

# MODULE 2: DRAFTING AND FORMALISATION

## Purpose of this module:

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This module outlines the process through which a contract is drafted and formalised.

Even when a general consensus has been reached in an agreement, the drafting and formalisation stage often involves ongoing negotiations about specific details or terms and requires a constant awareness of the preparatory background and *why* you are entering a contract. The principles discussed in *Module 1: Preparation and Negotiation* remain equally relevant throughout the formalisation phase.

This module has the following objectives:

- To give a simple overview of the steps required to adequately document and manage simple contracts (where no separate written contract is required);
- To further explain what kind of agreements need to be formally documented through a separate written contract – and how that process should be managed;
- To provide some guidance around the definition of contract deliverables and performance measures; and
- To outline the process around signing a contract, including University sign-off and the proper storage procedure for signed agreements.

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## A. Introduction – what level of formalisation is required?

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Any agreement entered into on behalf of the University – no matter how simple it may seem – must be documented in some way and recorded in the University’s centrally accessible records management system. 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.

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 is set out in Table 1.1 in *Module 1*. They have been developed specifically for the University context – and were designed to capture the main circumstances in which ambiguities may arise, or in which things are more likely to go wrong (or expose the University to higher risks if they go wrong). There are also some situations in which the law requires a separate written agreement, such as the transfer of intellectual property; and there are cases where the University may wish to limit or end the agreement at its own convenience in the future. In all these cases, a separate written contract is required to address the relevant issues properly.

If one of the “triggers” applies to your situation, the Procedures set out the steps that must be taken in terms of consultation, formalisation and ensuring the contract is appropriately drafted and vetted by legal experts. This process will be discussed in more detail in Section 2.3 below. If none of the triggers apply, you may still consider that a separate contract is appropriate 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.

However, it is understood that sometimes an agreement is so simple that it does not need to be accompanied by any bells or whistles. Where no triggers apply, and only simple documentation is required, then Section 2.2: ***Basic checklist for documenting and managing simple contracts***, set out below, provides some guidance for handling such contracts on an everyday basis.

## B. Basic checklist for documenting and managing simple contracts

Having followed the **Contract Planning Preliminary Checklist** (see Section 1.1 of *Module 1*), determined that no separate written contract is required (Section 1.2) and reached agreement on the terms of a simple contract, this checklist will help you comply with the requirements of the *Contracts and Agreements Policy* – and protect you in the event that even your simple agreement goes wrong down the track.



**ALERT:**  
University Policy  
Requirements

CHECKLIST: DOCUMENTING AND MANAGING SIMPLE CONTRACTS

**Make sure the agreement is properly authorised within the University.**

Ensure what you are committing the University to is in line with your own delegations (financial *and* non-financial) – if not, get the approval of someone who is authorised to bind the University in that way.

**Keep others in the loop if they need to be informed.**

Even though the agreement is very simple, there may be other people in the University that need to know about it. Ask yourself whether there is:

- Anyone else in the University who might need to *do something* in connection with the agreement, directly or indirectly? (Note: if there is anyone in this category, consult with them *before* committing)
- Anyone else in the University who also has an agreement with the same party, that might be impacted in some way by your agreement (or interested to know about it)?
- Anyone else in the University that might be affected by the agreement in some other way (eg, a time or work commitment you previously made to them might be altered by this new agreement)?

If you identify any people who need to know (or might want to know), let those people know about the agreement – all it takes is a brief email but it will be appreciated as a collaborative courtesy!

**Be sure to make the agreement in the name of the University of Adelaide.**

The University is the only “legal” entity – so do not make the agreement in the name of any sub-unit of the University (such as a School or Research Centre). In the case of a simple agreement, this simply means using language in your documents that indicates you are agreeing “on behalf of the University of Adelaide”.

**Document the agreement in a manner that is suitable given the nature of the agreement.**

- Clearly and simply state what it is that has been agreed – especially the rights and obligations of the parties.
- Confirm that the terms are agreed by *exchanging* letters or emails.
- Print the exchange that shows the terms have been agreed, collate it and register it as a “legal document” through Records Services using the prescribed form (see [Forms & Templates | University Library | University of Adelaide](#)).
- If there was any negotiation process (such as a back-and-forth over price or some other condition) then make sure that negotiation has been transparently recorded – again, through emails or letters – and keep those records on a University file.

**Comply with applicable laws and University policies and procedures.**

eg: Policies and Procedures relating to procurement, receiving revenue, records, conflicts of interest.

**Take (or assign) responsibility for following up the agreement to make sure it happens**

This includes making sure anyone involved in performing the contract obligations (no matter how simple they seem) have been communicated with so that they understand what they are meant to do and when.

**If in any doubt, check with the Legal Services Branch.**

It’s better to be safe than sorry – if something feels wrong, check with a lawyer within Legal Services.

## C. Separate written contracts

If one of the “triggers” applies to your situation – as will usually be the case where your contract is one of those listed within Table 2.1 below – or if you otherwise consider that a separate written contract is justified, this section will address the steps that must be taken to create a formal contract.



### *Contract Manager*

**ALERT:**  
University Policy  
Requirement

If a separate written contract is required, you should appoint a University Contract Manager as early as possible, to take responsibility for overseeing the development, negotiation and execution of the contract, as set out in the rest of the Handbook.

Who will be the most appropriate University Contract Manager will vary in each case. It should be someone of suitable seniority to negotiate on behalf of the University – or someone who is skilled and experienced in the subject matter of the contract, with sufficient technical understanding of the contractual arrangements to manage the process. Often, the Contract Manager may not be a delegated signatory, and therefore will not be authorised to complete and execute the contract on the University’s behalf. Care must be taken not to overstate your authority when negotiating with outside parties, as discussed in Section 1.6 in *Module 1* above.

**TABLE 2.1: At a local area level, what kind of contracts are we talking about?**

*The following are examples of local area agreements that usually “trigger” a separate written contract:*

<p><b>Teaching-related</b></p> <ul style="list-style-type: none"> <li>• Engaging a consultant to develop and deliver curriculum and/or course materials</li> <li>• Collaborating with other educational institutions or professional organisations on curriculum and/or course materials</li> <li>• Licensing teaching materials from another organisation</li> <li>• Joint program and/or course delivery</li> <li>• Pathway or articulation arrangements with other universities or TAFE</li> <li>• Student placement / internship agreements</li> <li>• Sponsorship from companies for student projects or prizes / scholarships</li> <li>• Teaching &amp; learning grants</li> </ul>	<p><b>Research-related</b></p> <ul style="list-style-type: none"> <li>• Research grants</li> <li>• Contract Research</li> <li>• Research collaboration</li> <li>• Consultancies</li> <li>• Clinical trials</li> <li>• Subcontracting out work under research grants, contract research and/or consultancies</li> <li>• Material Transfer agreements</li> <li>• Confidentiality agreements</li> <li>• Permitting visiting students / staff from other institutions to work on a University research project</li> <li>• Secondments to and from external organisations</li> <li>• Joint ventures</li> </ul>
<p><b>Facilities-related</b></p> <ul style="list-style-type: none"> <li>• Arrangements to use someone else’s space or equipment</li> <li>• Arrangements for someone else to use the School or Faculty’s space or equipment</li> <li>• Purchasing and/or leasing equipment or materials</li> <li>• Joint purchase of equipment</li> <li>• Transfer of equipment (e.g. if a staff member transfers to another university and wishes to ‘take’ equipment with them)</li> <li>• Software licences</li> </ul>	<p><b>Other</b></p> <ul style="list-style-type: none"> <li>• Providing services to other parties</li> <li>• Engaging other parties to provide services</li> <li>• Strategic MOUs with educational bodies, Government or companies</li> <li>• Staff/student exchange</li> </ul>

## Contract specialist areas – making the most of the University’s contracting expertise

When an agreement relates to an area where there is existing internal operational expertise within the University – such as capital works, intellectual property commercialisation, or international agreements – you must consult with that area to determine the appropriate contract manager. Sometimes, it may be appropriate to maintain management within the local area, while for more complex or University-wide agreements, it may be more appropriate to have someone from a contract specialist area act as the contract manager.



**ALERT:**  
University Policy  
Requirements

For some agreements, there will be a pre-determined specialist process to follow; for others, what process is appropriate to the agreement will be something determined based on the individual circumstances. Either way, it is in the best interests of the University and of individual local areas to make the most of the contracting expertise that is already present within the institution – your time is too precious to be reinventing successful practices and relearning expertise.

<b>TABLE 2.2 Contracts and Agreements Relating to</b>	<b>Specialist Areas or Officers</b>	<b>Framework/Policy Process to Follow</b>
International arrangements – any contract to be entered into with a party not located in Australia which relates to teaching, research, students or other forms of cooperation or joint activity	Pro Vice-Chancellor (International)  Chief Security Officer	<a href="#">Foreign Engagement Compliance Review</a>  Other processes as directed
Jointly conferred academic (coursework) awards	Deputy Vice-Chancellor and Vice-President (Academic)	<a href="#">Jointly Conferred Coursework Awards Policy</a>
Jointly conferred academic (higher degree by research) awards	Deputy Vice-Chancellor and Vice-President (Research)	<a href="#">Jointly Conferred Higher Degree by Research (HDR) Awards Policy</a>
Use of University brand (including name, logos, trademarks)	Marketing and Communications	<a href="#">Brand Policy</a>
Competitive research grants	Research Services	<a href="#">Research Grants, Contracts and Consultancies Policy</a>
Research contracts, non-competitive research grants or consultancy services	Innovation and Commercialisation Services, Business Development	<a href="#">Research Grants, Contracts and Consultancies Policy</a>
Protecting and commercialising intellectual property (including related Confidentiality Disclosure Agreements and Material Transfer Agreements)	Innovation and Commercialisation Services, Commercialisation	<a href="#">Invention Disclosure Form</a> ; <a href="#">Intellectual Property Policy</a>
Collaborative research ventures with external parties	Deputy Vice-Chancellor and Vice-President (Research)	<a href="#">Research Centres and Research Institutes Framework - Joint Research Ventures with External Partners Template</a>

Establishment or acquisition of Controlled Entities	Legal Services Branch Innovation and Commercialisation Services	<a href="#">Controlled Entities Policy</a>
Capital works (major and minor building work and infrastructure projects) or other arrangements relating to premises or real property	Infrastructure Branch	As directed by <a href="#">Infrastructure Branch</a>
Procurement of goods and services	Strategic Procurement	As directed by <a href="#">Strategic Procurement Financial Management Policy Procurement Procedures</a>
Maintenance and utilities supply Agreements	Capital Projects and Facilities Management	As directed by Capital Projects and Facilities Management
Information Technology software licensing or implementation	Information Technology and Digital Services	As advised by <a href="#">Information Technology and Digital Services</a>
Information Technology Third Party Hosting services	Information Technology and Digital Services	<a href="#">Third Party Hosting Security Guidelines</a>
Information Technology Hardware Purchasing or Implementation	Information Technology and Digital Services	As advised by <a href="#">Information Technology and Digital Services</a>
Contracts of employment and appointment of titleholders	Human Resources Branch	As directed by <a href="#">Human Resources Branch Recruitment Policy</a>
Engagement of consultants or contractors	Human Resources Branch	<a href="#">Information Sheet for Engaging Independent Contractors</a>
Gifts, sponsorships, externally- funded scholarships	External Relations	<a href="#">Giving Policy</a>
Externally-funded postgraduate research scholarships/sponsorships	Adelaide Graduate Research School	As directed by <a href="#">Adelaide Graduate Research School</a>
Contracts enabling access to learning or teaching resources by University personnel or students	Adelaide University Library	Consultation with University Librarian
Insurance contracts	Risk and Insurance Branch	As directed by Manager, Insurance
All contracts containing or proposing a 'hold harmless' clause or provision	General Counsel	<a href="#">Hold Harmless Briefing Note and Application Form</a>

## Significant Contracts

A particular contract is considered 'significant' if it satisfies any one of the criteria identified in the Table below.

<b>TABLE 2.3</b> <b>A contract is a significant contract if it satisfies any of the following criteria*</b>	<b>Exclusions</b>
The contract commits the University to an investment or potential liability, or will generate revenue (including research income), in excess of \$2 million (whether in-kind or cash, and assuming that any options are exercised by the University)	\$2 million threshold to be calculated without reference to any funds the University receives and distributes for the benefit of a third party (e.g. under administering authority arrangements)
The contract relates to activities which require a formal risk assessment in accordance with Procedure 2.1 of the Risk Management Policy	None
The contract is entered into with a third party which is recognised as a strategic partner of the University, i.e. Defence industry partner, State or Commonwealth Government Department.	Excludes grants and regularly occurring research activities occurring under legal terms which have previously been approved by Legal Services Branch  Excludes student exchange agreements and credit transfer agreement
University Council or any of its standing committees have been briefed about the contract or its underlying activities	None
The contract is likely to impact or enhance the University's CRICOS licence	Excludes the engagement of student recruitment agents
The contract is for the delivery or supply of key strategic enabling services, infrastructure or technology (e.g. electricity supply, internet services or facilities management)	None
The purpose of the contract is to commercialise intellectual property, or the contract will result in the University holding equity in an external entity or in the creation of a controlled entity (for example, a commercialisation lead agreement, technology licence agreement, distribution of proceeds agreement, option agreement, royalty deed etc)	Excludes participation in companies limited by guarantee or incorporated associations which do not impose commitments on the University above mere membership  Excludes contracts which will be executed by Innovation and Commercial Partners Pty Ltd instead of the University
The University's obligations or activities under the contract will require a unique or separate regulatory permit, approval, and registration either in Australia or overseas which is not already held by the University	Excludes mere notification of a contract to the Foreign Arrangements Scheme

Significant contracts call for additional governance and management requirements as follows:

### Contract Development and Execution

- documented due diligence on all counterparties
- legal advice obtained unless the contract is based on an approved University template
- identifying the obligations of the parties, performance measures and intended outcomes
- the contract must be registered in an approved contract register as a 'significant' contract
- a formal risk assessment must be done in accordance with the Risk Management Policy with identified risks recorded on an appropriate risk register

## Ongoing Contract Management

- appoint a contract manager with appropriate skills, time and resources to adequately manage the contract
- develop a contract management plan that:
  - outlines objectives, intended outcomes and success factors for the contract
  - describes how the contract will be managed
  - outlines how the University will comply with the contract
  - identifies how risks will be identified and managed
  - allocates clear roles and responsibilities for the above.

### *Seeking internal approvals – and keeping other areas in the loop*

If the activities being proposed under your agreement involve a significant commitment by the University in terms of finances, resources or obligations, it is a good idea to seek in-principle approval from your Head of School or other relevant senior manager at an early stage, to avoid investing a lot of time and energy without the support you will ultimately need to get the deal approved internally. The extent of senior management involvement in the development of the contract will depend on the complexity and sensitivity of the contract. Regardless of the complexity, agreements that commit University resources or commit the University to act in certain ways may *only* be entered into by staff with the delegated authority to do so – and any University approval processes required to properly authorise an agreement (such as committee approvals) must be undertaken *before* any commitments are made to outside parties. Making sure those who are authorised to sign-off on your agreement are on board from the outset is critical.

Where the agreement involves or impacts on other areas of the University, you should consult with people from those areas as early as possible in the process. These other areas of the University may have separate considerations that should be taken into account when formulating the agreement – and which you may not be aware of or think about on your own. Early engagement of relevant stakeholders will avoid unexpected delays later. There have been instances where agreements have been drafted and negotiated in isolation and presented for signature, only for signing to be delayed or even refused when other affected University areas discover the arrangement for the first time, and determine that it is not compatible with University operations.



If you know that other areas of the University have existing or prior agreements with an outside party you are dealing with, then you may be able to obtain negotiating hints (and copies of contracts) from those other areas, to save yourself time. Or, if you know that other University areas are also contemplating contracting with the same party, you may be able to combine your bargaining power. Existing contracts are searchable on Content Manager as 'Legal Documents', or you may request the Records Services to undertake a search for you.



### *Example 1: Consulting the right areas*

The School of Music wants to set up a joint degree with two foreign universities which will be delivered fully online. What University areas does it need to consult?

- ☑ **Learning and Quality** – the new program needs to be approved by Program Approval Committee, and follow the requirements of the *Jointly Conferred Academic Awards Policy*.
- ☑ **Pro Vice-Chancellor (International)** – this arrangement involves international universities, so the International Agreements Framework must be followed, which includes pre-approval for certain aspects of the agreement.
- ☑ **Student Administration** – on operational issues like enrolment, fees, examinations, graduations.
- ☑ **Marketing & Communications** – regarding the use of the University's logo by the other Universities.
- ☑ **Finance and Procurement Services** – on potential taxation implications, particularly given the international context.
- ☑ **Information Technology and Digital Services** – to make sure there are no issues using the University's web servers to host the site (or ensure our students can feasibly get access if the site is being hosted by one of the partner institutions).

If your agreement is related to any of the arrangements listed in Table 2.2 above, you must consult the relevant specialist area and follow any applicable internal University processes listed. The specialist area will be able to provide assistance in developing and formalising the contract.

### *Example 2: Institutional memory – and not reinventing the wheel*

The School of Earth & Environmental Sciences is negotiating with Primary Industries and Resources SA (PIRSA) for PIRSA to fund some student scholarships.

The School undertakes a search on HPE Content Manager and discovers that the University has an existing contract for PIRSA to fund scholarships for students in the School of Agriculture, Food and Wine. Speaking to that School reveals that this agreement has been operating well, so the parties agree to use the same contract terms for the new scholarships. This reduces the need for lengthy negotiations and legal review.

## D. Drafting the contract: theirs or ours?

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In most cases, it is preferable to use a contract which has been drafted by the University. This may not always be feasible due to the nature of the transaction, the nature and size of the other party or the relative bargaining positions. However, whenever appropriate, you should propose to the other party that the University draft up the contract. This is particularly desirable for collaborative or strategic arrangements, or for commercial arrangements which go beyond the procurement of simple goods or services.

Nonetheless, having the other party draft the contract is not fatal, since there is always scope to review and negotiate terms before a contract is signed – a “draft” contract is exactly that. If the other party issues a contract, the Contract Manager (and any other relevant University personnel) should read through to check that all the terms of importance that were agreed during the negotiations are included – and to ensure nothing unexpected has been inserted.

**Using a contract drafted by the University is preferable – but not a deal breaker!**

The Contract Manager should then submit it for legal review, either to the Legal Services Branch or to an external lawyer, and accompany the draft with some of the basic information requested in the *Contract Drafting/Review Instruction Form* (available on the Legal Services Branch website, and included as an Appendix 2.1 to this Module). The Contract Manager should provide all the necessary contextual information to enable the legal advisor to fully understand the matter and be able to provide relevant and accurate advice and suggest amendments which you can use to further negotiate the final details and terms.

In some rare cases, where the other party has a significant bargaining advantage over the University, there may be little or no scope to modify terms in the draft agreement that the other party presents. This may be the case when dealing with large corporations for ‘off-the-shelf’ goods or services. However, even in those cases it is still important to thoroughly review the proposed agreement, so that it is understood exactly what the University is agreeing to – and because the University has often been successful at negotiating a fairer position on some of the more extreme clauses.

In other words, you should never refrain from getting the draft contract checked simply because the other side tells you the terms are not negotiable, “standard terms” with “no chance” they can be changed.

If some of the terms are so problematic that the University would ordinarily wish to alter them, then at least the risk associated with those terms can be properly weighed up before signing – and the University can either walk away, or proceed with full understanding of that risk. This is particularly important if the contract contains indemnity or ‘hold harmless’ clauses.

If the other party has not provided a contract, or has agreed to the University drafting up a contract, the Contract Manager is responsible for instructing Legal Services Branch or an external lawyer to draft the contract, again using the *Contract Drafting/Review Instruction Form*.

### *Using standard form contracts*

For some common arrangements, such as engaging consultants, a standard form contract may be available. These contracts are a “template” that contain set terms and conditions, so that the Contract Manager need only fill in the key commercial information such as details of the contractor, a description of the service being provided, the payment terms and any other special conditions.

Standard form contracts are **not** suitable for complex or high-risk arrangements – even if that arrangement is, at a basic level, a kind of contract that could usually follow a standard form in simpler cases. For instance, even though simple consultancy agreements are perfectly suited to a standard form contract, you may need a customised contract for a complex and long term consultancy arrangement involving high risk or high value services, interaction with other arrangements or difficult to measure performance indicators.

Please refer to the Legal Services Branch website ([www.adelaide.edu.au/legalandrisk/](http://www.adelaide.edu.au/legalandrisk/)) to see if there is a suitable standard form contract for your arrangement. In addition, further guidance is included in **Module 6: Standard Form Contracts**.

If your area frequently engages in the same kind of transaction with various outside parties, you may wish to discuss the possibility of developing a standard form agreement with Legal Services Branch. This will make the creation and finalisation of such agreements much simpler and quicker. It also helps staff in your area handle that type of agreement in a consistent, predictable and efficient manner.

Each standard form contract available on the Legal Services Branch website will contain detailed instructions for use. Once the variables have been completed, the Contract Manager should send the contract to the Legal Services Branch for a quick review of the terms (particularly of the contract deliverables described). This is an important step to confirm that your insertions convey your intended meaning, and also make sure that the standard form contract being used is appropriate in the circumstances.

### *Custom drafted contracts*

If no standard form contract exists or is appropriate for the arrangement, the Contract Manager must instruct either the Legal Services Branch or an external lawyer to draft the contract, using the *Contract Drafting / Review Instruction Form* (Appendix 2.1 to this Module).

This form will save a lot of time for both you and your lawyer, since it asks for the details required by the lawyer in order to draft a contract. Be mindful that contracts may take some time to draft, so ensure you budget for this in your timeframe.

If you know during the preparation and negotiation phase that the University will be drafting the contract, it may be useful to bring your legal advisor into the loop early on, so that they can support you through the process, as well as gain a more comprehensive understanding of the agreement.

If you would like to learn more about common terms or clauses that appear in many contracts (often called “boilerplate” clauses), some of these are described and discussed in **Module 7: Common terms and boilerplate clauses**. That module also identifies some common clauses that should not be treated as “boilerplate” but should instead be treated with caution and specifically addressed before signing.

## **E. What you are agreeing to: defining contract deliverables**

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Regardless of the form of contract used, one of the most critical aspects of any contract is the planning of and description of contract deliverables. These are the tasks, outputs or commitments that are being agreed to in the contract, which the parties are required to perform or “deliver” as part of the deal.

Simple agreements can have very simple deliverables. For instance, agreeing to have someone come and deliver a once-off guest lecture has “deliverables” that can be described in one or two sentences: “Professor X from the University of South Australia will be paid \$300 to come on the 3<sup>rd</sup> of March, 2010 and deliver a

guest lecture on human rights in the Law School at the University of Adelaide, between 5 and 6pm.” Having such simple and easily described deliverables means that agreeing that detail through an exchange of letters or emails may suffice.

Where contract deliverables are more numerous or complex, a separate written contract is usually required. The contract should clearly set out:

- **WHAT** needs to be delivered or performed
- **HOW** these things are to be delivered or performed (e.g. to what standard, or with what method)
- **WHEN** (e.g. a single deadline or a series of milestones)
- **WHERE** (if the location of performance is critical)
- **BY WHOM** (this is particularly relevant if there are key personnel with particular skills)

**Contract “deliverables”**  
are the **what, when, where, how** and **who** of your agreement...

It is crucial that you flesh out this detail in the contract – and never lose sight of the **WHY** when doing so!

The deliverables should be as concise as possible (while at the same time fully describing the requirement), complete and correct, and clear, consistent and unambiguous. Critically, the deliverables should also be feasible and achievable, and described in a measurable and verifiable way, so that the parties are able to determine whether they have been achieved or not.

The deliverables or statement of work can either be set out in the contract itself (usually in a Schedule) or may have already been created as a separate document during the negotiation (e.g. as a proposal), in which case that document can be appended to the contract.

In defining contract deliverables, it can often be important for the contract to reflect the fact that the deliverables may need to be amended over the life of the contract to take account of changing circumstances or requirements, and for the contract to provide for a mechanism to amend the deliverables. This is particularly the case for many service contracts such as IT services.

### *Examples – deliverables that are measurable and verifiable:*

  
**TOO VAGUE**

**A. “The contractor will assist the University in developing a management plan”**

There is no indication of what sort of assistance is required. If the contractor provided only the barest assistance, he would have satisfied this requirement but the University would have no meaningful output.

**B. “The contractor will conduct a review of the Faculty of Sciences research operations, with particular focus on the issues set out in Appendix 1, and provide the University with a report on the outcomes of the review including suggested strategies for improvement. The report must be submitted by 31 December 2010.”**

  
**ACCEPTABLE**

In developing your statement of work, bear in mind that some kinds of University agreements need flexibility (particularly where research or innovation is required) whereas others are of a nature that is most effectively managed through a clear prescription of the methods and processes to be used.

### *Examples – flexible versus prescribed processes:*

  
**ALLOWS FLEXIBILITY**

**A. The University receives funding to undertake a study of the connection between car accidents and drivers using their mobile phones while driving. The University’s obligation is to “deliver a report at the end of 6 months.”**

This deliverable provides flexibility, to allow for innovation and a free approach to the research - the University is free to choose how to conduct the research, with the only constraint being the deadline.



## APPROPRIATELY PRESCRIPTIVE

**B. The University engages a cleaning company to clean University premises. The contract specifies that cleaning of an animal laboratory may only be undertaken with certain cleaning agents.**

This is critical because the animals in that lab have been bred with low immunity and are affected by the presence of chemicals contained in harsh cleaning agents. Where the University requires goods or services to be provided in a specific way, this must be clearly stated.

Where the contract is for the development of systems, software or products, detailed technical and/or functional specifications must be included.

Most contract disputes arise from parties having differing views over whether the work has satisfied the contractual requirements.

It is therefore vital for the description of the deliverables to be clear, complete and unambiguous – and that will be equally important whether the University will be performing the services for another party, or whether the University is obtaining goods or services from someone else.

## F. Knowing whether deliverables have been met: performance measures

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The need for measurable and verifiable deliverables under a contract has been emphasised, but sometimes it is necessary to actually spell out in the contract *how* those deliverables will be measured or verified. These are known as “performance measures” or “performance indicators”.

In any contract with complex or multi-faceted deliverables, the statement of deliverables should be accompanied by performance measures. Establishing performance measures provides a source of evidence that can be collected and used to assess performance over the life of the contract.

Establishing performance measures requires decisions about what and how often to measure, and what indicators and targets, and/or standards will be used for those measurements. “Indicators” will tend to be qualitative factors to focus on in assessing performance, while “targets” will be quantifiable measures such as a number, a percentage, or a time frame. “Standards” may include actual industry standards or ISO or AS/NZ standards, particularly in technical contracts. Which of these are relevant will depend entirely on the contract subject matter and context.

Performance measures need to be sufficiently comprehensive and specific to allow the Contract Manager to be certain that the work meets contractual requirements. They may also provide the basis for authorising progress payments. The contract may also include performance measures that will alert the Contract Manager to potential problems, so that remedial action can be taken if needed.

Although performance measures are important, and enable ongoing monitoring of contract performance, there are several factors worth keeping in mind when defining them:

- **Make sure the measures are things that can be objectively assessed – and that they are understood by all the parties.**
- **Remember there are costs associated with monitoring anything.**  
If one party needs to “measure” or monitor something, and then report on it to the other party, there will be costs associated with that, which may ultimately increase the contract cost. Avoid defining performance measures just for the sake of it – and be sure to ask whether the performance regime is cost effective to administer for all the parties.
- **Think about *why* you want to measure something, not just *what* you want to measure.**  
A government contract once used as a performance measure “the time taken to answer phone calls” in a service centre. The target was achieved by the contractor simply picking up the phone and hanging up again. What was really wanted was an indicator of how long it took to have a client’s inquiry answered. This shows how crucial it is to design performance measures that motivate the contractor to focus on your true requirements.
- **You get what you measure, so measure what’s important to the objectives of the contract, not merely things that are “easy” to measure.**
- **If special or technical skills are needed to assess particular performance measures, make sure they are available before agreeing to them.**

If your agreement requires performance measures, it is recommended you seek further advice from your lawyer about how best to design and describe those measures.

## G. Final negotiations

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Although the bulk of the negotiation on terms may be completed before the contract is drafted, it will usually be necessary to have further negotiations around the exact terms of the written contract. All the principles discussed in Module 1 remain relevant to that process. It is important to remember the following principles, which can assist greatly in negotiation of the written terms:

- Be sure to allow sufficient time for all sides to review and respond to draft agreements. Rushing is not conducive to a mutual understanding and meaningful outcomes.
- If there is significant disagreement around the proposed written terms, agree to negotiate them in small sections – this will make it easier to reach agreement and prevent the process from seeming insurmountable.
- Always retain a clear idea of the University’s objectives and bargaining position – including through a “PAN” (preferred, acceptable, not-negotiable) analysis set out in Module 1 (Section 1.4). Sometimes taking a step back to remember why you started negotiating the agreement in the first place can help you identify what clauses are truly important – and what is capable of compromise.
- When reviewing and amending a draft written contract, always ensure that any changes made are transparent. Do not try to “sneak” in any changes to the contract as this could quickly lead to a loss of trust.

Once all issues have been negotiated satisfactorily, remember to have the final contract checked by the legal advisor with whom you have been working throughout the process. You should also read through the contract closely yourself, to ensure that all aspects have been covered and all schedules and attachments are completed or attached.

## H. Sealing the deal – signing the contract

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The order in which the parties sign the contract has no bearing on the legal status of the document. However, where the contract has been prepared by the University, it is preferable for the University to prepare the hardcopies for signing to make sure that the correct version is used and the other party does not slip in any amendments.

If the other party has prepared the executable hardcopies of the contract, it is always good practice to check that the hardcopy is the same version as what was last agreed upon during negotiations, and that it contains all schedules and attachments.

Where there are more than three parties to the contract, it may be more convenient for the contract to be signed in “counterparts”.

This means that the parties’ signatures do not need to all be on the same copy; each party can sign their own respective copies of the contract and send their signed copy back to the party coordinating the signing process. To do this, there must be a special term in the contract enabling counterparts to be signed. Once all the parties have signed their copy, the party coordinating the process should always ensure that each other party receives a copy of the sets of signed counterparts.

### University sign-off

The contract must be signed in accordance with the University’s delegations ([www.adelaide.edu.au/governance/delegations/](http://www.adelaide.edu.au/governance/delegations/)).

If you require the Vice Chancellor and President, or a Deputy Vice Chancellor or Vice President to sign the contract, it is a good idea to prepare a brief accompanying briefing memo setting out the purpose of the contract, its value and duration, any unusual clauses, any significant risks assumed by the University and whether the contract has been reviewed by the Legal Services Branch or an external legal advisor.

Whoever signs the contract on behalf of the University must be satisfied of certain things under the *Contracts and Agreements Procedures*, so it will speed up the process if you address them in your briefing.

**Remember:** Appropriate approval should have been obtained *prior* to undertaking a lengthy negotiation and contract drafting process; ideally from the delegate most likely to sign the contract in the end. If you obtained in-principle approval earlier, then briefing the signatory will be faster and simpler.

### Things the University’s signatory must be satisfied:

- ☑ That they are authorised to sign the agreement on behalf of the University, in terms of both financial *and* non-financial delegations.
- ☑ That the agreement has been approved by a legal advisor (where required).
- ☑ That the agreement is in the best interests of the University, considering the contracting principles set out in the Contracts and Agreements Policy.
- ☑ That they sign and execute the agreement properly.

### Storage of signed contract

The University’s [Records and Archives Management Manual](#) prescribes that all executed contracts (excluding employment contracts) must be lodged with the Records Services to ensure secure storage and central traceability.

Given the decentralised nature of the University’s operations, centrally lodging final executed contracts is the only means through which the University can keep track at an institutional level of its contractual commitments.



**ALERT:**  
University Policy  
Requirements



**ALERT:**  
University Policy  
Requirements



**ALERT:**  
University Policy  
Requirements

To lodge an executed contract with Records Services, please complete the [Legal Document Lodgement Form](#) and submit it with the executed contract. Records Services will then register it as a Legal Document on Content Manager (where it will be allocated a legal document reference number). The metatags of all Legal Documents will be searchable on Content Manager. This will enable users across the University to see if other areas within the University have entered into similar types of arrangements, or agreements with any particular party.

Even after the contract has been finalised and signed, you should retain and file key documents, drafts and other evidence from the negotiation process on a University file. For more information, see **Module 4: Records Management**.



## Appendix 2.1 – Contract Drafting / Review Instruction Form: General



### \*CONTRACT DRAFTING INSTRUCTION FORM

Please complete this form if you need a contract to be drafted. If you have a contract you want us to review, please use the Contract Review Instruction Form.

<b>Why do we need you to use this form?</b>	We need you to provide us with sufficient details about your proposed contractual arrangements so that we understand your needs and can draft an appropriate contract. In completing this form, you will also be turning your mind to, and addressing, your contract management responsibilities under the University's <i>Contracts and Agreements Policy</i> ( <a href="http://www.adelaide.edu.au/policies/2964/">www.adelaide.edu.au/policies/2964/</a> ).
<b>To whom should you send this form?</b>	You can send this to any of the lawyers within Legal and Risk. If you are not sure whom to contact, please send to <a href="mailto:helpdesklegal@adelaide.edu.au">helpdesklegal@adelaide.edu.au</a> and it will be allocated to one of our lawyers.
<b>What happens when we get your completed form?</b>	In ordinary circumstances we will endeavour to allocate your request to a lawyer within 1-2 business days. That lawyer will contact you directly to acknowledge receipt.  Once allocated, our lawyers will attend to requests in chronological order and endeavour to respond within the timeframe that you request below, subject to the complexity of the contract and current workloads.

<b>ABOUT YOU</b>	Your name & Position	Your name and position
	School/Branch/Faculty	School/Branch/Faculty
<b>WHAT TYPE OF SERVICE DO YOU REQUIRE?</b>	<input type="checkbox"/> <b>Assistance using University template agreement</b> State which template agreement: State which template agreement	
	<input type="checkbox"/> <b>Renewal of existing contract</b> (* Please attach existing contract) <input type="checkbox"/> <b>Draft a new contract</b>	
<b>WHAT TYPE OF SERVICE DO YOU REQUIRE?</b>	By when do you need the contract drafted? Please indicate your timeframes for negotiating the contract.  If urgent, please state reasons.	Enter text here
	<input type="checkbox"/> <b>Assistance using University template agreement</b> State which template agreement: State which template agreement	
<b>ABOUT THE CONTRACT</b>	What is the contract for? (Provide summary and attach any relevant background documents, eg project proposal; business case; product specifications; emails)	Enter text here
	Is this contract related to any other contract?	Enter text here
	Who are the other parties to this contract?	Enter text here
	Will there be any payments between the parties under the contract? If yes, how much and when?	Enter text here
	When do you want the contract to start and finish? Will there be any interim milestones?	Enter text here

	What deliverables are required under the contract?	Enter text here
	Where will the activities under the contract be undertaken? (ie on campus, off-campus, overseas)	Enter text here
	Will the other party be creating any intellectual property that the University will need to licence or own? Will there be any background IP that the University requires access to? If yes, please describe.	Enter text here
	Will the other party have access to the University's confidential information, Intellectual Property, facilities or equipment? If yes, please detail.	Enter text here
	Are there any other obligations you want to impose on the other party/s?	Enter text here
	What termination and/or renewal options do you want?	Enter text here
	Any important details that you want to make sure are covered in the contract?	Enter text here
<b>YOUR CONTRACT MANAGEMENT RESPONSIBILITIES *</b>	Do you have internal in-principle approval for the contract? (e.g. from HoS or higher)	Enter text here
	Who is the University's contract manager for this contract?	Enter text here
	Have you undertaken a risk assessment for the activity? (Refer <a href="http://www.adelaide.edu.au/policies/2965/">www.adelaide.edu.au/policies/2965/</a> )	Enter text here
	Have you consulted with other areas of the University that could be impacted by the contract?	Enter text here

\* in accordance with *Contracts and Agreements Policy* ([www.adelaide.edu.au/policies/2964/](http://www.adelaide.edu.au/policies/2964/))

Before you email this form, please ensure you have attached any relevant background documents. If attaching multiple documents, please list title and/or brief description of each.

\*This form is not used when instructing Research Legal which has its own form.

## Appendix 2.2 – Road map of contract formation process

