MODULE 1: PREPARATION AND NEGOTIATION

Purpose of this module:

This module outlines the basic principles and steps involved in the first two stages in the life of any contract: preparation and negotiation.

This module has the following objectives:

- To highlight the importance of preparation to any contracting activity, regardless of how simple the agreement may seem;
- To provide some practical tools for guiding your preparation process;
- To explain what kind of agreements need to be formally documented through a separate written contract – and why – so that you understand from the outset what kind of approach you will need to take to the contracting process;
- To help you work out your bargaining position through the "P.A.N." (preferred, acceptable, not-negotiable) approach;
- To highlight the importance of negotiation and the process through which a negotiation can transition to a binding contract; and
- Provide some initial legal guidance around the transition from negotiation to binding contract, and introduce some of the ways in which you can protect yourself from making this transition before you are ready.

Contents of this module

A. Planning to enter an agreement – the critical step of preparation

Too often, parties push each other towards agreeing to a deal *before* they have each taken a step back to consider what it is that they really hope to achieve through the agreement – and what it is that they can realistically offer in terms of services and resources.

Taking the time to think through these questions is critical even for "simple" agreements. Just because an agreement is seemingly small or simple does not mean it is immune from going wrong down the track. A real life example is a "simple" $2,000 consulting agreement to provide expert witness services in a court case culminating in a multi-million dollar liability exposure due to the extreme sensitivity and controversy of the subject matter.

Good preparation need not take a lot of time. Certainly, for a large and complex contract, the preparation phase (and each stage in the life of the contract) will involve a significant investment of time and energy. However, for a simple agreement, good preparation may only involve spending a few minutes going through the following preliminary checklist in your mind.

PREPARATION: Preliminary checklist

Contract planning – preliminary checklist:

- ☑ Who are the parties? Do I trust them (and are they reputable)?
- ☑ What is the contract trying to achieve? Why?
- ☑ Can we live up to our end of the bargain? (Do we have the resources? Is it in line with University policy, any pre-existing contractual obligations, our legal and regulatory requirements, and any other ethical commitments we have?)
- ☑ What areas and people within the University might be affected, either directly or indirectly?
- ☑ What timelines are there? (For negotiation, signing, performance outcomes)
- ☑ What University approvals are required? (Committees, management approval)
- ☑ Is the agreement in the University's best interests and in line with its strategic objectives?

Part of the preparation phase involves making an assessment of what "level" of contract management will be appropriate for your agreement. Contracts can range significantly in value, duration, risk exposure and complexity. As a result, the nature and extent of contract management practices will vary, depending on the particular circumstances of a contract. During the preparation phase, you will need to exercise judgment about the contract development and management practices that are appropriate to the particular situation. If you are ever unsure about what level of management or formalisation is required, you should ask someone in the Legal and Risk branch, or someone in your area who has prior experience and expertise in contracting.

The University's *Contracts and Agreements Policy and Procedures* sets out a number of general factors that must be proactively considered before entering any agreement on behalf of the University. The Policy also contains a list of "triggers" to help you determine whether a separate, formal written contract is required – or whether you can simply document the agreement in an informal way. Finally, it sets out common requirements for *all* contracts, to guide you

The ***Contracts and Agreements Policy*** is a useful document to refer to when preparing to enter any agreement – it includes basic principles and checklists for contracting.

You can find it on the University website at**:** www.adelaide.edu.au/policies/2964/

through the stages beyond preparation – and provides more detailed steps to follow for more complex and formal agreements.

General factors that must be considered before entering any University agreement:

a) The reputation, standing and/or credit-worthiness of any outside parties with which the University will form a relationship under the agreement;
b) The need for the agreement;
c) Potential impacts on University resources, including personnel and infrastructure, or other areas of the University;
d) Whether the University can reasonably meet its obligations under the agreement;
e) Compliance with other University Policies, existing contractual obligations, legal and regulatory requirements, and any ethical commitments of the University;
f) Identification of the risks connected with the agreement, the relationship, the project or the activities, and how best to manage them, in accordance with the *Risk Management Policy*.

ALERT:
University Policy Requirements

B. How formally will my agreement need to be documented?

Any agreement entered on behalf of the University – no matter how simple it may seem – must be documented in some way. Simpler agreements may only need to be documented via an exchange of letters or emails, while for complex agreements it may be more appropriate to draft a separate contract.

The need to document and centrally store all University agreements is a requirement of the *Contracts and Agreements Policy*. This requirement ensures that all University contracts are trackable by "the University", regardless of which area enters or performs them. Over time, it will also enable the University to form a picture of its contracting obligations, the value of its contracting activity, and the breadth of its contracting partners across industry, government and the wider community.

The main reason for documenting a contract is to ensure clarity of the terms, so that the parties are on the same page regarding the obligations imposed and details agreed upon. Having the terms written down also makes it much easier to *prove* that you have an agreement, and to enforce the terms of that agreement down the track if required. Where an agreement is particularly complicated, a separate written contract can include specific terms that address what the parties will do if things happen to go wrong in the future, and set out agreed-upon rights for one party to exercise if the other party fails to meet its obligations under the contract.

The *Contracts and Agreements Policy and Procedures* contains a list of "triggers" to help you determine whether a separate, formal written contract is required – or whether you can simply document the agreement in a less formal way. These triggers (set out in *Table 1.1*) capture the main circumstances in which:

- **Ambiguities may arise** (therefore more clarity can be achieved through a separate contract, particularly since negotiating the written terms will require each party to really think about what they want the contract to say);
- **Things are more likely to go wrong and/or the University is likely to be exposed to higher risks if they do go wrong** (therefore the University wants to protect itself by ensuring that a separate contract properly defines the University's rights and how problems down the track will be dealt with);
- **The situation *requires* a separate written contract under the law** (such as where intellectual property is assigned, or where the agreement is with a Government entity); or
- **The University knows that down the track it may want to limit or end the agreement at its own convenience** (in which case the contract should include a means for that to happen).

TABLE 1.1: TRIGGERS FOR A SEPARATE WRITTEN CONTRACT

a) The agreement involves **ongoing (not once-off) obligations or tasks**, by the University or other party.
b) The contract deliverables or outcomes **require some explanation** (there is not a clear one line description of the contract output).
c) The agreement involves a **significant in-kind contribution by the University** or poses a **significant risk** to the University.
d) The agreement is to provide **research or expert related services** to an outside body, including as expert witnesses.
e) The agreement assigns or licenses **intellectual property** (including copyright) to or from the University, for existing or new material.
f) **Confidential or private information** may be disclosed under the agreement, by the University or other party, which requires protection.
g) An outside person or company is being engaged to undertake some activity for or on behalf of the University and the **University requires the contractor to comply** with certain legislative or regulatory requirements, and/or University Policies and Procedures.
h) Successful performance of the contract is **dependent on specific personnel** (either University or outside personnel).
i) The parties' obligations **extend beyond South Australia** (interstate or overseas), including all **international agreements**.
j) The agreement is with a **Government or Government entity**.
k) The agreement involves the sale or purchase of **land**, or lease of property.
l) The agreement is a **material transfer agreement**.
m) The University wants or needs to **limit** the agreement in some way.
n) The University needs or wants an ability to **end** the agreement at its own convenience.

ALERT:
University Policy Requirements

If one of the "triggers" applies to your situation, then the Procedures set out the steps that must be taken in terms of appointing a contract manager within the University, consulting with internal University stakeholders, drafting, ensuring the contract is appropriately vetted by legal advisors, and executing the contract. This process will be discussed in more detail in ***Module 2: Formalisation*** – but it is important in the preparation phase to identify whether you will need to follow this process (particularly the need to appoint a contract manager)

If none of these triggers apply, you may still consider that a separate contract is appropriate in order to ensure that all the parties are on the same page in terms of their intentions and the obligations imposed by the contract. It will never be inappropriate to document *more* than you need to, provided you take care to ensure that the terms you are documenting properly reflect and capture the agreement reached. Where only simple documentation is required (as distinct from a separate written contract), the handout contained at the start of *Module 2*, ***"Basic checklist for documenting and managing simple contracts"***, provides brief and practical guidance for handling such contracts on an everyday basis.

C. How and when a contract forms – the importance of negotiation

Legally enforceable obligations embodied in a contract usually come about after a process of negotiation. Such negotiation may take minutes, hours, days or even years. Until a contract is finalised, the parties generally have no enforceable right or obligations against one another; but the moment the contract comes into existence, they do. Determining the point at which a contract is formed is therefore critical.

The crossing of the line from no contract (with no obligations) to contract (with binding obligations) can involve significant consequences and, accordingly, risk. Parties may form different views of just when that

point has been reached. Some parties may not consciously communicate whether the point of consensus has been reached. One may begin acting upon the belief that a legally binding agreement has been reached, when the other party does not share that view.

There are situations where an arrangement that appears to be a "done deal" may not have yet achieved the quality of a legally enforceable "contract". For example, the parties may reach agreement on all of the important terms for their bargain but one or more of them may wish to reserve their right to withdraw from the deal until some further step is taken or condition is met (this is sometimes called a "precondition"). Or, the parties may agree on most of the important terms of their bargain and intend to be bound by it, but may have failed to agree on a fundamental detail that the whole deal remains uncertain or incomplete.

Sometimes parties might not be ready to enter into a binding contract but simply want to be able to assure another party of their commitment to continue negotiating towards a contract. A memorandum of understanding or letter of intent can be used to signal such a commitment.

When the parties finally do agree they are each bound by a contract, they may decide to put their agreement into writing. However, it is possible they will have different ideas about the significance of all of the negotiations that went before and elements of their communications that have not been put into the written form. Section 1.6 of this Module will address a set of practical questions regarding the negotiation phase.

D. Preparing to negotiate – understanding your bargaining position

There is no one right approach to negotiations, although it is generally best to aim to engender mutual understanding and a commitment to resolving issues in a co-operative manner. The University's ability to negotiate will depend on its bargaining power in any given relationship. Be aware that the University is a large organisation – and this can often be used to the University's advantage.

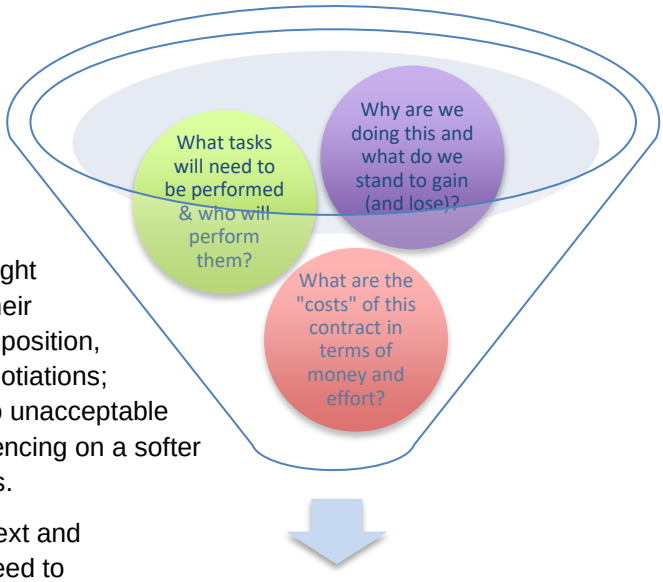
Whenever you enter a negotiation process, it is important to understand what your own bargaining position is. It is easy to get caught up in thinking about what the *other* side might want or demand of us, without actively thinking about what *we* want from the deal, what we would live with, and what we absolutely cannot accept under any circumstances.

The "P.A.N." approach:

- What is my **PREFERRED** position: what would be a "win"?
- What is my **ACCEPTABLE** position: what would I be happy to live with?
- What is my **NOT-NEGOTIABLE** position: what is my "bottom line", below which I cannot go?

Working out your preferred, acceptable and absolutely not-negotiable positions *before* entering into a negotiation will empower you to negotiate in full understanding of your goals and limits.

It can be equally helpful to anticipate what the preferred, acceptable and not-negotiable positions might be for the other parties. For instance, if you expect their acceptable position to be the same as your preferred position, then you can more confidently go in harder in the negotiations; but if you suspect your preferred position would be so unacceptable to them as to be not-negotiable, then perhaps commencing on a softer middle ground will lead to greater negotiating success.



The University's "acceptable" negotiating position

Your actual "P.A.N" positions will depend on the context and circumstances of each agreement. You will usually need to consider the dollar amount of the agreement (i.e. the amount you are prepared to pay, or the amount you expect to be paid) and the time frame (such as the time frame you are prepared to wait to receive some service, or the time frame within which you believe you can provide some outside research service). You may also need to

consider your position in relation to the people you hope to do business with. The "P.A.N." position may be a combination of many things.

Regardless of what success measures are being applied (money, time, people or other), there are some fundamental questions that may inform your determination of the preferred, acceptable and not-negotiable position in each case:

- ☑ Why are we doing this – and what do we stand to gain (and lose)?
- ☑ What tasks will need to be performed and who will perform them?
- ☑ What are the "costs" of this contract in terms of money and effort?

It is useful to think about each of these questions in terms of not only monetary costs and tangible resources, but also in terms of people (particularly where there is specialist expertise involved), risk (what we stand to lose), and reputation (the "intangible" benefits or risks of the deal).

Asking and answering these questions within the specific context of your potential contract can help you filter the University's acceptable position (as well as its preferred and unacceptable positions). Note that this position may need to be re-evaluated as negotiations proceed.

You may notice that these questions are closely related to the preparatory questions suggested in the preliminary checklist on page 1.2 above. This emphasises the inter-relationship between preparation and negotiation: good negotiations can only flow from good preparation, and thorough preparation will arm you for successful negotiations.

E. More detailed preparation: the pre-agreement evaluation

For more complex contracts, preparing to negotiate and ascertaining your bargaining position can be informed by undertaking a more detailed evaluation of the University context and motivations behind the intended agreement.

The pre-evaluation matrix below can provide a useful starting point. How each question in the matrix applies will depend on the nature of the proposed arrangement.

Where an arrangement is straightforward or part of the University's everyday operational activities, you need not undertake this evaluation, apart from confirming the financial suitability – the ***Preliminary***

Checklist contained in **Section 1.1** above may be more useful in simpler contracting situations. However, the more unusual or complex the arrangement, the more important it will be to consider each question before proceeding too far along the contracting process.

Answering "no" to any of the questions in the matrix does not necessarily mean you should stop the contracting process. Rather, this should prompt you to consider whether the agreement is viable and/or necessary. This may involve seeking input from your manager, or consulting with your local area's Business Manager or School Manager, who may have additional insights and information to assist you with early evaluation and planning. At any stage, you may also request help from Legal and Risk (helpdesklegal@adelaide.edu.au or 8303 5033).

Contract Preparation – Pre-evaluation Matrix

STRATEGIC	Does your proposed agreement align with: • the University's strategic plan? (https://www.adelaide.edu.au/vco/strategic-plan) • your Faculty / Division strategic plan? • your School / Branch plan?	Yes ☐ No ☐ Yes ☐ No ☐ Yes ☐ No ☐
	Does your proposed agreement align with the State's strategic plan? (https://premier.sa.gov.au/delivering-for-south-australia)	Yes ☐ No ☐
	Will your proposed agreement advantage the University?	Yes ☐ No ☐
	Will your proposed agreement maintain, protect or enhance the University's brand and reputation?	Yes ☐ No ☐
	Is the other party suitable? (e.g. is it reputable; have you worked with it before?)	Yes ☐ No ☐
	Have you checked that a relationship with the other party will not cause conflict with any existing University relationships?	Yes ☐ No ☐
OPERATIONAL	Does the University have the skills, knowledge or experience required to perform its obligations under the proposed agreement?	Yes ☐ No ☐
	Are there sufficient personnel or human resources to manage the proposed agreement and undertake the University's obligations under your proposed agreement?	Yes ☐ No ☐
	Does the University have the infrastructure or equipment required for your proposed agreement?	Yes ☐ No ☐
LEGAL	Is your proposed agreement legally acceptable? (i.e. does not contravene any law)	Yes ☐ No ☐
	If your proposed agreement creates any additional compliance obligations on the University, are you confident these can be met? Have you confirmed this with Legal and Risk?	Yes ☐ No ☐
FINANCIAL	If your proposed agreement involves exchange of money, is it of appropriate commercial value? (don't forget to take into account any oncosts)	Yes ☐ No ☐
	If your proposed agreement involves expenditure, is this within an approved budget and does your area have sufficient resources/funds for the term of the contract? (don't forget to take into account any oncosts)	Yes ☐ No ☐
RISKS	If you have answered "No" to any of the above, your proposed agreement may pose a **risk** to your area or the University as a whole. • Is the risk acceptable and manageable? • Is there a greater risk to the University if the agreement is NOT entered into (e.g. political, threat to existing relationship, loss of market position)? If you have answered "No" to both these questions, you should seek higher level approval before proceeding any further with your proposed agreement.	Yes ☐ No ☐ Yes ☐ No ☐

F. Never assume negotiation is "futile"

Even when presented with the standard terms and conditions of large corporations like Canon or Microsoft, do not assume that these cannot be negotiated. Those standard terms and conditions are typically very one-sided in favour of the other party. While those parties are unlikely to be receptive to the University putting forward its own drafted contract, or wholesale changes to their terms and conditions, in many cases, the University has at least been successful at negotiating a more equitable position on some of the more extreme clauses in their terms and conditions.

Where contract negotiations are on more even footing, the following principles will assist:

- Agree on the make-up of the negotiating team of both parties – this will ensure that there is a consistent voice speaking for all sides.
- Allow sufficient time for negotiations. Rushing is not conducive to a mutual understanding and meaningful outcome, and the University will always be on the back foot if the contract must be finalised within days.
- Establish timeframes in which negotiations of individual issues, as well as negotiations overall, will be conducted. For larger contracts in particular, negotiating in small steps will make it easier to reach agreement and prevent the process from seeming insurmountable.
- Have a clear idea of the University's bargaining position – including through a "PAN" (preferred, acceptable, not-negotiable) analysis as set out in Section 1.4 above.

G. Legal guidance: the transition from negotiation to binding contract

The guidance provided here is intended to help you understand the general nature of the transition from negotiation to binding contract.

If you are dealing with a specific situation and are unsure if you may have bound the University before you intended to, you should discuss that case with Legal and Risk as soon as possible. They will be able to provide more relevant assistance taking into account the facts of your particular circumstances.

(a) How can the University be adequately protected becoming legally bound before intended?

Firstly, make it clear to the other party/s that the University will only be bound once a written contract is signed by a properly authorised officer of the University. Be honest with the other parties: tell them that you can negotiate the terms, but you are not authorised to accept the final terms and sign the contract on behalf of the University. Explain that there are internal approval mechanisms (such as committees or management lines) that must be followed. Ideally, after you have explained this to the other parties, confirm it to them in writing.

If you do not clearly state this, and behave as if you have more authority than you really do, then the other party may be entitled to assume that you *are* authorised to bind the University. This could result in you committing the University to something before it has been properly authorised internally.

However, if you communicate openly about the limitations of your authority, then it would be unreasonable (and dishonest) for the other party to act like the contract is binding before it has been through the proper University channels.

If you *are* authorised to bind the University (for instance, if you are a senior manager negotiating a contract), you may need to be much more careful about what commitments you make before written terms are drawn up, as your words may more readily bind the University. Make it clear, in writing (email or letter), that until a contract has been drafted or reviewed by your legal advisors, and subjected to any relevant internal University approval mechanisms, the University does not intend to be bound by any agreement.

Secondly, until the contract is signed, do not commence activities under the contract or do anything that may be construed as authorising the other party to proceed with work under the contract. This will significantly reduce the University's ability to negotiate the terms of a written contract, and the University

will run the risk of having created an uncertain oral or implied contract – in other words, being contractually bound before it intends to be.

(b) How can parties define the moment that a contractual relationship comes into being?

This depends on the circumstances of each particular contract. The best way is to ask when there was a "meeting of the minds" or consensus reached on the critical aspects of the agreement. However, this consensus must occur *between the legal entities entering the contract*.

For instance, if the University contracts with an outside company, then a consensus reached between the negotiating representatives of each could only represent consensus between "the University of Adelaide" and "the outside company" if each representative is clearly authorised to bind the corporation.

This highlights the importance of question (a) above: it is crucial to be honest about the extent of your authority. Provided you are honest about your need to get internal approvals within the University, it will be much harder for the other party to claim the contractual relationship has become binding before the University believes it has. Conversely, if the other party's negotiator has made it clear that he/she does not have the authority to bind that party, do not rely on their word without a written contract.

(c) How far can parties go in securing a commitment from another party to continue negotiations without becoming prematurely bound by a contract?

As with most situations through the life of a contract, intention is paramount here – and clearly communicating your intention is the key to minimising confusion.

Exchanging an intention to continue negotiating in good faith (such as in the form of a letter of intent or memorandum of understanding) will not prematurely bind the parties, provided the exchange is *only* expressing an intention to negotiate, and does not purport to place any legally binding rights or obligations on any of the parties.

A memorandum of understanding is a common tool used to document such intention.

Ideally, the MOU should include a statement that neither party intends to be legally bound until the intended negotiation has resulted in the finalisation of a written contract, duly authorised and signed by each party.

However, be aware that if it does not include such a statement, and it actually documents rights and obligations upon which the parties intend to be able to act, then it is a binding "contract" regardless of it being titled an "MOU".

(d) What devices can legitimately be used to secure a binding obligation before all of the details have been thrashed out?

If the parties have reached agreement on all of the important terms for their bargain, and want to commit to the deal but continue thrashing out certain details, then a preliminary contract (sometimes referred to as a 'Term Sheet' or 'Heads of Agreement') could be drawn up that documents the agreed terms, states the timeframe and/or basis for the negotiation of the remaining details and gives each party (or one party, depending on the circumstances) rights to withdraw from the deal up until such time as the additional details are negotiated and a final contract drawn up incorporating those terms. Thus if agreement cannot be reached on the details, the parties can still walk away or the preliminary contract will lapse. If you are employing this kind of arrangement, it is strongly recommended that you seek legal advice before committing.

(e) What happens when the other party, believing that the contract is binding, acts upon that belief, when I don't think there has been an agreement yet?

Hopefully, if you have followed the advice under (a) and (b) above, then this should not happen, or can be resisted by pointing to the lack of authority for you to bind the University in the absence of a contract signed by an authorised officer.

However, if you do notice that one party starts acting in a way that suggests they believe the contract is binding, when you consider the negotiations to still be ongoing, and if you are unable to simply point to your previous communications about lack of authority, then you should seek legal advice immediately. Do not simply ignore their actions in the hope they will revert to negotiating. By seeking legal advice immediately, your legal advisor can help work out whether the contract may in fact be binding already, and help you communicate about the issue with the other parties in a way that will not compromise the University's position (or do so only minimally).

(f) When parties do finally conclude a contract and put it in writing, what is the relevance of their prior discussions – and when might parties be bound by aspects of their prior agreement that are not found in the ultimate printed document?

This is a complex area of law, which is highly dependent on the circumstances of each contract. One common tool used to avoid confusion in this area is to include a term in written contracts that state that it represents the "entire agreement" between the parties. While this can be a useful tool for stopping things that were said in negotiations from coming back to bite you, it can also work *against* a party if they do not carefully check the written terms to ensure that all the terms agreed upon, which are important to them, are included in the formal contract.

While you are negotiating, it is a good idea to keep notes of the negotiation sessions, particularly of any things that are "agreed" to throughout the process. When the draft contract is presented, you can then check the terms against your notes, and make sure that all the agreed details of importance to the University are included. If something is missing that you think should be included, inform your legal advisor, so that they can suggest additions or amendments to the contract terms while it is still in a draft phase.

Additional resources and training: If you would like more training around the art of successful negotiations, the Legal and Risk team can provide you with additional materials or customised training upon request

