

# MODULE 8: ENTERING INTO COLLABORATIONS

## Purpose of module

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In the University context, some contracts provide the basis for *collaboration* with one or more other parties. Since collaborative agreements are generally more complicated than many other University agreements, this module has been developed to guide you specifically through the management of collaborations. It has been laid out in the form of an annotated checklist, to give you the most practical guidance possible. Any questions about the module or the checklist should be directed to the Legal Services Branch.

This module has the following objectives:

- To provide a checklist of issues to consider when setting up a collaboration; and
- To help raise awareness of the kinds of issues that are relevant to University collaboration agreements.

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## Entering into Collaborations – Introduction and summary

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Many contracts are limited in their scope – such as when one party pays another to provide a service. However, in the University context, many contracts form the basis for *collaboration* with one or more other parties. In such situations, the contracts are hardly limited in their scope: they form a framework for future action that could go on for years and may involve multiple parties across the globe.

Since collaborative agreements are generally more complicated than many other University agreements, this module has been developed to guide you specifically through the formation, formalisation and management of collaborations. It has been laid out in the form of an annotated checklist, to give you the most practical guidance possible.

Not every issue in the checklist will be relevant for every collaboration agreement. However, by walking through this list in each case where the University is pursuing a collaborative arrangement, you will be able to proceed with greater confidence that you have addressed the key issues, and not overlooked anything of significance to the University. The issues raised in the checklist will not only ensure you are on the same page as your collaborators, but it will also serve as a guide for assessing the risks – both threats and opportunities – to the University associated with the collaboration.

### *Major sections of the checklist*

- A. Preliminaries – what are the basic circumstances, why are we collaborating, and is everyone on the same page?
- B. Key elements of the collaboration – the nature of the collaboration, what its expected inputs and outputs are, and how the collaboration will be managed and maintained.
- C. Intellectual property and information management – including confidentiality, publication, reporting.
- D. Legal, governance and risk issues – addresses a host of issues, including the proposed governance and decision-making structures for the collaboration, how disputes will be handled, and how to end the collaboration.
- E. Formalising the agreement.

### *Things to keep in mind when using the checklist*

**Defining responsibilities** – Where the checklist asks who will be responsible for a particular task, it should be kept in mind that often responsibility will be *jointly* allocated. However, it is always a good idea to specify who will be doing what in terms of jointly held responsibility – otherwise, in practice, things may get missed.

**Once you have identified what is relevant in the checklist for your collaboration** – Think about whether some responsive action is required or whether evidence should be collated on that issue, and use the checklist to help you summarize that. If something strikes you as relevant but has never been discussed, that should prompt you to talk about the issue, both internally and with the other parties. The issues raised in the checklist will also provide a good starting point for briefing your legal adviser.

## A. Preliminaries

This section of the checklist addresses the basic circumstances and why the collaboration is happening. You should think of this section as forming a big picture overview of the collaboration.

| A. PRELIMINARIES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <p>Will the proposed collaboration be a Significant Contract?</p> <p>Refer to Module 2 Table 2.2 for the list of contracts and agreements that are Significant Contracts and the Policy requirements that relate to those contracts and agreements.</p>   |                    |
| <p>Who is the University collaborating with?</p> <p>Have we collaborated with them before? Do we know and trust them? Or do we really need to find out more about them before we proceed further?</p>   |                    |
| <p>What is the purpose of this collaboration?</p>   |                    |
| <p>Why is this collaboration valuable to the University?</p>  |                    |
| <p>Would the University be sacrificing anything to enter this collaboration, and/or does the University stand to lose anything?</p>   |                    |
| <p>Have you thought through the potential impact of the collaboration on the <i>whole</i> University (not just your area)?</p> <p>Note: Thinking about the broader impacts may highlight people across the University who you may need to bring to the table in negotiating the collaboration.</p>  |                    |
| <p>Why is this collaboration valuable to the other parties?</p>   |                    |
| <p>Would any of the other parties be sacrificing anything to enter this collaboration, and/or do we stand to lose anything?</p>   |                    |
| <p>Are the intentions and motivations of the University at odds in any way with those of the other parties, or are they compatible?</p>   |                    |
| <p>Is everyone on the same page about what is happening and why?</p>  |                    |
| <p>Does this collaboration pose any obvious risks or conflicts of interest that should be assessed and addressed before proceeding any further? Risks could include reputational risks to the University if there is a proposed collaboration with a foreign entity, especially if it involved sensitive technologies. If the proposed collaboration is with a foreign entity seek endorsement by completing the Foreign Entity Compliance Review referred to in Module 2.</p> <p><i>Note:</i> Risk assessment will be addressed in more detail later in the checklist – and in many ways, this entire checklist serves to facilitate a common-sense risk assessment. However, it is never too early to start thinking about possible risks: it ultimately helps you plan better and secure the best collaboration outcome.</p> <p>Consider seeking risk assessment advice and support early in any collaborative process from the Director, Risk and Insurance Services.</p> |                    |

## B. Key elements of the collaboration

Building on the preliminary questions above, this section addresses the nature of the collaboration, including its expected inputs and outputs **(B.1)**. This section also asks how the collaboration will be managed and maintained, including a consideration of:

- Relationship management and communications – including managing conflicts of interest **(B.2)**
- Branding and reputation **(B.3)**
- Funding and the contributions of each party (physical resources and other contributions) **(B.4)**
- Profits and losses – what revenue/expense streams are expected, how will they be shared? **(B.5)**
- For Learning and Teaching collaborations, academic issues related to the collaboration **(B.6)**


| B. KEY ELEMENTS OF COLLABORATION – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>B.1 Nature of the collaboration</i>  |                    |
| Is this collaboration intended to be short term, long term but time-limited, or potentially indefinite?   |                    |
| What is the purpose and objective of the collaboration?<br>(e.g. operation of a school, course or program; collaborative research output; establishing an articulation arrangement; acquiring assets from another body?)  |                    |
| What will the output of the collaboration be?   |                    |
| Are there any clear milestones or goals that can be defined in the collaboration?   |                    |
| Who are the key players in the collaboration, both internally and externally?<br>(e.g. are there specific researchers, teachers or others who will be relied on to produce the output of the collaboration? Who do each of the key players work for? If any of them left or became unable to work on the project, how would that affect the collaboration?)   |                    |
| What is the nature of the collaboration in a legal relationship sense, and how do the parties intend to structure it?<br>(e.g. a joint venture, licensing arrangement, articulation agreement, twinning agreement, acquisition, merger, agency agreement, a new company, other?)<br><br>Note: this is addressed in more detail in <b>Part D</b> of the checklist (Legal, Governance & Risk Issues), under section <i>D.2: Governance, ownership and decision making</i> . |                    |
| What are the general responsibilities and obligations of each party going to be?<br>(e.g. who will be doing what in a general sense?)   |                    |


| B. KEY ELEMENTS OF COLLABORATION – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>B.2 Relationship management and communications</i>   |                    |
| <p><i>Managing relationships within the University of Adelaide</i></p> <p>Who internally is working on the collaboration?<br/>           Are there internal people with relevant expertise, who we haven't considered?<br/>           Who needs to be kept in the loop on the project? How will this be done?<br/>           Where multiple people need to be kept in the loop, what communications protocol will be used to ensure that they are? (e.g. emails always copied to certain people, and/or one person responsible for disseminating information to all relevant people)<br/>           Who will keep records of the internal communications?<br/>           Are any aspects of the internal communications confidential or sensitive? If so how will they be handled to maintain confidentiality?<br/>           Who are the “finders, minders, binders and grinders” for the University?<br/> <i>(see below for more information on this concept)</i></p> |                    |
| <p><i>Managing relationships between the University and the other party/parties</i></p> <p>Who is going to be the “voice” of the University in dealing with outsiders?<br/>           Who are the main contacts for each party to the collaboration?<br/>           What will the communications protocol be between the parties?<br/>           Are any introductions required amongst the proposed collaborators? Who will do that and in what circumstances?</p>   |                    |

**FINDERS, MINDERS, BINDERS AND GRINDERS – defining who does what internally**

There will always be different people in the University who are involved in different capacities in your collaboration, and in facilitating and formalising an agreement. This flows from different skills as well differences in their level of authority or seniority. It can be helpful to define who has what role in each of these areas (primary and backup):

|  | Relationship management | Operational | Legal | Other? |
|--|-------------------------|-------------|-------|--------|
| <b>FINDERS</b> (find the opportunities for collaboration)                  |                         |             |       |        |
| <b>MINDERS</b> (handle administrative tasks, coordinate efforts of others) |                         |             |       |        |
| <b>BINDERS</b> (bring everyone together, connect people)                   |                         |             |       |        |
| <b>GRINDERS</b> (grind or churn out most of the substantive)               |                         |             |       |        |

| B. KEY ELEMENTS OF COLLABORATION – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <p><i>Managing government relationships</i></p> <p>Is there any government involvement? (Local, State, Federal)</p> <p>Is there any international entity involved? (Government, University, Company)</p> <p>Is a government or government agency a party to the agreement? If so are there any special requirements for managing communications with them?</p> <p>Is government interaction involved, such as obtaining permits, consents or funding?</p> <p>Is this collaboration politically topical or sensitive? Who will manage any media issues or spin? Do we need someone politically savvy involved? Who?</p>   |                    |
| <p><i>Managing conflicts of interest</i></p> <p>What protocols will be used to ensure that any potential conflicts of interest are identified, disclosed and managed appropriately, throughout the collaboration?</p> <p><i>Note:</i> Conflicts can arise (and disappear) at different times during a project’s life. It is important to constantly monitor potential conflicts, and to have a clear understanding between the parties of the fact that conflicts <i>must</i> be disclosed to each other at any stage when they are detected.</p>  |                    |
| <p><i>B.3 Branding and reputation</i></p>  |                    |
| <p>How will branding of the collaboration occur:</p> <ul style="list-style-type: none"> <li>• <i>Individual branding</i> (with each party just branding their own contributions normally and separately); or</li> <li>• <i>Joint branding</i> (for instance, side-by-side use of each party’s brand); or</li> <li>• <i>Some new and separate brand</i> (such as a new logo or business name being created for the collaboration)?</li> </ul> <p> <b>ALERT:</b> You should consult with Marketing and Communications about branding, <i>before</i> any final decisions are made – particularly if any joint branding or new branding is proposed. You should also review the <a href="#">Brand Policy</a>, which outlines the approval mechanisms required, including for registered business names.</p> <p><small>University Policy Requirement</small></p> |                    |
| <p><i>Think back to the preliminary questions about why the collaboration is valuable to each party (and what each party may sacrifice or stand to lose) in answering these next questions.</i></p> <p>Does the University or any other party face any potential impacts on reputation, either good or bad, arising from the collaboration?</p> <p>Do the other parties take the protection of their reputation as seriously as we do?</p> <p>Can we trust the other parties to act in a manner that will reflect well on the University and enhance the reputation of the University?</p>   |                    |

| B. KEY ELEMENTS OF COLLABORATION – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>B.4 Funding and contributions</i>  |                    |
| How will the collaboration be funded? Who is responsible for obtaining it? (e.g. financial contributions from the parties; and/or funding from third parties, from industry, from government sources? If outside funding sources, are there any restrictions or terms of use?)  |                    |
| What assets, property and other resources will each party contribute? Think outside the box to capture all in-kind contributions and intangible contributions. (e.g. funds, land, buildings, room/laboratory space, equipment, IT infrastructure or access, library infrastructure or access, people/labour, utilities/amenities, intellectual property, services, brand)   |                    |
| Will the parties continue to own the things they contribute? Or will there be some changes to ownership or use rights of certain property or resources? In either case, how will use of the resources be facilitated for those who need to use them? (e.g. property transfer, lease, licence, access and use agreement?)  |                    |
| When will the contributions be made? (e.g. at the start, after certain things have happened, mid-way through, or “as needed”?)  |                    |
| <i>B.5 Profits and losses</i>   |                    |
| What revenue and expense streams are expected to flow from the collaboration?   |                    |
| Who will receive revenue or pay expenses, and how will they be tracked/reported?  |                    |
| How will expenses and revenue be shared between the parties (if at all)?  |                    |
| <i>B.6 Academic issues – for learning and teaching collaborations</i>   |                    |
| <p>What is the nature of the academic offering being created through the collaboration? (e.g. a new school, discipline, program, course?)</p> <p> <b>ALERT:</b> Note: If the proposed collaboration will result in a degree being jointly conferred by the University and some other institution, you must follow the process set out in the <a href="#">Jointly Conferred Coursework Awards Policy</a>. For more information, contact the Pro Vice-Chancellor (Student Learning).</p> <p><small>University Policy Requirement</small></p> |                    |
| What is the proposed academic delivery mechanism? (e.g. domestic or international, taught by us or by others, distance/online education, combination?)  |                    |
| Where will the students be enrolled – and what will the enrolment process be?   |                    |



| <b>B. KEY ELEMENTS OF COLLABORATION – Issues to consider</b>  | <b>Relevance/Evidence</b> |
|---|---------------------------|
| What eligibility criteria will be used for admission? Who will assess them? (e.g. IELTS, GPA, pathways from other institutions, other?)   |                           |
| Will any scholarships be offered? By whom? Who will decide how to award them?   |                           |
| How and by whom will fees be assessed, collected and distributed?   |                           |
| Will there be any mechanisms for obtaining credit transfers and/or advanced standing? Who will make the decision?   |                           |
| Student interface: who can say what (and when) to students? (e.g. advertising/representations, letters of offer, pathway invitations, confirmation of enrolment)  |                           |
| What administrative systems are required to facilitate the academic offering? Who is responsible for doing what, and when?<br>Note: as part of the administration, will access need to be given to the University's systems (or obtained for the University to some other system)? How will security of the systems be ensured? |                           |
| What information/reports will the parties be required to make to each other? (e.g. on academic quality issues, student progress, administration issues, ESOS issues)  |                           |
| What forums will be set up for discussion, decision-making, representation, and resolution of disagreements or issues?  |                           |




## C. Intellectual property and information management

This section of the checklist considers issues relating to intellectual property and information management, including intellectual property ownership and use (C.1), confidentiality and freedom of information (C.2), publication (C.3), reporting (C.4) and records management (C.5).

| C. IP AND INFORMATION MANAGEMENT – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <i>C.1 Intellectual Property (IP)</i>  |                    |
| <p><i>Note: To properly address intellectual property issues, it is important to think about the different phases of a collaborative project, and separately deal with <b>pre-existing IP</b> brought to the collaboration by one or more parties (either at the start or during the project), and <b>IP created</b> in the course of or as a result of the collaboration. Disputes can be avoided by clearly stating who owns what to start with, who will own what at the end, and who can use the various IP components and on what terms. These questions will guide you through this assessment in a basic sense, but it is strongly recommended that legal advice be sought on this issue.</i></p> |                    |
| <p>What intellectual property is each party contributing to the collaboration? (e.g. copyright in course materials, trademarks, brand names, websites, domain names, research findings, patentable knowledge)</p> <p>Are we sure that each party contributing IP owns that IP, or has secured rights to contribute and use it for the collaboration?</p>   |                    |
| <p>Is there any intellectual property owned by third parties (not part of collaboration) that needs to be used in the collaboration? If so, who will be responsible for obtaining permission to use it? What conditions might attach to the permission?</p>  |                    |
| <p>Will each contributing party continue to own the IP they contribute? How will the intellectual property be contributed? (e.g. assignment of ownership)</p>  |                    |
| <p>For what purposes or in what circumstances can intellectual property contributed by one party be used by the other parties to the collaboration? (e.g. are there limits on how, why, when or where IP contributed to the collaboration can be used, or limits on who can use it? Why are such limits being imposed and are they reasonable?)</p> <p>If there are limits on the use of IP contributed by one party, what is the approval process for authorising its use?</p>  |                    |
| <p>Who will own the intellectual property rights created as a part of the collaboration?</p>   |                    |
| <p>What is the approval process for authorising use of the IP created as part of the collaboration? What rights of use will each of the parties to the collaboration (individually) have over the IP they collaboratively create?</p>  |                    |
| <i>C.2 Confidentiality – including freedom of information issues</i>   |                    |
| <p><i>Note: It is important to remember that the University's mission and vision advocate the ultimate sharing and dissemination of knowledge, including through education, research and community service. There</i></p>  |                    |

| C. IP AND INFORMATION MANAGEMENT – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <p><i>are sometimes very valid reasons for keeping information confidential; but given our public mission and knowledge sharing orientation, it is important to think through those reasons and articulate them – and question whether confidentiality requirements are reasonable and necessary.</i></p>  |                    |
|  <p><b>ALERT:</b><br/>University Policy Requirement</p> <p>Is the collaboration itself confidential, or are the terms of the collaboration agreement going to be confidential? Why?</p> <p>Note: if the terms of the collaboration agreement are going to be confidential, that fact needs to be pre-approved and a special clause needs to be included in the contract, in order to protect the contract from being disclosed under the <i>Freedom of Information Act (FOI)</i>. See the University's <a href="#">Freedom of Information Policy</a> for more detail.</p> |                    |
| <p>What information brought to the collaboration, held by the collaboration, gathered or created by the collaboration should be kept confidential, and why? (e.g. student information, research data, IP that might be patented)</p> <p>How will confidentiality be ensured? Will the information be kept confidential through normal, existing processes within the University and other parties (such as for the handling of student records) or are special measures required?</p>  |                    |
| <p>What obligations will there be to return or destroy confidential information? (e.g. an obligation to destroy or return information when its use is no longer required by a party, or when the collaboration ends)</p>   |                    |
| <p>Should there be restrictions on the publication of press releases? If so, who will authorize them and in what circumstances?</p>  |                    |
| <p>What rights will a party have to make representations about the collaboration, or publicly advertise its relationship with the other parties? In other words, can we <i>tell</i> other people that we are collaborating? How much information about the collaboration can we share – and what <i>can't</i> we say about it?</p>   |                    |
|  <p><b>ALERT:</b><br/>University Policy Requirement</p> <p>Will privacy laws apply to the collaboration or its activities? Are the privacy policies of the other parties compatible with the <a href="#">University's Privacy Policy</a>?</p>   |                    |
| <p>Does the FOI apply to any other parties apart from the University? Do the other parties understand the University's FOI obligations? (e.g. do they understand that things need to be clearly marked confidential in order to be protected from disclosure under FOI?)</p>   |                    |
| <p><b>C.3 Publication</b></p>  |                    |
| <p>Will the collaboration lead to publishable output?</p>  |                    |
| <p>Who will be publishing? Will the publication be joint, or by only one or some of the collaborating parties?</p>   |                    |

| C. IP AND INFORMATION MANAGEMENT – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| Are there any limits being placed on publication, such as for reasons of confidentiality? Are they reasonable?  |                    |
| <i>C.4 Reporting</i>  |                    |
| <p>Are there any requirements to report to any funding bodies, government agencies or other outside parties related to the collaboration?</p> <p>Who will be responsible for making those reports?</p> <p>Will those reports require information to be collated from various members of the collaboration? If so, who will collate the information and how?</p>   |                    |
| <p>Is there a need to have the parties report to each other on any issues throughout the collaboration?</p> <p>For instance, if parties are individually responsible for different aspects of the collaboration, do they need to keep each other updated on their progress? (e.g. for the delivery of an academic program, the party that admits and enrolls students may need to keep the other parties informed about the admission criteria or progress of the students)</p> |                    |
| <p>Are there any legal compliance obligations that require the parties to be kept informed about particular issues? (e.g. ESOS or funding agreements)</p> <p>If so, how will that be reported to the party so they can meet their obligations?</p>  |                    |
| <p>When and how regularly will any reports between the parties be made?</p> <p>What format will they take? What information will they include? How detailed?</p> <p>Will there be a mechanism for a party to seek additional information, beyond that contained in the report?</p> <p>Will there be any resolution mechanism if a party fails to make their necessary report, or provides an incomplete or inaccurate report?</p>   |                    |
| <p>Are there any instances or events that you would want to be notified about? (e.g. if another party assigns part of their interest, or sub-contracts some of their work, or changes their personnel or activity in a certain area, or enters a similar agreement with someone else)</p>   |                    |
| <i>C.5 Records management</i>   |                    |
| <p>What planning or budgetary documents will be prepared for the collaboration? (e.g. business plans, marketing plans, budgets)</p> <p>Who will be responsible for making those records, and when? How will they be shared and with whom? (e.g. at the outset of the collaboration, annually thereafter)</p>  |                    |
| <p>What type of records will be created and kept for the collaboration? (e.g. financial records, accounts, invoices, research data, progress reports)</p> <p>Who will create or collect the records, and who will store them?</p>   |                    |

| C. IP AND INFORMATION MANAGEMENT – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <p>If certain records are held by one party, what right will the other parties have to access the records and through what process?</p>  |                    |
| <p>What rights will a party have to audit the records associated with the collaboration (either communal records or records held by another party)?<br/>What will be the process for audits and who will bear the cost?</p>  |                    |
| <p> <b>ALERT:</b><br/>University Policy Requirement</p> <p>Does the <i>State Records Act</i> apply to any other parties apart from the University? Do the other parties understand the University's State Records obligations, and know what they need to do to ensure the University can be compliant? (e.g. do they understand that things need to be retained for a certain period, and cannot be destroyed or altered without following particular processes?)</p> <p>Note: the University <a href="#">Information Management Policy</a> summarizes the requirements for records management.</p> <p>The <a href="#">Records and Archives Management Handbook</a> provides further practical guidance around records, and is available online.</p> |                    |
| <p>For parties outside of South Australia, do any parties other than the University have any other legislative obligations related to records management, similar to the <i>State Records Act</i>? Is there anything the University would need to do to ensure the other party can comply with that different law?</p>   |                    |
| <p>Are there any other compliance requirements for records management that apply to this collaboration?<br/>(e.g. for a research collaboration, the research records and data provisions of the Australian Code for the Responsible Conduct of Research may apply; for an academic collaboration, there may be ESOS or other requirements that impact on record keeping)</p>   |                    |

## D. Legal, governance and risk issues


This section of the checklist addresses a host of issues, including the entities entering the collaboration and due diligence (D.1), the proposed governance and decision-making structures for the collaboration (D.2), how contributions will be made and managed – money and assets (D.3) as well as people and time (D.4) or operational contributions (D.5) – and what the obligations of each party are (D.6). The questions also address competition issues (D.7), risk assessment (D.8), indemnity and insurance (D.9), how disputes will be handled (D.10) and how the collaboration might end (D.12).

While many of the issues listed have already been touched on in previous sections, this section goes into more detail, so that the legal implications can be more fully anticipated and addressed.

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>D.1 Legal entities entering the collaboration</i>  |                    |
| <p><i>The University of Adelaide</i></p> <p>Which legal entity will be undertaking the collaboration on behalf of the University? (e.g. the University itself or a subsidiary? It must be a legal entity, not simply a business name or School/Department name)</p> <p>What internal approvals will be required before entering the collaboration? (e.g. endorsement of the Chief Security Officer obtained through a <a href="#">foreign entity compliance review</a> for collaboration with overseas universities, governments or organisations, Program Approval Committee for new collaborative programs)</p> <p>Would entering the collaboration cause the University to breach any existing legal obligations – contractual, legislative or other? (e.g. funding agreements; exclusivity agreements with others; legislative / regulatory obligations)</p> <p>Would entering the collaboration cause the University to breach any of its own policies or divert from its strategic plan?</p>                    |                    |
| <p><i>For each of the other parties to the collaboration</i></p> <p>What is the legal entity that the University will be entering an agreement with? Is the entity duly established and validly existing? (i.e., can it legally “contract” with us?)</p> <p>What is the legal structure and ownership of the other party? (e.g. a university, government Minister or entity, company, trust, partnership, individual, unincorporated or incorporated association, unincorporated joint venture)</p> <p>In which jurisdiction (or place) was it established, and in which jurisdiction does it carry on business?</p> <p>What is the history of business or activity carried on by the party?</p> <p>What is the reputation and standing (in Australia or overseas) of the party? Is collaborating with them more likely to enhance or damage our own reputation?</p> <p>Is the other party financially sound? How can we assess or know that? Is the party currently subject to any litigation or investigations?</p> |                    |
| <p><i>Due diligence – making sure we <b>know</b> the other party before we collaborate</i></p>  |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <p><i>Think back to the preliminary questions about how well we know the parties we are collaborating with and whether we already know and trust them.</i></p> <p>How well do we really know the other parties?</p> <p>What due diligence activity is required to properly assess the other parties before we enter into collaboration with them?</p> <p>Who is managing and funding any necessary due diligence assessments, particularly for any off-shore entities?</p> <p>What external parties (if any) will contribute to due diligence investigations? How are they to be engaged, by whom, at what cost, and on what terms?</p> <p>Note: Consider getting advice from the Legal and Risk Branch about undertaking due diligence.</p> |                    |
| <p><i>Adding or removing parties to the collaboration later</i></p> <hr/> <p>Is it likely that new parties may be added to the collaboration later? Who will make the decision to do that? Will all the parties need to agree? What will the new parties be expected to contribute, or who will decide what is a reasonable contribution?</p> <p>Is it possible that one or more parties would want to leave the collaboration before it is completed? If so, what processes will need to be in place for assigning ownership (changing ownership or shareholding in the collaboration)? Will the other parties need to agree to a party leaving and to how they will redistribute their ownership?</p>                                      |                    |
| <p><i>Third party involvement</i></p> <hr/> <p>Will any third party contributions, involvement, consents, approvals or licenses be required – in other words, is there anything that needs to be done by anyone who is <i>not</i> a party to the collaboration, for the collaboration to actually work? (e.g. from government, industry, other universities, intellectual property owners)</p> <p>Who will be responsible for liaising with the third party and obtaining their contribution/consent etc?</p> <p>If any agreements need to be entered with any of the third parties, will all the parties to the collaboration enter them jointly, or will one party enter it on everyone's behalf?</p>                                      |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <i>D.2 Governance, ownership and decision making</i>   |                    |
| <i>Governance and decision-making</i>  |                    |
| <p><i>Note: When deciding on a governance structure, remember that what is appropriate and effective will depend on the nature and circumstances of the collaboration. In all cases, <u>some</u> level of formality in governance and decision-making is required, to ensure that things are properly managed in an accountable and transparent way. These questions will guide you through the basics, but it is strongly recommended that you seek management advice from the Legal Services Branch <b>before</b> you decide on an appropriate structure.</i></p>  |                    |
| <p>What is the proposed structure for the collaboration? How is that being decided? Has legal advice been sought in making that decision?<br/>(e.g. unincorporated joint venture, company, trust, partnership, contract, acquisition, merger)</p>  |                    |
| <p>What is the structure for decision-making, management and governance of the collaboration? Does the proposed structure allow effective decisions to be made, even where there is some disagreement about what should happen?<br/>(e.g. a single person making the decisions, a group of people making the decisions, a governing council, board, committee, project team, consultation)</p> <p>What voting rights will each party have, and how will deadlocks be broken?</p>   |                    |
| <p>What will the composition of any governing body be? How will they be appointed or nominated? Whose interests will each member be representing?<br/>(e.g. will a University employee sitting on the committee be representing the University or simply acting in their own personal capacity? Will there be representatives of each party?)</p> <p>Will any outsiders be appointed to the governing body, to bring an independent voice to decision-making? How will they be chosen and what expertise will they be required to have?</p> <p>What will the functions, powers and responsibilities of the governing body be, and what limits will be placed on its authority?</p> <p>What training in governance and management will members of the governing body be required to undergo? Who will coordinate that and who will pay for it?<br/>(e.g. directors and officers training)</p> |                    |
| <i>Ownership</i>   |                    |
| <p>How will the parties hold their interest in the collaboration?<br/>(e.g. shares in a company, ownership rights to new intellectual property created, income stream, property holding, student enrolments – remember, not all “interests” are financial)</p> <p>Can the parties change, sell or assign their interest later? Will the other parties have to agree, or will there be a requirement that the other parties be notified?</p>  |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider  | Relevance/Evidence |
|--|--------------------|
| <i>D.3 Contributing and managing assets and funds</i>  |                    |
| What assets and funds will each party contribute?  |                    |
| <p>What capacity does each party have to borrow, mortgage, encumber or commit funds or assets?</p> <p>Note: Make sure that any University delegations and internal approval mechanisms are complied with before committing to contribute funds or assets (including Finance Committee and Council approval if required). Consult with the Legal Services Branch or the Council Secretary for more information on when Council approval may be required.</p>  <p><b>ALERT:</b><br/>University Policy Requirement</p> |                    |
| Is any grant funding (or other third party funding) being obtained? Who is responsible for seeking it? How will the responsible party ensure that all collaborators act in a way that complies with the grant, and enables the proper acquittal of the grant funding?  |                    |
| Will any assets, funds or equipment come from third parties? What special tasks or requirements will that involve and who will be responsible for those?   |                    |
| <p>How will contributed funds or assets be held?<br/>(e.g. where a new entity is created for the collaboration, will that entity hold them; for an unincorporated joint venture or similar, will one party hold on behalf of the collaboration?)</p> <p>Will the parties continue to “own” what they contribute to the collaboration? Or will ownership be transferred to either another party or a new entity?</p>  |                    |
| <p>If equipment or facilities are contributed, how will their use be managed? Will they be used exclusively for the purposes of the collaboration, or will they also be used by other people/purposes? If use is not exclusive, how will use be shared?</p> <p>How will use be authorized and facilitated for non-owning parties?<br/>(e.g. a license agreement, a lease, granting of access to building/IT facilities)</p> <p>Will there be any restrictions on use or access to any facilities or assets?</p>  |                    |
| Who will be responsible for maintaining or repairing any equipment, facilities or other assets?  |                    |
| At what point in the collaboration (and on what conditions) will each party make their contributions? At the outset, during the collaboration, as needed?  |                    |
| How will assets and funds be dealt with when the collaboration comes to an end?  |                    |



| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>D.4 Contributing and managing people and time</i>  |                    |
| <p>Who is doing what in the collaboration? Will this remain the same throughout the collaboration, or change at different stages?</p> <p>What skills, experience and/or qualifications are needed by people working on the collaboration? Are these rare?</p>   |                    |
| <p>Who is providing personnel to do the work of the collaboration? Will there be any new staff hired? Who will hire them?</p>   |                    |
| <p>Are any employees of the University (academic or professional staff) going to be contributing time to the collaboration?</p> <p>Will the collaboration affect their capacity to perform their normal University duties? If so, has their work been redistributed or taken care of, to the satisfaction of their work team and Head of School or Branch Head?</p>   |                    |
| <p>If labour or staff are being provided by a party (such as the University), will it be on a full-time or part time basis? What mechanism will be used to provide them?</p> <p>(e.g. secondment, contracting temporarily to the collaboration entity or to another party to do the work, internal workload adjustment to allow them to work on the project on top of current job?)</p> <p>Who will be responsible for the remuneration and entitlements of staff working on the collaboration? (e.g. if staff come from several places, will they just continue to be paid by their current employer?)</p>     |                    |
| <p>Who will be responsible for complying with employment, workers compensation and industrial laws (including occupational health, safety and welfare)?</p> <p>Note: it is likely that all parties contributing to the collaboration will have <i>some</i> responsibility for these things, particularly occupational health, safety and welfare.</p>   |                    |
| <p>Are there any key personnel requirements – in other words, are there any individuals or kinds of people (based on skills, qualifications, experience) who are essential for the collaboration to be successful?</p> <p>(e.g. is the collaboration only going to work if a particular researcher or someone with particular skills is available? Think through the objectives and expected output of the collaboration, and consider whether its success rides on the continued involvement of certain people – if it does, it's crucial to lock in their involvement as part of the collaboration deal.)</p> |                    |
| <p>Can a party request that certain personnel be removed from the collaboration, or that certain personnel must stay in the collaboration?</p>  |                    |
| <p>If a person is not performing well in the collaboration, how will that be handled and by whom?</p>   |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <i>D.5 Valuing the operational contributions of the University</i>  |                    |
| <i>Note: It is important that you make a genuine effort to incorporate all relevant costs into your financial and business models for the life of the collaboration. Consult with the Legal and Risk Branch and, where appropriate, Executive Director, Infrastructure or Chief Operating Officer for assistance.</i>   |                    |
| <p>Does your collaboration include the contribution by the University of facilities, amenities or infrastructure?</p> <p>If so, their value should be known and form part of the management of the contract or arrangement.</p> <p>Such contributions and costs might include:</p> <ul style="list-style-type: none"> <li>➤ Lecture or teaching space</li> <li>➤ Research areas or special access areas (laboratories)</li> <li>➤ Cleaning and waste removal</li> <li>➤ Security</li> <li>➤ Electricity</li> <li>➤ Water</li> <li>➤ Library services</li> <li>➤ Building maintenance</li> <li>➤ Software or technology access and licenses</li> </ul> <p><b>Please refer all inquiries to office of the Executive Director, Infrastructure or Chief Operating Officer who will direct you to an appropriate area for further assistance in valuing the contribution</b></p> <ul style="list-style-type: none"> <li>➤ Car parking, if available will be accessible within the University's policy (refer website)</li> </ul> |                    |
| <i>D.6 Obligations of the parties</i>   |                    |
| <p>What are the obligations of each party? In other words, who is doing what?</p> <p>How can the obligations be defined for the purposes of the agreement document? Are they vague or specific? Is there any way they can be measured over time?</p>  |                    |
| <p>Will there be any milestones for the performance of certain obligations under the collaboration? If so, what will the timetable be for those milestones?</p> <p>Can the timetable be changed – and if so, by whom and by what process?</p> <p>Will there be penalties for failing to meet milestones, and if so what will they be?</p>   |                    |
| <p>What is the standard to which each party will be held in meeting their obligations?<br/>(e.g. good industry practice, best practice, due care and diligence)</p>   |                    |
| <p>Will the parties need to comply with each other's internal policies or procedures?<br/>How will this be monitored or ensured?</p>  |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| <p>Are there any overarching obligations that rest primarily with one party, but need to be flowed on to all parties in the collaboration?<br/>(e.g. obligations under a funding contract, legislative or regulatory compliance obligations such as ESOS or health and safety)</p>  |                    |
| <p>Will there be a quality assurance regime for the collaboration?<br/>What will it look like and who will oversee it?</p>  |                    |
| <p>Can the parties sub-contract their obligations to others?<br/>In what circumstances, and with what limits? Do they need to get the permission of other collaborating parties before doing so?<br/>If they are allowed to sub-contract, how will they ensure that the sub-contractor fulfils the obligation properly and satisfactorily?</p>  |                    |
| <b>D.7 Competition and exclusivity</b>  |                    |
| <p>Will the parties (including the University) have any exclusivity or non-compete obligations? In other words, will there be any limit placed on the ability of the collaborating parties to do the same (or similar) things with <i>others</i> outside the collaboration?<br/>(e.g. if the collaboration is researching and developing something that may lead to commercialization, there may be a limit on the parties to prevent them from sharing the information or working on the same kind of research with any other people or entities)</p>                                |                    |
| <p>What will be the scope of such obligations and how will they be limited?<br/>(e.g. will they be limited to a certain territory or country, or restrictive only for a fixed term or duration; or will the exclusivity only relate to a small, specific set of activities that are restricted?)</p>  |                    |
| <p>Are there any trade practices or restraint of trade issues?<br/>(e.g. is the collaboration setting up a monopoly or excluding certain competitors in an unfair way?)<br/><br/><i>Note: If you think there may be competition or exclusivity issues, you should definitely discuss it with Legal Services Branch.</i></p>   |                    |
| <p>Does the University already have any exclusivity or non-compete obligations in place (through other agreements) that might be inconsistent with this collaboration?</p>  |                    |
| <b>D.8 Risk Assessment – an overview</b>  |                    |
| <p><i>Note: In many ways, this entire checklist serves to facilitate a common-sense risk assessment. However, it is helpful to think specifically about what level and depth of risk assessment might be required for your collaboration.</i></p> <p><i>For complex collaborations, some kind of dedicated risk assessment will almost always be necessary. Similarly, if the activities that will be happening under the collaboration are inherently hazardous or unpredictable, then a detailed risk assessment will be important. In any collaboration, even simple ones,</i></p> |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider  | Relevance/Evidence |
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| <p><i>thinking in terms of risk assessment will ultimately help you plan better and secure the best collaboration outcome.</i></p> <p><i>The questions below simply guide you to think about whether some of the highest risk factors in collaborations are present in your case. If any of these are triggered, you should definitely do a comprehensive risk assessment.</i></p> <p><i>For any collaboration, consider seeking risk assessment advice and support early in any collaborative process from the Director, Risk and Insurance Services.</i></p> |                    |
| <p>Are there any activities involved in the collaboration that are inherently hazardous or unpredictable?</p> <p>Are there any activities that are happening overseas?</p> <p>Are there any aspects of the collaboration that would fall apart without particular individuals working on the project?</p>  |                    |
| <p>What level of financial and non-financial (including operational resources, people, equipment, facilities, time) commitment is the University putting into this collaboration? Is the contribution we are making likely to compromise our operations in any other areas?<br/>(e.g. by taking people away from other functions, or by tying up facilities/equipment)</p>   |                    |
| <p>What impact would a break down in certain relationships (with government, funding bodies, collaborating partners, industry and business) have on the project? And what potential is there for the <i>project itself</i> to impact relationships?</p>  |                    |
| <p>What kind of legislative and regulatory compliance obligations will be involved in the collaboration? Are they all things that are already faced in day-to-day activities, or are some of them new and unusual requirements?<br/>(e.g. if the collaboration is taking us overseas, what new requirements will we have in that place?)</p>   |                    |
| <p>What kind of effect will this collaboration have on the University's reputation? This is of particular importance when dealing with foreign entities and/or sensitive technologies.</p> <p>Are there things that could go wrong in the collaboration that might have a bad effect on the University's reputation?</p> <p>Are there any "nightmare scenarios" that you can see happening in the collaboration that would result in negative press and reputational damage?</p>   |                    |
| <p><b><i>D.9 Indemnity and insurance</i></b></p>   |                    |
| <p>What liabilities will each party inherit by participating in the collaboration?</p> <p>Will each party's liability under the collaboration be limited?<br/>(e.g. limited to a fixed cap amount, or limited by excluding indirect or consequential losses)</p> <p>Will the parties be required to indemnify each other under the collaboration agreement (in other words, will the parties be "covering" each other for any liability)? If so, in what circumstances, on what terms, and to what extent?</p>   |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| (e.g. one party may agree to indemnify each other party for losses that the other parties suffer due to negligence, a breach of the agreement, or willful misconduct by the first party)  |                    |
| <p>What insurance policies should the parties be taking out in relation to the collaboration – and at whose costs and to what levels?</p> <p>Should insurance be in joint names, or in the name of one party with the others simply noted as having an interest?</p> <p>To what extent does the University's existing insurance already cover the people or activities in the collaboration?</p> <p>Are any updates required to the University's insurance, or does anything need to be notified to our insurer?</p> <p><i>Note: If you have questions or want advice on liability, insurance and indemnity issues, contact the <a href="#">Insurance Specialist</a>.</i></p> |                    |
| <i>D.10 Dispute resolution</i>  |                    |
| How will disputes under the collaboration agreement be resolved? In other words, what process will be used to resolve disputes?   |                    |
| Will the parties be required to pursue some non-litigious path (alternative dispute resolution) before they are allowed to take legal proceedings in a dispute?   |                    |
| <p>What types of alternative dispute resolution might be appropriate for this collaboration?</p> <p>(e.g. a disputes committee with representatives from each party, who are more detached from the work of the project, and who can meet to discuss the dispute more objectively; mediation or arbitration by an outsider; expert assessment)</p>  |                    |
| Will certain disputes need to be determined by an independent expert? Who engages and pays for the expert?  |                    |

| D. LEGAL, GOVERNANCE AND RISK ISSUES – Issues to consider  | Relevance/Evidence |
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| <i>D.11 Other common legal issues</i>  |                    |
| <p>Will the parties be excused from performing their duties under the collaboration if, in circumstances that are outside of their control, something unexpected and uncontrollable happens – something that affects their ability to fulfill their duties? (e.g. natural disaster or accident – things that are legally referred to as “force majeure”)</p> <p>Will the parties be allowed to terminate or end the collaboration if such an uncontrollable event occurs?</p>  |                    |
| <p>In how many different jurisdictions is the collaboration occurring? For instance, are different parties carrying out different parts of the collaboration in several places?</p> <p>What legal obligations arise in each jurisdiction, under legislation and regulation? (e.g. tax laws, safety laws, environmental laws, immigration laws)</p> <p>Which jurisdiction’s laws will be used to resolve disputes under the agreement? (e.g. it is normal to choose one jurisdiction where the matter would be taken to court, if necessary, and by whose laws the contract document would be interpreted and resolved)</p>   |                    |
| <p>Can the parties assign their ownership, rights or obligations in the collaboration?</p> <p>Will consent of the other parties be required before assignment can happen – and if so, can consent be unreasonably withheld? In other words, do the parties need to have a real reason why to withhold consent for a party to assign its interest?</p> <p>Will a change in control of a party (such as new management, new ownership) be considered an assignment or trigger some other consequences?</p> <p>Will the parties in the collaboration have a right to buy out or take over the other collaborators interest before they sell or give it to an outsider? By what process?</p> |                    |
| <i>D.12 Ending a collaboration</i>   |                    |
| <p>What kind of events would allow the collaboration to be brought to an end (or terminated), and by whom?</p>   |                    |
| <p>What rights will each party have to terminate the agreement? (e.g. if a breach by a party is not remedied within a certain period; if a party becomes insolvent)</p> <p>What will the process be for exercising a right of termination? (e.g. by service of a written notice)</p>   |                    |
| <p>What are the consequences and process upon termination or expiry (the natural end) of the collaboration? (e.g. an obligation to return documents and property, the ongoing application of non-compete or exclusivity obligations)</p>   |                    |

## E. Formalising the agreement

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This section of the checklist addresses the formalisation of a collaboration agreement. It also addresses issues like term, renewals and variations to agreements.

| E. FORMALISING THE AGREEMENT – Issues to consider   | Relevance/Evidence |
|---|--------------------|
| What form will the collaboration agreement take? Who will draft it?   |                    |
| Will the collaboration be for a fixed term, or will it run indefinitely? The University does not generally accept indefinite terms or contract with fixed terms of greater than 3 years.  |                    |
| Who will bear the costs of negotiating and preparing documentation for the collaboration, including the main collaboration agreement? Who will be responsible for registering and stamping any documents that need it?  |                    |
| Who will review the agreement for the University? Is a review <i>team</i> needed to ensure all the relevant internal people are consulted?  |                    |
| Who is going to sign the agreement for each party? Are they properly authorized?  |                    |
| Can the collaboration agreement be varied? If so, in what circumstances and by what mechanism?<br>(e.g. by written agreement between the parties only)  |                    |
| <p>Will there be any rights of renewal under the agreement, allowing the parties to extend the collaboration beyond its initial term?</p> <p>If so, will there be conditions attached to the right?<br/>(e.g. satisfaction of performance benchmarks or targets in the collaboration)</p> <p>What process will be used for renewals?</p> <p>Will there be a review process for considering renewals? Do all parties have to agree that it's the best course before it can happen?</p> |                    |