well established, it may be appropriate to transfer the ownership of the IP to the spin-out company. This is dealt with on a case by case basis.

### Voting

- Each share in the spin-out company carries one vote.
- Ordinary resolutions usually require a simple majority vote.
- Special resolutions usually require a 75% majority.<sup>2</sup>

### Directors

- The directors are appointed by the shareholders. The researchers and USE (and, if applicable, the investors) will each agree on the number of directors to be appointed.
- The total number of directors varies, but we suggest keeping the board to a manageable number initially (3–5 directors).
- Decisions of the board are normally taken by way of a simple majority vote.

### Reserved matters

USE does not interfere with the day-to-day operations of the spin-out company and leaves management thereof to the discretion of the company's management, the board and the shareholders. The only exception is that Innovus and USE must be consulted and must also consent before the spin-out company makes any decisions that could damage the reputation of the University. Sometimes, the shareholders may choose to restrict the power of the board to take certain decisions unless a minimum percentage of the shareholders agree as set out in the MOI or SHA of the company.

### Pre-emptive rights

Shares in private companies (such as spin-out companies) always have some basic restriction of a right of first refusal on equity sale:

- Any shareholder who wishes to sell his/her shares must first offer the shares to all the other shareholders.
- Before the spin-out company issues new shares to outside parties, the existing shareholders should first be given the opportunity to take up those shares.

### Tag-along and come-along rights

It is often considered fair to allow all shareholders to take part in a sale – this is generally represented by these two clauses:

- *Tag along:* If 50% of shareholders desire to sell their shares, they may not do so unless the person buying their shares also offers to buy everyone else's shares on the same terms.
- *Come along:* If a third party wants to buy the entire company and 65% of shareholders agree to sell, all the shareholders must sell their shares on the same terms.

<sup>1</sup> Through the National Intellectual Property Management Office (NIPMO) and the Intellectual Property Act

<sup>2</sup> Special resolutions require more votes because they usually address very significant decisions, such as selling the entire business of the company or merging with another company.



## *Requiring another shareholder to sell*

Early-stage companies typically recognise that if something happens to a shareholder, the spin-out company may buy back that shareholder's shares. These instances are examples:

- If a shareholder commits a material breach of the terms of the spin-out company's shareholder agreement/MOI (and fails to remedy).
- If a shareholder is convicted of a serious offence.
- If a shareholder is liquidated or sequestrated (except for USE because the University will be given an opportunity to move the shareholding to another holding vehicle).

## *USE' right to return its shares*

- Stellenbosch University (a public entity) is the ultimate shareholder and interested party of USE (a private entity). USE's involvement as a shareholder in the Spin-Out Company is pursuant to the University's goal to commercialise academic excellence broadly across all industries, and being public entity, the University holds a multifaceted role which requires it to be cognisant of broad range of sensitivities (racial, cultural, political and academic) across both a national and international spectrum in all of its dealings. This position is contrasted with the position of a private shareholder (founder or investor) whose goals are likely directly aligned with the Spin-Out Company in isolation.
- The University's involvement as a public entity in the private sphere (by extension through USE) adds a layer of complexity, and if the Spin-Out Company does something that could negatively affect the University's reputation, USE requires the option to return its shares to the company. The rationale for this, is that the University's most valuable asset is its reputation, and it therefore needs to have the ability to dissociate itself from the company in case something happens involving the company that could jeopardise the University's reputation by association. The Put Option is included in all Spin-Out Company documents as a standard provision and the same right cannot be extended to other shareholders as this would dilute the effectiveness of the mechanism and also create a precedent amongst USE spin-out companies which is not acceptable, or fair to the previous parties who have not obtained the same right.
- USE's ability to exercise this right (the Put Option) cannot be exercised for flagrant reasons and if there is any dispute as to whether a certain issue is actually reputationally damaging, the definition itself provides for a dispute resolution process which allows the shareholders to ask an independent third party to consider whether the action by the Spin-Out company is in fact reputationally-damaging to the University. If that independent third party disagrees with the University, USE will not be entitled to return its shares to the company.
- The Put Option will be structured as a 'sale' of shares back to the company, but the company will not be put under any financial pressure. In fact, USE will sell its shares back to the Spin-Out company at a discount (70% of the share value) and the Spin-Out Company will only need to pay USE as and when it has the funds to do so, taking into account its budgeted capital and operational expenditures.

## *Employment*

If viable, you may be employed by the spin-out company. In that case, if you are also employed by the University, you may remain employed there, subject to University agreement (please refer to the University's terms regarding allocation of your time to the spin-out company and earning consulting fees) and the Conflict of Interest Policy.

Key employees of the spin-out company must agree to refrain from competing with the University and are subject to a confidentiality/proprietary information

## *Employment (continued)*

obligation to the University. Any inventions created by an employee of the company whilst also employed by the University shall belong to the University. See our mention of Improvements earlier in this document.

University employees and related benefits:

- If you are a shareholder or full-time employee of the spin-out company, you may be required to relinquish your rights to participate in the University's Royalty Policy.
- In terms of the University's Commercial Exploitation of IP Policy, a researcher may share in the proceeds or benefits of Innovus' shareholding (via USE) in the relevant spin-out company but if you acquire your own shares in the spin-out company, you waive the right to receive royalties as you will be sharing in dividends (the profits of the company).
- In circumstances where the spin-out company is majority owned by USE, the employees of the spin-out company may receive certain employment benefits available to employees of the University (such as disability insurance, pension and medical aid but excluding leave, study allowances and similar benefits).
- Income tax for earnings at the spin-out company is relevant, and we recommend that you seek appropriate tax advice.

## *Restraints and competing with the Spin-out Company*

During the Shareholding period (therefore once shares are no longer held by a shareholder, points 1 and 2 no longer apply):

1. Researchers cannot be involved in another business or company which sells products competitive with the Company's products or renders services competitive with the Company's services
2. Researchers cannot supply property or services relating to Company's services knowing that the person receiving the information intends to compete with Company.

During the Shareholding period + 2 years:

3. Researchers cannot encourage or entice Company employees to leave the Company, or furnish information or do anything which is designed to get Company's suppliers, clients or contacts to terminate their relationship with Company.
4. Researchers cannot solicit or tender for orders or to provide services from Company's clients/contacts, or canvass for business from Company's client's/contacts.
5. Researchers cannot share know-how or technology unique to the company relating to Company's services knowing that the person receiving the information intends to compete with Company.

So technically, during the period in which a person is a shareholder, if there is an activity which is potentially competitive with or complimentary to the service of the Company and the shareholder wishes to pursue such opportunity, then he/she will be required to notify the Company. The board (which will include the Researchers) will then make a determination on whether it makes sense for the Company to pursue the opportunity. If the board decides that it makes sense for the Company to pursue the opportunity, then the Company can internalise that opportunity and the researcher could still undertake the task as an employee; or if it doesn't make sense for the company to internalise the opportunity then the Company will waive its right and the researcher would be free to pursue it.

## Disclosures

Each of the Shareholders are required to make the following disclosures:

- they have not been convicted of or found guilty of committing a criminal offence;
- they are not currently, and have never been declared as an ineligible or disqualified director;
- they are not currently, and have never been declared as an unrehabilitated insolvent; and
- they are not aware of any incident or circumstance, currently in existence or in the past having occurred, which might reasonably cause reputational harm or damage to the University.

*The above disclosures shall be made in writing to the Company and each other Shareholder.*

## General

- If the fair market value of the spin-out company must be calculated for any reason, an independent expert will be appointed for that purpose if it is feasible.
- Dividends will only be declared when shareholders agree and a special resolution to this effect is passed.
- Researchers may not compete with the business of the spin-out company or its subsidiaries or acquire any interests in any business that does compete. They may not solicit or entice employees, customers or suppliers of the spin-out company.<sup>3</sup>
- Researchers may elect to have their shares in the spin-out company held by a family trust or company.
- Researchers must adopt and follow the Innovus Spin-Out Company Governance Framework.
- Nothing will restrict USE's rights to hold shares in other spin-out companies. This is because the University is bound by the principle of academic freedom to assist all academics to commercialise their ideas. However, Innovus will always manage this by internally segregating the personnel who work with the spin-out companies.

*Please adopt and follow the Innovus Spin-Out Company Governance Framework.*

## 4.2. Disclaimers

*Neither the University nor USE has any obligation, duty of care, fiduciary duty or any other duty towards the researchers (or any other inventor or author of any IP), whether in relation to the amounts to be received by them in terms of the Royalty Policy, in respect of any shares that they may be offered in any spin-out company or otherwise. The University and USE make no representations and give no warranties (i) regarding the likelihood of success or otherwise of any opportunity, (ii) in connection with any spin-out company or (iii) in connection with any personal tax consequences that may arise for a researcher or other author of IP out of their rights in terms of the Royalty Policy or any shareholding in any spin-out company.*

*This document cannot cater for the specific circumstances of every opportunity, but we look forward to building a unique framework for each spin-out company.*

*Neither Innovus nor USE are tax or financial advisors. Please seek your own tax and financial advice from a professional in relation to the tax treatment and finances of your shareholding in spin-out companies.*

<sup>3</sup> Refer to the [Conflict of Interest Policy](#).

# 5. What happens next?

## Reach out to Innovus

*Contact us to get started  
or just to get more information.*

*Anita Nel*

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and Commercialisation

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## Speak to previous spin-out founders

We have walked this journey with a great many spin-outs before, and we encourage you to speak to them directly. Please let us know if you would like to engage with other academics who have participated in spin-outs, and we will gladly introduce you. Or, have a look [here](#) at the spin-out companies we have supported and contact them directly.

## Useful links

*Innovus website*

[www.innovus.co.za](http://www.innovus.co.za)

*IPR Act and its regulations*

<https://www.dst.gov.za/images/pdfs/IPR%20Act%20of%202008.pdf>

[https://www.gov.za/sites/default/files/gcis\\_document/201409/33433675.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/33433675.pdf)

*SU Conflict of Interest policy*

[https://www.sun.ac.za/english/research-innovation/Research-Development/Documents/Policies%20and%20Guidelines/ENGLISH/Policy\\_on\\_Conflict\\_of\\_Interest\\_2013.pdf?](https://www.sun.ac.za/english/research-innovation/Research-Development/Documents/Policies%20and%20Guidelines/ENGLISH/Policy_on_Conflict_of_Interest_2013.pdf?)

*SU IP Policy*

<http://www.innovus.co.za/media/forms2010/101205%20Final%20IP%20Policy.pdf>

*SU LaunchLab*

<https://launchlab.co.za/startups/>

*University Technology Fund Application process*

<https://innovus.co.za/assets/files/UTFapplicationprocess.pdf>

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