



THE UNIVERSITY
of ADELAIDE

CONTRACT MANAGEMENT

Developing and Managing University Contracts

Legal Services handbook

Published November 2022

adelaide.edu.au

Structure and Contents

The handbook is intended to be a general reference guide for University managers, contract managers, and any University staff or stakeholders involved in the development and management of contracts on behalf of the University. It is not intended to be a substitute for legal advice in respect of particular agreements or where specific issues arise.

- ▶ **INTRODUCTION** provides an overview of what a contract or agreement is; the kinds of contracts that arise in the University setting; the University's approach to contract management, and common issues that arise in any contracting situation.

*Since different users of this handbook will have different needs, the remainder of the handbook is divided into separate **modules**, to allow easy reference on each aspect of contracting activity.*

The first four modules deal with the major stages in the life of any contract:

- ▶ **MODULE 1: PREPARATION AND NEGOTIATION** outlines the basic principles and steps involved in the earliest stages of developing an agreement. It highlights the importance of preparation to any contracting activity, regardless of how simple the agreement may seem, and provides some practical tools for both preparation and negotiation with external parties.
- ▶ **MODULE 2: DRAFTING AND FORMALISATION** discusses the process through which the negotiations are finalised and a contract is drafted and formalised. At the start of the module, there is a summary of how to document *simple* agreements, which will be relevant for staff involved in any level of University contracting. The remainder of the module inform contract managers about the drafting and execution process for formal written contracts.
- ▶ **MODULE 3: ONGOING MANAGEMENT** will assist those persons with ongoing responsibility for managing the administrative and relationship matters under contracts once signed. This module also discusses how contracts end. (Note that termination for breach of contract is addressed in detail in Module 5).
- ▶ **MODULE 4: RECORDS MANAGEMENT** summarises some of the key record keeping obligations that should be constantly happening *throughout* the life of any contract.

The remaining modules (which will be developed and expanded over time) introduce more specific or detailed contracting issues.

These modules are intended for those engaged in frequent or complex contracting on behalf of the University. However, if you require specific support or have a particular issue in any of these areas, it is recommended that you obtain legal advice or assistance:

- ▶ **MODULE 5: WHEN THINGS GO WRONG** – not in use
- ▶ **MODULE 6: STANDARD FORM CONTRACTS** – not in use
- ▶ **MODULE 7: COMMON PROVISIONS AND BOILERPLATE CLAUSES** describes certain standard terms or clauses that appear in many contracts – often called “boilerplate” clauses. This module also identifies some key clauses that should *not* be treated as “boilerplate” but should instead be treated with caution and specifically addressed before signing (“danger” clauses).
- ▶ **MODULE 7B: INDEMNITIES – MOVING RISK AROUND** - not in use

- ▶ **MODULE 8: ENTERING INTO COLLABORATIONS** discusses service level agreements (SLAs) and consulting agreements, and provides some tools to help you decide when and how it might be appropriate to outsource certain activities or services.
- ▶ **MODULE 9: SUSTAINABLE CONTRACTS** –not in use
- ▶ **MODULE 10: TENDERS** –not in use

Acknowledgement

This handbook is based on and contains some material reproduced or adapted from Developing and Managing Contracts – Better Practice Guide, published by the Australian National Audit Office and the Commonwealth Department of Finance and Administration, February 2007 © Commonwealth of Australia, reproduced by permission.

INTRODUCTION

A. What is a contract?	i
B. Types of contracts that arise in the University setting	iii
C. The University's approach to contract management	iv
D. Goal and structure of this Handbook	vi
E. Common issues in contracting	vii

Contracting is an integral part of doing business in any industry, including the higher education sector. The University of Adelaide, with its diverse and complex operations, enters into a variety of contracts with industry partners, private sector service providers, and public sector agencies – just to name a few. Many, if not most, of the University's day-to-day activities involve some element of contracting with someone outside the University. As a result, developing and managing contracts is a skill required by an increasing number of staff across the University.

It is important to realise that the contracting decisions of a single staff member in a single School or area may well bind the University as an institution. In other words, contracts made on behalf of the University by any staff member in any area impose "University" obligations. It is therefore important to understand exactly what you are getting the University into, both from a legal and practical perspective, *before* commitments are made. The University has a *choice* whether to enter a contract or not, and an ability to negotiate the terms; but once the University agrees to something, the obligations under that contract become mandatory. A failure to meet the obligations may then result in implications not just for the local area responsible for the contract, but for the University as a whole.

This handbook is designed to:

- Identify **key issues and considerations** to be aware of in developing and managing contracts, and
- Serve as a **general reference guide** for anyone involved in contracting on behalf of the University

This handbook does not attempt to address all issues that may need to be considered in a particular circumstance. In particular, it does not address all the specific issues that arise in high value, complex contracts, where specific legal assistance should be sought as early as possible in the contracting process. Rather, this handbook identifies the key issues and considerations to be aware of in developing and managing *any* contracts. The handbook is intended to be a general reference guide for University managers, contract managers, and any University staff or stakeholders involved in the development and management of contracts on behalf of the University.

A. What is a contract?

A "contract" is a *legally enforceable agreement* – an exchange of promises for which the law can provide a remedy if the promises are not kept. It may be an agreement to pay something, to do something, to not do something, to give or receive something, or to warrant something. A contract may be written down, or it may be verbally agreed; it may be a formal document that is negotiated over many months, or it may arise via an exchange of emails or even a handshake. There are specific legal principles that determine whether a promise or undertaking will be legally enforceable, and those principles apply equally regardless of the name or label given to the arrangement (e.g. "contract", "agreement", "memorandum of understanding").

Intention

Not every agreement or consensus reached in everyday life is a legally enforceable "contract". For instance, when you agree to pay your son \$5 pocket money in return for him agreeing to wash your car, that is not something that either of you can sue each other over. However, if you agree to buy some item from a shop and settle upon a price, payment method and delivery time, then that will be legally enforceable by either one of you if the other simply changes their mind and tries to go back on the deal.

A contract is a legally enforceable agreement, where:

- Both sides intend to enter a legal relationship and be legally bound by their promise.
- Both sides are contributing something of value to the deal.
- There is a “meeting of the minds” about the terms.

The critical difference between these two scenarios, and the factor which makes only the latter enforceable, is a *mutual intent by the contracting parties to enter a legal relationship*. Both sides in the buying and selling scenario understand that “a deal is a deal” and that you cannot simply go back on your word in a commercial setting once an agreement has been formed. In contrast, when making a car-wash arrangement with your child, neither one of you would consider the agreement to be a “legal deal” that might later be enforced through legal action

Of course, there are many scenarios that are less clear and more complex than the two provided; but in any situation, asking whether the agreement is of the kind where you both expect to be bound by it – or “intend to create legal relations” between you – is one of the most helpful indicators in determining whether you have a legally enforceable contract.

Where two parties reach any kind of agreement in a commercial or business setting, it will generally be *presumed* that the parties intended to be legally bound by it. This is likely to be the case whenever agreements are reached on behalf of the University, regardless of whether they are formalized in a contract document, or simply contained in an exchange of emails or letters, or even agreed verbally over the phone or over a drink. Therefore, it is particularly important to be aware that even seemingly informal “understandings” can in fact be held to be legally enforceable “contracts”.

Consideration

To be legally enforceable, a contract normally requires both sides to “give” or contribute *something* to the deal – be it money, property, ideas, time, services, branding, support, the performance of some task or an agreement to refrain from doing something. This contribution and exchange of things of value by the parties is called *consideration*.

Consensus

A contract also requires a consensus to be reached by the parties; if one person in the deal thinks that he is buying a boat for \$10,000 but the other person thinks she is selling a motorcycle for \$8,000, then there is no “consensus”. While this may sound obvious, it can become a critical point in more complex contracts, where there might be general agreement, but a confusion or lack of consensus around particular details or terms of the deal. Consensus occurs through *negotiation* – a process through which parties offer and accept terms to achieve a “meeting of the minds”.

Until a contract is finalised, the parties generally have no enforceable rights or obligations against one another; but the moment the contract comes into existence, they do. Determining the point at which a contract is formed is therefore critical, and gives rise to a number of important practical questions, which will be addressed in *Module 1: Preparation and Negotiation*.

The more completely and accurately the terms of the agreement are recorded, the easier it will be to demonstrate that there is an agreement in place, ensure that both sides are clear on their obligations, and enforce the deal if things go wrong. Even for an agreement that seems very simple, writing it down is the best way to make sure you are all on the same page.

Table A.1 – Some important terminology used throughout the Handbook

Contract (or agreement)	Any <i>legally enforceable agreement</i> . “Contract” and “agreement” are used interchangeably in the Handbook to mean <i>any</i> legally binding arrangement. Often the term “contract” is perceived as only applying to <i>written</i> agreements; but legally, a verbal agreement can be just as binding and constitute a contractual commitment, as can an agreement that is called something else like a “memorandum of understanding” or a “letter of intent”. What makes something a contract is its intention and content, not its name or form. Any agreement between the University and an outside party should be documented in some way; but whether a more comprehensive or “formal written contract” is required will depend on the circumstances.
Parties	The people or organisations entering a contract.
Obligations or “deliverables”	The tasks, things or commitments agreed to in the contract, which the are required to perform (or “deliver”) as part of the deal.
Terms	The details of the agreement and the obligations imposed or deliverables expected.
Performance	Carrying out the tasks or meeting the obligations agreed to under a contract.
Negotiation	The process through which parties offer and accept terms to reach consensus.
Risk	A potential threat or event that could compromise the University’s position if it happened.
Breach of contract	A failure by one or more parties to comply with the terms or perform their

B. Types of contracts that arise in the University setting

Contracts that can arise in the University setting can be summarised under three major categories:

1. Agreements where the University “gets paid” to do something or meet some obligation

Common examples include consultancies and contract research, grants or sponsorships, licensing or branding agreements, secondment agreements. Basically, this category covers any situation where the University receive payment but is required to do something in return for, or in connection with, the payment. It is important to note that “getting paid” does not necessarily mean the University receives money; being given something of *value* (such as equipment, use of premises, or promises in return) will also count as *consideration*.

2. Agreements where the University “pays” someone else to do something

Common examples include employment contracts or agreements with contractors and consultants (where the University pays outsiders to provide a wide array of services such as cleaning, electrical work, outside legal services, or guest lecturing). Another common example is property and infrastructure expenditure. In fact, any University related procurement activity by anyone within the University involves an “agreement” in which the University pays someone outside the University to do or supply something. Again, “payment” may not involve money but may involve some item of value, or may even also involve providing another service by way of exchange.

3. Agreements where there may be no payment involved, but obligations are still imposed on the University

These are some of the most reputationally critical agreements, but also the most difficult to spot, so they are often overlooked in terms of formalisation. Common examples include articulation agreements, memoranda of understanding (MOU), mutual benefit arrangements and student placement agreements.

Regardless of the lack of payment or exchange, the University may be exposed to liability or serious consequence (including damage to reputation) for breaching the obligations.

When dealing with people outside the University, you have probably entered a “contract” if you have:

- Agreed to anything that involves money changing hands or services being exchanged
- Agreed to do something in return for something else
- Made promises about something in the future
- Arranged for someone else to do something for you, in return for payment of some kind

One of the biggest dangers to the University in contract management is that an agreement could be entered, and obligations imposed on the University, that *no-one knows about or follows up*.

For example, a professor may travel overseas and enter an MOU with his international colleague that has the effect of committing certain University resources towards future research, despite its non-“contract” title. Suppose that no-one in the professor’s home Department knows of this commitment until it is called in at some time in the future, at which point there are insufficient personnel or resources to fulfil the agreed commitment. Not only does this expose the University to liability in terms of being forced to carry out the commitment or compensating the other party, but it also reflects poorly on the University’s reputation as a reliable collaborative institution.

If you engage with the outside world on the University’s behalf, often recognising that you are about to commit the University to a contract (or that you have in fact just done so) is half the battle.

Thinking about the three categories of contracts described above can help you to quickly identify whether some interaction or arrangement may in fact indicate a “contract” is being formed or negotiated.

If you are not sure whether something you have said or done may be considered to create a legally binding agreement for the University, it is always a good idea to check with your supervisor, Head of School or Branch Head, or someone in the Legal and Risk Branch.

Asking questions need not “stop” the deal or activity that you are interested in. On the contrary, being open, asking questions and dealing with potential issues as early as possible allows contracts to be managed with minimal effort and stress, and ultimately frees up more time for you to carry out your desired activities and goals. The main purpose of having a properly negotiated and documented agreement is to ensure that all the parties are on the same page. You may well be able to negotiate and agree a position that resolves or addresses the issue or risk that you foresee – or at least incorporates some mechanism for how the parties are going to deal with a certain problem if it does arise.

However, hiding or ignoring the possible contract, or failing to even consider whether you may have bound the University, can lead to messy incidents, stress, reputational damage (to you and your University) and potential legal liability down the track.

Ensuring that you, your work team and your fellow department members maintain at least a general awareness of what it means to “enter a contract on behalf of the University” empowers *everyone* to help increase the detection of contracts, facilitate more proactive management of any obligations your area enters into, enable time to be spent on real activities rather than “damage control”, and minimise stress and incidents in the future.

If in doubt: ASK SOMEONE

Asking questions about possible contracts or concerns need not “stop” the deal or activity...

Being open and dealing with things early allows issues to be handled more easily, and ultimately enables **you** to spend more time on real activities rather than “damage control”.

C. The University’s approach to contract management

Contracting is an integral activity of any organisation. With its diverse and complex operations, the University enters into a wide variety of contracts. The University is a unique organisation that operates under significant pressures, including:

- Functioning in a challenging, changing and increasingly competitive environment.
- Having a great diversity of activity, and being subject to an equally diverse range of compliance requirements: both legislative/regulatory requirements and contractual obligations.
- Being subject to ongoing audits from external agencies, who scrutinise all aspects of the University's operations and expect best practice standards to be met in both academic and management areas.
- Meeting the high standards of diligence, transparency and accountability demanded by the government, external collaborators, insurers and funding bodies – an increasing number of which are making best practice a condition of funding.
- Pursuing ambitious goals and targeting a significant growth trajectory.

The University is committed to continually improving its measures for the management of contracting, compliance and risk. Hence, a set of policies has been developed to formally enunciate the University's commitment to best practice in the areas of contracting, legal compliance and risk management (and to require staff to engage in these practices).

The implementation of these policies will help effect the cultural and practical changes needed to streamline

The University is committed to:

- Continually improving its contract management methods
- Understanding its contracting activities as an institution
- Supporting its staff in contracting activities in order to reduce problems, enable better informed decisions, streamline processes and maximise the time that can be spent on their substantive activities

the University's operations and reporting demands, and help relieve the pressures on managers and the institution. It will establish a more consistent approach across the University in contract management, as well as the related areas of legal compliance and risk management. It will also greatly improve the University's awareness as an institution of its obligations and activities, and improve compliance and accountability across the University.

Critically, the implementation of these policies will improve the University's ability to demonstrate accountability and transparency to external funding bodies, collaborators and government agencies, and enhance the University's long term sustainability and growth.

Contracts and Agreements Policy

The [Contracts and Agreements Policy](#) formally enunciates the University's commitment and approach to best practice in contracting. The Policy and its associated Procedures are practically oriented towards establishing common, consistent and better-supported University processes for formalising agreements made on behalf of the University; and for tracking and managing contractual obligations. The Policy also clearly allocates responsibility for each stage of the contracting process - development, negotiation, formalisation and ongoing management.

Central to this Policy is a recognition of the fact that enforceable agreements made by any person in any part of the University impose "University" obligations; that the institution as a whole must have a clearly documented understanding of its contractual undertakings; and that it is important to know exactly what the University is getting into before commitments are made.

The Policy applies to all University contracts and agreements (with a few exceptions set out in the Policy). The terms "contract" and "agreement" are both used in the Policy, because the Policy is intended to incorporate *any* legally binding arrangement. Often people perceive the term "contract" to only apply to written agreements; but legally, a verbal agreement can be just as binding and constitute a contractual commitment. In the University context, any agreement with an outside party should be documented in some format; whether a more formal and comprehensive separate written contract is required will depend on the circumstances.

Responsibility for initiating and managing agreements remains with local areas, but certain strategic and operational considerations must be taken into account when entering into agreements.

The Procedures specify how an agreement should be documented (whether by formal contract or a simple written note), when the agreement should be referred to specialist areas, and how executed agreements

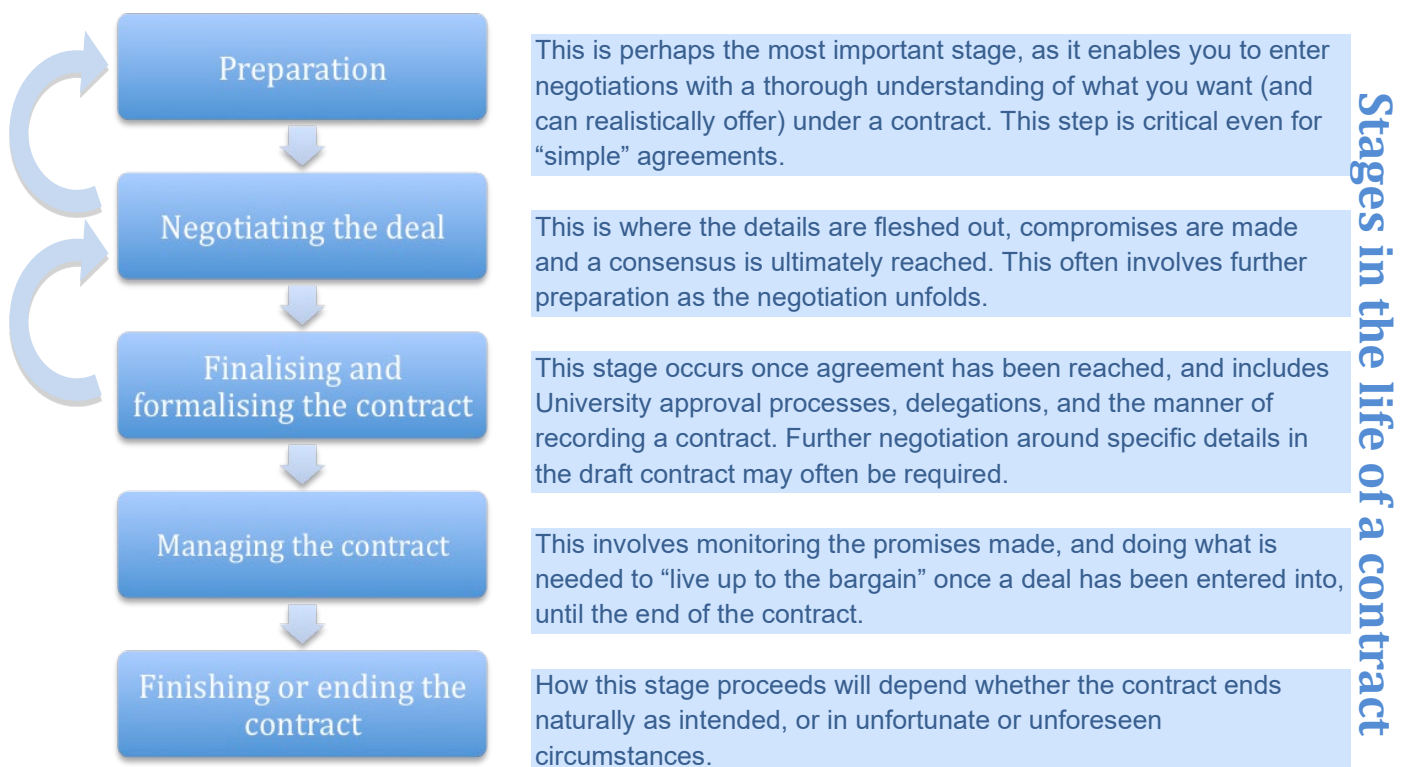
should be recorded. For formal contracts, the Procedures provide guidance on how the agreement should be drafted or reviewed.

D. Goal and structure of this Handbook

Since contracts can range significantly in value, duration, risk exposure and complexity, the level of contract “management” required will vary, depending on the particular circumstances of a contract. Those involved in University contracting need to apply judgment about the contract development and management practices that are appropriate to each particular situation. This handbook has been developed to help members of the University community make those judgments, and to provide practical guidance about how to manage different kinds of contracts once that judgment has been made.

This handbook does not attempt to address all issues that may need to be considered in a particular circumstance. In particular, it does not address all the specific issues that arise in high value, complex contracts, where specific legal assistance should be sought as early as possible in the contracting process. Rather, this handbook identifies the key issues and considerations to be aware of in developing and managing *any* contract.

Since different users of this handbook will have different needs, the handbook is divided into separate parts or “modules”, to allow easy reference to each aspect of contracting activity – and each **stage in the life of a contract**.



E. Common issues in contracting

There are a number of common themes that arise at all stages of contracting, and are thus important to continually think about and address as you move through the life of the contract (six “R’s”):



1. Defining **Responsibilities**
2. Managing **Resources**
3. Managing **Risk**
4. Managing **Relationships**
5. Managing **Records**
6. Doing the **Right Thing** (behaving ethically, maintaining **Reputation**)

Each of these six issues are discussed here in a generic and introductory way, and dealt with at certain points through the remainder of the Handbook. What approach is adopted to manage each issue, and how much time and effort is devoted to them, will depend on the size, complexity, nature and risks of the contracting environment and the individual contract in question. However, they each have basic relevance even for the simplest of agreements.

Defining Responsibilities

Ensuring the necessary authorisations and delegations are in place, and seeking the appropriate internal approvals within the University, are important prerequisites to ensuring that contracting decisions are valid and legally appropriate. Once a contract has been entered into, assigning responsibility for the ongoing management of the contract is critical in order to ensure the University meets the obligations it agreed to carry out.

Managing Resources

Whenever the University commits to performing certain obligations through a contract, it is important that the internal resources needed to fulfil those obligations are identified early, and allocated appropriately. This may require management support at the early stages, and the identification of staff with relevant skills for performing the contract. Often, the staff and resources of other areas of the University are impacted by a contract, not merely those of the individual or area that negotiated the terms. For instance, some arrangements may require special IT or infrastructure needs, which may require consultation with IT or Infrastructure Branch. Similarly, there may be some special safety, hazard or environmental concerns that arise, which may require specialist input or the obtaining of special permits.

Before any obligations are committed to, it is critical to consider what resources (both your own *and* those in other areas of the University) will be needed to perform contract obligations, and to consult with any other affected areas during the preparatory phase. This is closely linked to the identification of risks, since considering what might go wrong under a contract can help identify other areas that might be called upon to assist in that event.

Managing Risk

Risk management is a process and a way of thinking that can facilitate good contract management. We are “risk managing” every time we assess how things might turn out, weigh up the pros and cons, work out if the cons are fatal and mitigate them where we can, and make and execute the most informed decision possible.

While the word “risk” usually has negative connotations for people, in the context of “risk management” it is equally about *positive* possibilities. Risk management is therefore about detecting and dealing with things that might go wrong (preferably *before* they go wrong) as well as foreseeing and capitalising on potential opportunities.

In short, it is about figuring out how events might unfold in a situation, assessing how those events could help or harm the University's objectives, and using that knowledge to try and proactively minimise harm or maximise opportunity.

More detailed guidance on the University's risk management approach can be found in the Risk Management Handbook, or by contacting the Anne Hill (Director, Risk Services) on 8313 4603 or anne.hill@adelaide.edu.au.

Managing Relationships

Having professional, constructive relationships with everyone involved in the contracting process – both internal and external to the University – is a key ingredient in the successful completion of the contract's intended outcomes.

The aim of relationship management is to keep communication between the parties open, constructive, and based on mutual understanding. This should assist in preventing problems from arising, and in resolving them more smoothly should they arise. Maintaining a good relationship does not mean that issues of non-compliance or under-performance during the life of the contract cannot be discussed or acted upon; instead, it means that there is a greater likelihood that such issues can be discussed and resolved in an open, cooperative manner.

Relationships will begin to form at the early stages of the contracting process. In situations where a different contract manager is assigned within the University following the final formalisation of the contract, that contract manager should seek to build on existing relationships established during the negotiation phase.

Managing Records

Records are a critical part of the University's institutional memory, and provide crucial evidence of our activities in terms of maintaining our transparency and accountability. In the context of contracting, where the intention of the parties is paramount, keeping evidence of the University's intentions and the journey of the negotiation process could become crucial if any aspect of the contract was challenged in the future.

The University's [Information Management Policy](#) applies to all records that are created and received in the course of developing and managing a contract, whether paper based or electronic. It is also important to record in writing any discussions that constitute representations, decisions or undertakings by or to the other contracting parties.

A systematic approach to recordkeeping from the very beginning of the contracting process and throughout the life of the contract will assist the University to:

- Provide evidence of business conducted and decisions made;
- Manage legal and other risks;
- Meet its accountability obligations;
- More easily enforce its rights against other parties; and
- Satisfy its regulatory records management obligations (under the *State Records Act*).



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More information on good records management, and the University's *Information Management Policy*, can be found in the *Records and Archives Management Handbook*.

Doing the Right thing (behaving ethically and maintaining Reputation)

Reputation is critical to the University: to the community trust it engenders, to the attainment of its mission, to the continuity of funding and public support, and to the ongoing reliance by government, industry and the wider community on the expertise of its specialists.

It is important that we maintain this reputation in our interaction with outside parties. If you are ever concerned about whether you may be acting in the most appropriate and ethical manner, a good litmus test is to ask whether you or the University would be embarrassed or ashamed if your actions were publicised on the internet or on the front page of the Advertiser.

The Contracts and Agreements Policy specifically requires that negotiations and procurement processes be transparent, ethical and free of bias, having regard to the reputation, accountability and social responsibilities of the University to the wider community and environment. Staff must be sensitive to potential conflicts of interest and must disclose and manage them in accordance with the [Behaviour and Conduct Policy](#).

Conflicts of interest may arise at various stages of the contracting process, such as during the selection of the outside parties, if gifts or benefits are received during the negotiation phase, or if “quid pro quo” arrangements are evident amongst the contracting parties.



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MODULE 1: PREPARATION AND NEGOTIATION

Purpose of this module:

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

This module has the following objectives:

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

Contents of this module

1.1	Planning to enter an agreement – the critical step of preparation.....	1.2
	Contract planning – preliminary checklist.....	1.2
	General factors that must be considered before entering any University agreement:.....	1.3
1.2	How formally will my agreement need to be documented?	1.3
1.3	How and when a contract forms – the importance of negotiation	1.4
1.4	Preparing to negotiate – understanding your bargaining position	1.5
	The “P.A.N.” approach	1.5
1.5	More detailed preparation: the pre-agreement evaluation.....	1.6
	Contract Preparation – Pre-evaluation Matrix	1.7
1.6	Never assume negotiation is “futile”	1.8
1.7	Legal guidance: the transition from negotiation to binding contract	1.8
	(a) How can parties protect themselves against becoming legally bound before they intend to be?	1.8
	(b) How can parties define the moment that a contractual relationship comes into being?.....	1.9
	(c) How far can parties go in securing a commitment from another party to continue negotiations without becoming prematurely bound by a contract?	1.9
	(d) What devices can be used to secure a binding obligation before the details have been thrashed out?	1.9
	(e) What happens when one party, believing that the contract is binding, acts upon that belief when the other party considers they are still only negotiating?	1.9
	(f) When parties finally conclude a contract and put it in writing, what is the relevance of prior discussions – and when might parties be bound by aspects of their prior agreement that are not in the ultimate printed document?.....	1.10

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

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

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

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

PREPARATION: Preliminary checklist

Contract planning – preliminary checklist:

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

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

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

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

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

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

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

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



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Requirements

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

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

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

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

Table 1.1 contains a list of “triggers” to help you determine whether a separate, formal written contract is required – or whether you can simply document the agreement in a less formal way. These triggers capture the main circumstances in which:

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

TABLE 1.1: TRIGGERS FOR A SEPARATE WRITTEN CONTRACT

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



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University Policy
Requirements

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

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

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

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

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

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

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

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

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

D. Preparing to negotiate – understanding your bargaining position

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

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

The “P.A.N.” approach:

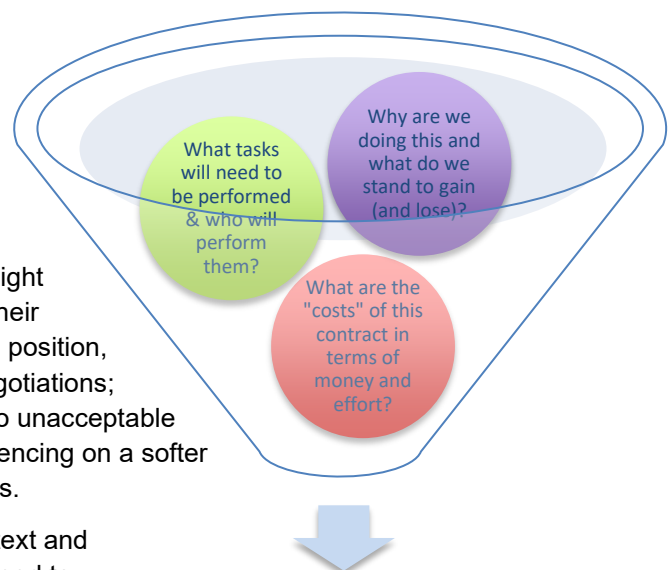
- What is my **PREFERRED** position: what would be a “win”?
- What is my **ACCEPTABLE** position: what would I be happy to live with?
- What is my **NOT-NEGOTIABLE** position: what is my “bottom line”, below which I cannot go?

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

It can be equally helpful to anticipate what the

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

Your actual “P.A.N” positions will depend on the context and circumstances of each agreement. You will usually need to consider the dollar amount of the agreement (i.e. the amount you are prepared to pay, or the amount you expect to be paid) and the time frame (such as the time frame you are prepared to wait to receive some service, or the time frame within which you believe you can provide some outside research service). You may also need to consider your position in relation to the people you hope to do business with. The “P.A.N.” position may be a combination of many things.



The University's "acceptable" negotiating position

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

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

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

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

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

E. More detailed preparation: the pre-agreement evaluation

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

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

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

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

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

Contract Preparation – Pre-evaluation Matrix

ISTRATEGIC	Does your proposed agreement align with: <ul style="list-style-type: none"> the University’s strategic plan? (https://www.adelaide.edu.au/vco/strategic-plan) your Faculty / Division strategic plan? your School / Branch plan? 	Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/>
	Does your proposed agreement align with the State’s strategic plan? (https://www.dpc.sa.gov.au/news)	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Does your proposed agreement align with the University’s commitment to the Commonwealth’s Protective Security Policy Framework? (Policies Protective Security Policy Framework)	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Will your proposed agreement advantage the University?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Will your proposed agreement maintain, protect or enhance the University’s brand and reputation?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Is the other party suitable? (e.g. is it reputable; have you worked with it before?)	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If the other party a foreign entity have you obtained endorsement under the University’s Foreign Engagement Compliance Review ?	Yes <input type="checkbox"/> No <input type="checkbox"/>
OPERATIONAL	Have you checked that a relationship with the other party will not cause conflict with any existing University relationships?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Does the University have the skills, knowledge or experience required to perform its obligations under the proposed agreement?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Are there sufficient personnel or human resources to manage the proposed agreement and undertake the University’s obligations under your proposed agreement?	Yes <input type="checkbox"/> No <input type="checkbox"/>
LEGAL	Does the University have the infrastructure or equipment required for your proposed agreement?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	Is your proposed agreement legally acceptable? (i.e. does not contravene any law)	Yes <input type="checkbox"/> No <input type="checkbox"/>
FINANCIAL	If your proposed agreement creates any additional compliance obligations on the University, are you confident these can be met? Have you confirmed this with Legal Services?	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If your proposed agreement involves exchange of money, is it of appropriate commercial value? (don’t forget to take into account any oncosts)	Yes <input type="checkbox"/> No <input type="checkbox"/>
RISKS	If your proposed agreement involves expenditure, is this within an approved budget and does your area have sufficient resources/funds for the term of the contract? (don’t forget to take into account any oncosts)	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If you have answered “No” to any of the above, your proposed agreement may pose a risk to your area or the University as a whole. <ul style="list-style-type: none"> Is the risk acceptable and manageable? Is there a greater risk to the University if the agreement is NOT entered into (e.g. political, threat to existing relationship, loss of market position)? If you have answered “No” or “Unsure” to either of these questions, you should seek higher level approval before proceeding any further with your proposed agreement	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>

F. Never assume negotiation is “futile”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MODULE 2: DRAFTING AND FORMALISATION

Purpose of this module:

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.

Contents of this module:

2.1	Introduction – what level of formalisation is required?.....	2.2
2.2	Basic checklist for documenting and managing simple contracts	2.3
2.3	Separate written contracts	2.4
	Contract Manager	2.4
	Contract specialist areas – making the most of the University’s contracting expertise	2.5
	Seeking internal approvals – and keeping other areas in the loop.....	2.7
2.4	Drafting the contract: theirs or ours?	2.10
	Using standard form contracts	2.11
	Custom drafted contracts.....	2.11
2.5	What you are agreeing to: defining contract deliverables.....	2.11
2.6	Knowing whether deliverables have been met: performance measures.....	2.13
2.7	Final negotiations.....	2.14
2.8	Sealing the deal – signing the contract.....	2.15
	University sign-off	2.15
	Storage of signed contract	2.15
	Appendix 2.1 – Contract Drafting / Review Instruction Form	2.17
	Appendix 2.2 – Road map of contract formation process	2.19

A. Introduction – what level of formalisation is required?

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.



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

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.



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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.

TABLE 2.2 Contracts and Agreements Relating to	Specialist Areas or Officers	Framework/Policy Process to Follow
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	Foreign Engagement Compliance Review Other processes as directed
Jointly conferred academic (coursework) awards	Deputy Vice-Chancellor and Vice-President (Academic)	Jointly Conferred Coursework Awards Policy
Jointly conferred academic (higher degree by research) awards	Deputy Vice-Chancellor and Vice-President (Research)	Jointly Conferred Higher Degree by Research (HDR) Awards Policy
Use of University brand (including name, logos, trademarks)	Marketing and Communications	Brand Policy
Competitive research grants	Research Services	Research Grants, Contracts and Consultancies Policy
Research contracts, non-competitive research grants or consultancy services	Innovation and Commercialisation Services, Business Development	Research Grants, Contracts and Consultancies Policy
Protecting and commercialising intellectual property (including related Confidentiality Disclosure Agreements and Material Transfer Agreements)	Innovation and Commercialisation Services, Commercialisation	Invention Disclosure Form ; Intellectual Property Policy
Collaborative research ventures with external parties	Deputy Vice-Chancellor and Vice-President (Research)	Research Centres and Research Institutes Framework - Joint Research Ventures with External Partners Template

Establishment or acquisition of Controlled Entities	Legal Services Branch Innovation and Commercialisation Services	Controlled Entities Policy
Capital works (major and minor building work and infrastructure projects) or other arrangements relating to premises or real property	Infrastructure Branch	As directed by Infrastructure Branch
Procurement of goods and services	Strategic Procurement	As directed by Strategic Procurement Financial Management Policy Procurement Procedures
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 Information Technology and Digital Services
Information Technology Third Party Hosting services	Information Technology and Digital Services	Third Party Hosting Security Guidelines
Information Technology Hardware Purchasing or Implementation	Information Technology and Digital Services	As advised by Information Technology and Digital Services
Contracts of employment and appointment of titleholders	Human Resources Branch	As directed by Human Resources Branch Recruitment Policy
Engagement of consultants or contractors	Human Resources Branch	Information Sheet for Engaging Independent Contractors
Gifts, sponsorships, externally- funded scholarships	External Relations	Giving Policy
Externally-funded postgraduate research scholarships/sponsorships	Adelaide Graduate Research School	As directed by Adelaide Graduate Research School
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	Hold Harmless Briefing Note and Application Form

Significant Contracts

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

TABLE 2.3 A contract is a significant contract if it satisfies any of the following criteria*	Exclusions
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?

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/) 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

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 3rd 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

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

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

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/).

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.

Why do we need you to use this form?	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> (www.adelaide.edu.au/policies/2964/).
To whom should you send this form?	You can send this to any of the lawyers within Legal and Risk. If you are not sure whom to contact, please send to helpdesklegal@adelaide.edu.au and it will be allocated to one of our lawyers.
What happens when we get your completed form?	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.

ABOUT YOU	Your name & Position	Your name and position
	School/Branch/Faculty	School/Branch/Faculty
WHAT TYPE OF SERVICE DO YOU REQUIRE?	<input type="checkbox"/> Assistance using University template agreement State which template agreement: State which template agreement	
	<input type="checkbox"/> Renewal of existing contract (* Please attach existing contract) <input type="checkbox"/> Draft a new contract	
WHAT TYPE OF SERVICE DO YOU REQUIRE?	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"/> Assistance using University template agreement State which template agreement: State which template agreement	
ABOUT THE CONTRACT	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

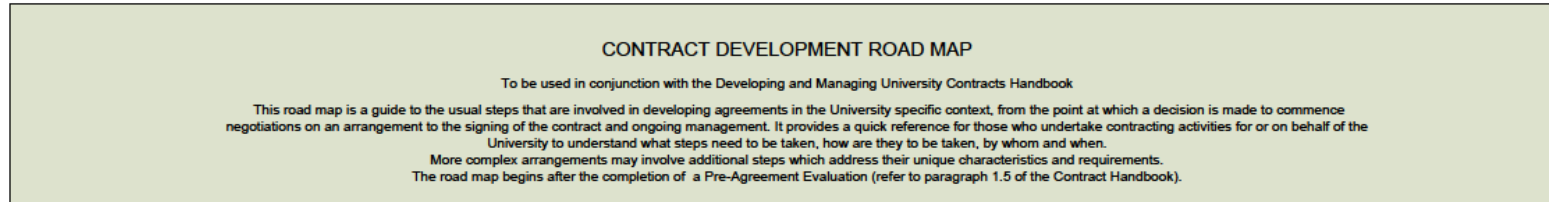
	What deliverables are required under the contract?	Enter text here
	Where will the activities under the contract be undertaken? (ie on campus, off-campus, overseas)	Enter text here
	Will the other party be creating any intellectual property that the University will need to licence or own? Will there 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
YOUR CONTRACT MANAGEMENT RESPONSIBILITIES *	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 www.adelaide.edu.au/policies/2965/)	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/)

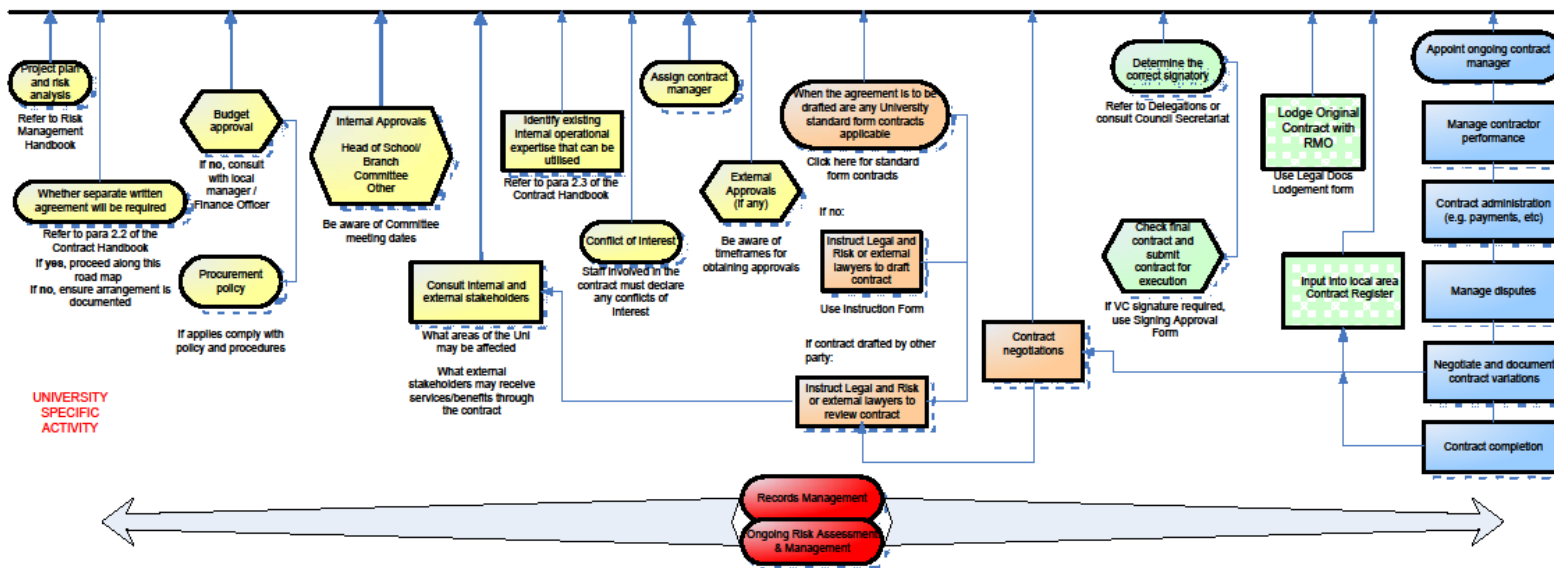
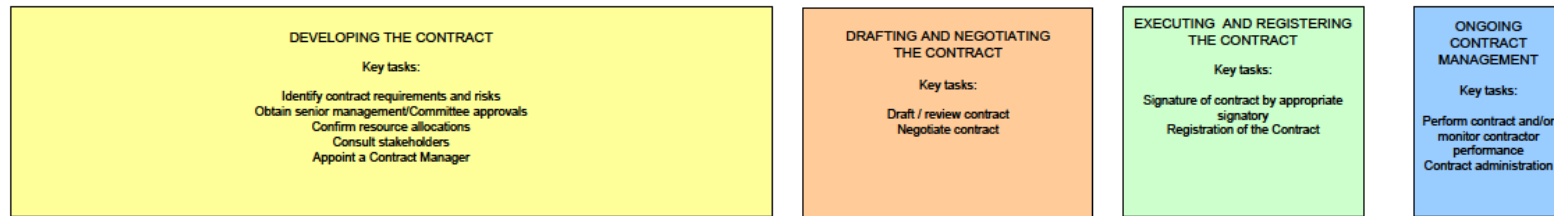
Before you email this form, please ensure you have attached any relevant background documents. If attaching multiple documents, please list title and/or brief description of each.

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

Appendix 2.2 – Road map of contract formation process



CONTRACT ACTIVITY



MODULE 3: ONGOING MANAGEMENT

Purpose of module

This module has the following objectives:

- To emphasise the importance of ongoing management of any contract, and of meeting the University’s contractual obligations;
- To explain how and why keeping a contract register can help you stay on top of your local area’s contracting activities;
- To provide guidance to help you manage the University’s end of the bargain;
- To summarise how to manage the other party when they are not keeping *their* end of the bargain;
- To introduce how contracts are varied and how disputes should be handled; and
- To explain the ways in which a contract can end – naturally, or through termination – and outline the “housekeeping” tasks that may be required once a contract has reached the end of its life.

Contents of module

3.1	Introduction	Page 3.2
3.2	Ongoing Contract Manager	3.2
3.3	Keeping a Contract Register.....	3.2
3.4	Contract Management	3.3
	Managing our <u>own</u> obligations – making sure we keep our end of the bargain.....	3.4
	Managing the other party when they are not keeping their end of the bargain	3.4
3.5	Contract Variations	3.4
3.6	Disputes	3.5
3.7	The end of a contract.....	3.5
	Table 3.1: How contracts can be ended.....	3.5
	End of contract “housekeeping” checklist	3.6

A. Introduction

Preparing, negotiating, drafting and signing the contract is only really the start of the contracting process: once the terms are agreed and the contract is signed, then the task of actually doing the things and performing the obligations agreed to commences and may, in some instances, continue for some time.

If the University fails to do the things and meet the obligations it agrees to, there can be very real and serious effects. Although contracting is a “voluntary” obligation (that is, the University has a *choice* whether to enter an agreement) once a choice has been made to enter a contract, the commitments under that contract become just as mandatory as any legislative or regulatory requirement – and often with more tangible and damaging consequences if they are not complied with. Equally, if another party agrees to do something for the University which they fail to do, then we can take action to remedy that breach. What happens when disputes arise or things go wrong is discussed in **Module 5: When things go wrong**.

The level of ongoing management required will vary from contract to contract, depending on the nature and circumstances of the agreement. The contract document itself may set out certain aspects of how ongoing management will occur (e.g. review meetings or performance measures) and for large, complex contracts, the contract “start-up” will warrant as much planning as the contract formation itself.

However, regardless of the size or complexity of the contract, at least *some* management is required to make sure that all those within the University who need to do anything to ensure the contract obligations are met understand the nature of the agreement, are fully aware of what they need to do, and actually do it.

B. Ongoing Contract Manager

During the course of developing and finalising the contract, thought should be given towards appointing an ongoing contract manager who will be responsible for managing the University’s obligations and rights under the agreement.

Depending on the kind of contract, this person may not be the same person who was the Contract Manager during the negotiation and formalisation phases – although that person must take responsibility during the finalisation of the contract for liaising with the Head of School or Branch where the contract will be performed to appoint an appropriate person as the ongoing contract manager.

The ongoing contract manager should have at least an oversight of the arrangement under the contract, if not day-to-day involvement.

C. Keeping a Contract Register

While key details of the contract, such as the subject matter, contract value, significant obligations (e.g. exclusivity), are captured in the *Legal Document Lodgement Form* and will be recorded in Content Manager, these details only serve as high-level reporting tools – they do not really capture the essence of what it is that people have to *do* to meet the contract obligations.

To ensure that more complete information is captured and understood by relevant people within the local area(s) performing the contract obligations, each academic and administrative unit is required to maintain their own “contract register”, recording the contracts for which they are responsible with sufficient details to enable monitoring of key dates, tracking of the internal University actions required to be completed, and management of the relationship with the other contracting party.

The [University Contracts Register](#) has been developed as a simple, cost-effective, central, web-based contract register that can be utilised by areas of the University that do not have existing contract management software.

Contract register – typical contents

The following details should typically be recorded in the contract register, for each contract (or at least each major contract) in the Faculty/School/Branch:

- **Commencement and expiry dates**
- **Milestones and milestone dates**
- **Cut-off dates or contract review dates** (e.g. if the contract has an automatic roll-over provision, what is the last date by which you can give notice to terminate?)
- **Any requirements that must be fulfilled by certain dates** (e.g. obtain licence or approval from a regulatory body, provide progress or final reports)
- **Significant obligations** – not only those the University must meet, but also any that the other party must meet which would cause the University problems if they were not met (e.g. if by the other party failing to meet its end of the bargain, the University would then be unable to meet *its own* commitments to another party or funding body)
- **Financial arrangements under the contract**
- **Names and contact details** of the other party's contract representatives
- **Notes** as to whether the contract has been extended or varied

In short, the contract register contains a quick and relevant snapshot of what each contract is about, what is required to be done and by when, who is involved, and key dates and contacts. By having this information stored in one location, it will:

- Make it easier to keep track of your local contract obligations; and
- Serve as a tool for management reporting and risk assessment for the Faculty/School/Branch, reducing the need to “chase up” that information every time a major report falls due.

Please contact the Legal and Risk Branch to arrange access to the University Contracts Register or for further information.

D. Contract Management

Good relationship management is vital to the successful formation of a contract – and is equally important in the ongoing management of an agreement once finalised. Having professional, constructive relationships with everyone involved in the contracting process – both internal and external to the University – is a key ingredient in the successful completion of the contract's intended outcomes.

The aim of relationship management is to keep communication between the parties open, constructive, non-adversarial and based on mutual understanding. This should assist in preventing problems from arising, and in resolving them more smoothly should they arise. Maintaining a good relationship does not mean that issues of non-compliance or under-performance during the life of the contract cannot be discussed or acted upon; instead, it means that there is a greater likelihood that such issues can be discussed and resolved in an open, cooperative manner.

The other key to ongoing contract management is keeping sufficiently aware of the contract's progress to detect any performance issues as early as possible – and deal with them straight away.

Managing our own obligations – making sure we keep our end of the bargain

Keeping our own end of the bargain can be made easier through the following mechanisms:

- Keep those who will need to perform any aspect of the contract in the loop during the negotiations – as discussed in *Module 1*, this will help ensure that the commitments agreed to are realistically achievable by the University. It will also give those people a chance to cater for the time needed on the project in advance.
- Once the contract is signed, ensure the clear appointment of an ongoing contract manager, who takes responsibility (beyond the contract signing) for the management and performance of the contract. There should be one person who actively keeps track of the situation and can remind others what is required to be done and by when.
- As soon as a contract is signed, communicate with each of the people required to do something to confirm what they are doing and the time frame. Again, if they have been kept in the loop throughout the process, this should come as no surprise to them.
- Use a local contract register – as discussed above, a contract register contains a quick and relevant snapshot of what each contract is about, what is required to be done and by when, who is involved, and key dates and contacts. It does not need to be complex or lengthy; but it provides one place where people (including the ongoing contract manager) can consistently refer to get the most up-to-date information on any local contract.

Managing the other party when they are not keeping their end of the bargain

In any damage control situation, spotting and addressing issues *early* will always minimize the damage and make controlling it less onerous. In the case of contracting, providing the other party with early warning may make it easier to address the issues at low cost and with minimal disruption, and will draw out any misunderstandings over the requirements or expectations.

At the early stages of under-performance, agreeing informal remedial action will often be the best approach. Depending on the seriousness of the under-performance, more formal action may be required and could include:

- Withholding payments until performance returns to an acceptable level;
- Developing strategies to address the problem and formally documenting them (therefore creating an evidence trail to show the steps taken, just in case the dispute ends up in legal proceedings); or
- Invoking other rights or processes under the contract – don't forget that often the contract document itself will set out a procedure for dealing with exactly this situation, including through formal dispute resolution processes.

However, care should always be taken to not erode the University's rights by inadvertently amending the contract by oral agreement or conduct. It is good practice to always address under-performance issues in writing (even if it is a written follow-up to an informal conversation). Before taking any significant action aimed at remedying under-performance, it is recommended you discuss the situation with a legal advisor (preferably, the lawyer who helped you formalise the contract in the first place).

E. Contract Variations

Sometimes, it is necessary or desirable to change the terms of a contract mid-way through its completion. These could be changes to timeframes, description of deliverables, or even substantive clauses.

Almost all contracts will contain a provision that requires variations to the contract to be made **in writing**. Some contracts include a specific process by which variations can be proposed and accepted.

Minor variations (e.g. changes to dates and prices) may be formalised simply by exchange of letters or emails – and making it very clear in that document that this is intended to vary the terms of the contract. If the proposed variations are more significant, and have the potential to affect the scope and effect of the contract, then you may have to undertake similar steps in regard to planning, consultation, drafting and

approvals, as you would if developing a new contract. These more major variations should be enacted in a formal amendment to the contract – which your legal advisor can help draft.

Once a contract variation has been finalised and executed, ensure that you keep a copy of it on file and update your contract register as necessary. If the variation is made through a formal Variation Agreement or Deed, you should lodge it with Records Services as a Legal Document (using the same process as for the original contract), indicating that it is a variation to the existing contract.

F. Disputes

Most disagreements and disputes arise when the parties cannot agree on issues related to the interpretation of contract provisions, the definition of deliverables, whether performance measures have been achieved, or the effect of unexpected events. As discussed above under Section 3.4: *Managing the other party when they are not keeping up their end of the bargain*, disagreements may be of a minor nature and can often be readily resolved as part of the contract management process – particularly if you have been working hard to maintain an open and constructive relationship with the other party.

If disagreements are unable to be resolved informally, you may wish to invoke the dispute resolution provisions of the contract, or take some other more formal step towards fixing the problem. If you wish to take this step, or if you receive notification from the other party that it wishes to take this step, please consult with the Legal Services Branch.

It is important that details of all discussions and negotiations relating to the dispute are recorded and a record maintained of any agreements reached. This will protect the University's position and provide tangible evidence of the resolution steps taken, in the event that legal proceedings eventuate.

Further information on how to handle disputes is contained in **Module 5: When things go wrong**.

G. The end of a contract

The most common way a contract ends is naturally – through completion of the agreed tasks, or upon its stated expiry date. However, contracts may also be terminated through any of the following ways:

Table 3.1: How contracts can be ended

Mutual agreement: the parties to the contract mutually agree that they no longer wish to continue with the contract. This agreement to terminate must be in writing and signed by both parties.

Release: where one party has completed all their obligations under the contract but the other has not. The party that has performed its obligations may choose to release the other party; generally by way of Deed.

Termination for convenience: the contract may provide for a party to terminate simply by providing written notice without having to provide a reason.

Termination for breach: this may either occur via provisions in the contract (in most cases, the contract will prescribe a rectification period), or pursuant to the common law which enables a party to terminate the contract if there is a breach by the other party of a fundamental condition of the contract. The breach may also give rise to a claim for damages.

Repudiation: occurs where one party suggests through words or conduct that it does not intend to perform its obligations under the contract. If the other party communicates acceptance of the repudiation, the contract is at an end and the accepting party can claim damages. If the repudiation occurs prior to the earliest date of performance (e.g. contract requires delivery by 1 March, but the contractor states before then that he will not deliver), then the other party may terminate on the basis of an anticipatory breach.

Frustration: occurs when an unforeseen event occurs which makes it legally or practically *impossible* for a party to perform its obligations under the contract. The parties are then discharged from the contract. Depending on the jurisdiction of the contract, there may be legislation which applies to frustrated contracts. Additionally, many contracts will contain a “force majeure” clause to deal with unforeseen events beyond a party's control.

Upon the completion or termination of a contract, the following administrative tasks may be required to be performed:

End of contract “housekeeping” checklist

- Satisfy yourself that the goods or services provided to you have met contract requirements.
- Request the return or destruction of any University documents, material or confidential information that were provided to the other party for the purposes of performing the contract.
- Arrange for the return of any equipment or other goods made available to the other party for the purposes of the contract.
- Record any intellectual property rights arising from the contract that the University gains ownership of (or a licence to use) pursuant to the contract, including any relevant documentation, technical data or reports that enable the University to use that intellectual property.
- Record any obligations of the University relating to intellectual property arising from the contract such as licences to other parties to use, including any relevant documentation that limit the University’s rights to deal with that intellectual property.
- As far as possible, ensure that any outstanding issues that may later result in a claim against the University are resolved.
- Make all final payments payable under the contract or submit all final invoices.
- Where personnel of the other party have been granted access to University premises or IT systems, ensure all access rights are terminated and security passes returned.
- Update the contract register to record when the contract was completed or terminated.
- Tidy up and archive the records associated with the contracting process.
- Undertake any “transitional” steps prescribed in the contract (e.g. contracts relating to teaching activities may prescribe that the University continue to teach out students already enrolled as at the date of termination).

When a contract ends:

Take care of the tasks on this “housekeeping” checklist, to make sure things are all resolved

MODULE 4: RECORDS MANAGEMENT

Purpose of module

Records management is presented in its own module to highlight its importance. Even though records management is not a specific *stage* of contracting, it is an essential activity that should be constantly happening throughout the life of any contract.

This module has the following objectives:

- To summarise the key record keeping obligations that attach to contracting on behalf of the University; and
- To emphasise the importance of good records management in contracting.

Contents of module

4.1	The importance of an evidence trail – why record keeping matters.....	2
4.2	University Records Management Policy	3
4.3	Key records management obligations.....	3
	Preparation phase	3
	Negotiating the deal.....	3
	Finalising and formalising the contract	4
	Storage of signed contract.....	4
	Managing the contract.....	4
	Finishing or ending the contract.....	5
4.4	Some final hints on records management.....	5

A. The importance of an evidence trail – why record keeping matters

Keeping good records is an integral part of contracting activity. Records serve as evidence of the University's activity – evidence that we can produce at any stage in the future, provided it is well preserved and properly managed.

Such evidence is particularly important in the context of contracting. As discussed in previous modules, in any contracting situation, the intentions of the parties are paramount. Being able to identify those intentions – and being able to provide tangible evidence of those intentions at a later stage – is crucial not only to understanding contract negotiations as they are happening, but also to interpreting a contract once it has been formally agreed. And if any aspects of a contract were challenged in the future, having clear and accessible evidence of the University's intentions and the journey of the negotiation process could become crucial in defending our position.

It is important to properly file and manage documents exchanged between the parties during the contracting process (such as letters, emails and their attachments), but it is equally important to *create* written records capturing any discussions that constitute representations, decisions or undertakings by or to the other contracting parties. This will form an *evidence trail* of the parties' intentions and negotiations.

Remember, the contracting decisions of a single staff member in a single School or area may well bind the University as an institution, imposing "University" obligations. This makes it particularly important for those staff members with first hand knowledge to document the negotiation and formation of those obligations. As in all aspects of contract management, what constitutes "adequate" records is a matter of judgment that will vary depending on the value, duration, risk and complexity of an agreement.

A systematic approach to recordkeeping from the very beginning of the contracting process and throughout the life of the contract will assist you and the University to:

- Provide evidence of business conducted and decisions made;
- Manage legal and other risks;
- Keep focused on the contracting goals, and constantly keep evaluating, as a contracting situation unfolds, whether those goals are being advanced – an analysis that is made easier by actively creating records of what is happening at each stage;
- Meet accountability obligations;
- More easily enforce the University's rights against other parties; and
- Satisfy regulatory records management obligations (under the State Records Act).

More information on good records management, and the University's Records Management Policy, can be found in the [Records and Archives Management Handbook](#).

B. University Records Management Policy

The University's Information Management Policy (<https://www.adelaide.edu.au/policies/4663/>) applies to all records that are created and received in the course of developing and managing a contract, whether paper based or electronic. It is also important to record in writing any discussions that constitute representations, decisions or undertakings by or to the other contracting parties.

C. Key records management obligations

While records management is not a specific *stage* of contracting, it is an essential activity that should be happening constantly throughout the life of any contract. For convenience, the key records management obligations at each stage of the contracting cycle are set out here.

Preparation phase

Your preparation should set the tone for the whole contract management process, and help you determine what level of formality and management is appropriate in the circumstances. It is therefore prudent to make notes summarizing your preparatory thought-processes. This will help you defend later why you took the approach you took, if things are challenged. It will also force you to think actively about why the contract is happening and how you wish to proceed, which will help you go into the negotiations more focused and prepared.

When documenting the contracting process, ask yourself:

Would someone reading this in the future, who doesn't know anything about the situation, understand what happened?

For instance, by making a note of your answers to each questions in the Preliminary Checklist (refer **Module 1.1**), you will have created an instant and succinct summary of the why, who, what, when and how of the impending contracting process. It will not take much time, but will provide a useful reference point that you can keep returning to throughout the life of the contract.

Similarly, documenting your "P.A.N." positions (preferred, acceptable, not-negotiable – refer **Module 1.4**) in advance of any negotiations can help you focus on the issues most important to the University during the negotiation, and ultimately reach the best possible arrangement.

For more complex agreements, more detailed preparation may be required and should be documented as thoroughly as possible. See **Module 1.5** (*Pre-agreement evaluation matrix*) for more guidance.

Negotiating the deal

Even in the simplest of agreements, where no separate written contract is required, there will always be some form of negotiation. For instance, you might go back-and-forth with the other party over the price or some other condition. Where any such negotiations occur, you should make sure that the negotiation has been transparently recorded (for instance, through emails or letters) and keep those records on a University file. Even simple agreements can ultimately lead to disagreements, so it is important to be clear on how they were reached.

For more complex agreements, where the negotiations might involve many people and extend over a period of time, it becomes even more important to keep a tangible evidence trail describing how the negotiations unfolded. This could become crucial if some aspect of the contract were challenged in the future. As you're making records, ask yourself "would someone reading this in the future, who doesn't know anything about the situation, understand what happened?"

Maintaining records of the negotiation process while it is happening also helps to keep everyone on the same page *during* the negotiation process. This increases the chance that the parties will reach a consensus acceptable to everyone. It also helps reduce the chance that there may be confusion around

exactly when the parties move from the negotiation phase to being bound by the terms of a formal contract (as discussed in **Module 1.3: How and when a contract forms – the importance of negotiation**).

Finalising and formalising the contract

It is a good idea to keep any old drafts of the formal contract document, and to keep a record of any changes requested or negotiated – again, because it transparently records the negotiation process. If you have a lawyer assisting you, they may retain those records for you. Keep records of any internal University approvals that were required before formalising the contract, such as committee endorsements, management sign-off and legal check. You should also keep some record of consultations with other affected areas of the University (such as emails or meeting notes discussing the contract with them).

You must store the signed contract in with Records Services (see “Storage of signed contract” below). And 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.

Storage of signed contract



ALERT:

University Policy Requirement

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.

The importance of this step cannot be understated. Given the decentralized 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.

To lodge an executed contract with Records Services, complete the Legal Document Lodgment 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.

More information, and a link to the necessary forms, can be found in Module 2 (**Module 2.8: Sealing the deal – signing the contract**) or on the Records Services website here:

<https://www.adelaide.edu.au/library/library-services/records-services/forms-templates>

Managing the contract

In managing ongoing obligations under the contract, it is important to keep evidence of what the University is doing to hold up its end of the bargain. If you are having issues getting the other party to perform its obligations, it is similarly important to document any communications, in case you are required later to show what attempts were made to remind them of their obligations and to get them to cooperate.

Any variations to a contract *must* be in writing (refer to **Module 3.6** for more details). It is also important to record the details of any discussions relating to a dispute over the contract at any stage. This will protect the University’s position and provide tangible evidence of the resolution steps taken, in the event that legal proceedings eventuate.

A succinct way to keep key details of a contract throughout its life is to use a Contract Register – a quick and relevant snapshot of what each contract is about, what is required to be done and by when, who is involved, and key dates and contacts. Depending on the complexity of your area’s contracting activity, such registers may be in the form of a simple Excel spreadsheet, or maintained through specific contract management software.

Contract Registers are discussed specifically in **Module 3.3** of this Handbook. However, the following is a summary of the kind of information that is most valuable to keep in your contract register.

Contract register – typical contents

The following details should typically be recorded in the contract register, for each contract (or at least each major contract) in the Faculty/School/Branch:

- **Commencement and expiry dates**
- **Milestones and milestone dates**
- **Cut-off dates or contract review dates** (e.g. if the contract has an automatic roll-over provision, what is the last date by which you can give notice to terminate?)
- **Any requirements that must be fulfilled by certain dates** (e.g. obtain licence or approval from a regulatory body, provide a report on progress, provide a final report)
- **Significant obligations** – not only those the University must meet, but also any that the other party must meet which would cause the University problems if they were not met (e.g. if by the other party failing to meet its end of the bargain, the University would then be unable to meet *its own* commitments to another party or funding body)
- **Financial arrangements under the contract**
- **Names and contact details** of the other party's contract representatives
- **Notes** as to whether the contract has been extended or varied

For more information about managing contracts, refer to **Module 3: Ongoing Management**.

Finishing or ending the contract

The most common way a contract ends is naturally – through completion of the agreed tasks, or upon its stated expiry date. However, contracts may also be terminated in a number of ways, which are discussed in **Module 3.7: The end of a contract**.

In terms of records management, there are several housekeeping steps that should be taken at the end of a contract, including:

- Request the return or destruction of any University documents, material or confidential information that were provided to the other party for the purposes of performing the contract.
- Record any intellectual property rights arising from the contract that the University gains ownership of (or a licence to use) pursuant to the contract, including any relevant documentation, technical data or reports that enable the University to use that intellectual property.
- Record any obligations of the University relating to intellectual property arising from the contract such as licences to other parties to use, including any relevant documentation that limit the University's rights to deal with that intellectual property.
- Update the contract register to record when the contract was completed or terminated.
- Tidy up and archive the records associated with the contracting process.

D. Some final hints on records management

If something is confidential, mark it as confidential – If something you record is confidential between the parties, then be sure to mark the record “confidential” and store it in a manner that respects and maintains its confidentiality. This will help to identify it as confidential, and protect it from unwanted disclosure, such as if the University is subject to a freedom of information request relating to the contract.

Keep records as you go, don't wait until the end of a contracting process – Records are far easier to create and maintain if you make and manage them continuously, as part of your day-to-day work. This is particularly true in the case of contracts, where you may spend lots of small amounts of time on a negotiation, talking to the other party, or managing an ongoing issue, amidst all your other work. If you keep a simple, written track of what is happening each time you *do* something on the contract, then you will be maintaining an accurate and complete record without imposing any real burden on your workload. However, if you let records get behind, and only make notes of things and organise your contract files every few months, it will require a lot of effort and time to catch up. It will also most likely be incomplete, as you may not remember everything that happened in conversations that occurred several weeks or months earlier. Delaying or constantly “putting off” your records management not only creates a more onerous and time-consuming task for you, it also reduces the reliability and usefulness of the evidence trail associated with the contract.

Records management is largely common sense, so you should listen to your instincts – if in the course of negotiating or managing a contract something doesn't quite feel right, that should be a cue to make a note of it and to follow it up.

Remember that records management is about transparency and enabling the contracting process to be understood in the future, in case something goes wrong – so, when documenting the contracting process, it is always good practice to ask yourself “*Would someone reading this in the future, who doesn't know anything about the situation, understand what happened?*”

MODULE 7: COMMON PROVISIONS AND BOILERPLATE CLAUSES

Purpose of module

This module has the following objectives:

- To describe certain standard terms or clauses that appear in many contracts – often called “boilerplate” clauses;
- To identify some key clauses that should *not* be treated as boilerplate, but should intend be treated with caution and specifically addressed before signing (“danger” clauses);
- To increase understanding of the purpose and legal effect of common boilerplate clauses; and
- To emphasise the importance of not taking boilerplate clauses for granted.

Contents of module

7.1	Introduction to boilerplate clauses	7.2
7.2	A – Z of common clauses	7.3
	Acceptance process	7.3
	Access and assistance to be provided by either party	7.3
	Confidentiality clauses	7.3
	Dispute resolution procedures	7.4
	Duration of the contract	7.4
	Entire agreement clauses	7.5
	Exclusion clauses – exclusion of liability or “liability caps”	7.5
	Exclusivity clauses	7.5
	Extensions and renewals	7.6
	Force majeure (uncontrollable events)	7.6
	Governing law or jurisdiction clauses	7.6
	Indemnity and insurance clauses	7.6
	Intellectual property rights	7.7
	Key personnel clauses	7.8
	Liquidated damages clauses	7.8
	Payment mechanisms and clauses	7.8
	Performance measures	7.9
	Termination rights	7.9
	Variation clauses	7.9
	Warranty clauses	7.10

A. Introduction to boilerplate clauses

Most contracts contain a number of common, stock-standard clauses – often called “boilerplate” clauses, in reference to their standardized nature. For instance, clauses that identify which jurisdiction (e.g. South Australia, New South Wales, Singapore, California) will be treated as the jurisdiction whose laws will govern the agreement, or clauses that state that the written contract represents the “entire agreement” between the parties, excluding any previous verbal or written agreements on the subject.

When reading separate written contracts, there is often a danger of glossing over the details, seeing “legal jargon” and assuming it must be boilerplate – it must be standard and “unimportant”. However, there are some common types of clauses that are hardly “standard”. In the University context, two critical examples are clauses relating to intellectual property, and clauses relating to confidential information. Such clauses should always be closely scrutinized and never treated as “boilerplate”.

Even when clauses are truly boilerplate, it is helpful for people who engage in a lot of contracting activity to understand what the “legal jargon” means, why it is there, and when it should be treated with caution. It is also useful to understand some of the common contracting terms, so that when instructing your legal advisor to draft a contract for you, you can turn your mind to such issues and provide clear instructions on them.

In this module, the following common clauses will be outlined:

- Acceptance clauses
- Access and assistance clauses
- Confidentiality clauses
- Dispute resolution procedures
- Duration of the contract
- Entire agreement clauses
- Exclusion clauses (liability caps)
- Exclusivity clauses
- Extensions and renewals
- Force majeure (unforeseeable events)
- Governing law or jurisdiction clauses
- Indemnity and insurance clauses
- Intellectual property rights
- Key personnel clauses
- Liquidated damages clauses
- Payment mechanisms and clauses
- Performance measures
- Termination rights
- Variation clauses
- Warranty clauses

This module is intended to provide background information to increase your understanding of the legal effect and purpose of some common contracting clauses. However, it is not intended to be a substitute for legal advice in the case of individual contracts. This set of common clauses should help you better identify potential issues in draft contracts that you are reading over – and once spotted, the issue should be discussed with your lawyer. It should help you better instruct the lawyer who is drafting your own contracts.

B. A – Z of common clauses

Acceptance process

Where the contract involves the supply of goods and services, there should be a clear acceptance procedure – that is, the contract should envision and explain what will count as “acceptance” of the goods or services, and accordingly what will count as satisfactory “delivery” of them. Acceptance terms will usually require the other party to provide the contract deliverables in the form specified by the contract. The University (if it is the receiving party) could then undertake testing in a specified timeframe and if the goods do not satisfy the test, the University may request the supplier to rectify the problems or resupply them without additional cost to the University.

Access and assistance to be provided by either party

Sometimes performance of the contract will require access by one party to premises, equipment, information or other resources of another party – and it is usual for the contract to contain a clause that addresses the provision of that access. In any contract, consider what access to premises and other assistance is to be provided by either party, without which the contract could not properly be performed. This is particularly important where the University is undertaking certain obligations under the contract and cannot perform those obligations without the assistance of the other party (e.g. provision of documentation; access to premises, equipment or personnel).

If the University is providing access to its premises, equipment or information, it is important to retain some right to terminate access in the event that a contractor starts abusing it – and it is useful to consider how that access will be cut off (through handing in of security access passes, deletion of IT access accounts etc) once the contract has been completed. When dealing with contractor access to premises, it is also important to address issues like occupational health and safety and security access, since the University will be held responsible for both the health and safety of the contractor while on our premises, and the health and safety of others arising from any actions or inactions of the contractor while onsite.

Confidentiality clauses

Legally, confidentiality has the same connotation as in everyday conversation; except that if you promise to keep something confidential through a contractual term (as opposed to just vowing to “keep a secret” for someone in a non-legal setting) then that promise, like any undertaking under the contract, is legally binding. Failure to comply with that promise could lead to legal action for breach of contract and breach of confidence – and if the information was commercially sensitive or valuable, then significant damages could result.

Whole contracts may be drafted exclusively to deal with the issue of confidentiality.

For example, if you had students or contractors working on a particularly sensitive project that was being funded by a defence company, then you may get those each of those working on the project to sign a specific “confidentiality agreement” or “deed of confidentiality” (your funding agreement may specifically require it). If you require such a document, the Legal Services Branch have standard form contracts that may be suitable.

However, in almost every significant contract there will normally be some kind of provision addressing confidentiality. There are several types of confidentiality clauses, which vary based on *what* is being kept confidential – information brought to the table in performing the contract, information created in the course of the contract’s performance, or the terms of the contract themselves. For instance, a contract may include:

- A “standard” confidentiality clause requiring parties to keep “confidential information” confidential, and then define “confidential information” to include certain specific things or

general categories of documents or information. This often is used just to cover everyone's bases in case the parties exchange certain sensitive information through the course of performing the contract.

- A more specific clause requiring the parties to keep certain outcomes of the contract confidential, or certain material supplied for the completion of the contract (such as information shared that would assist the performance of the contract, but that is otherwise to be kept confidential).
- A clause requiring the parties to keep the terms of the contract itself to be kept confidential. This final case requires special treatment, due to the University being an entity covered by the Freedom of Information Act. Where you require some or all of the actual terms of the contract to be kept confidential, a special clause referencing the Freedom of Information Act will need to be included, and the clause will need to be approved by the Vice-Chancellor. For more information, please refer to the Freedom of Information Policy (<http://www.adelaide.edu.au/policies/3/>) or speak with the Legal Services Branch.



ALERT:
University Policy
Requirement

Dispute resolution procedures

Contracts will often include provisions that specify what process should be followed if a dispute arises during the performance of the contract. When dispute procedures are included, they should clearly specify the requirements and responsibilities of both parties in handling the dispute. Time frames and methods of escalation should be addressed. Alternative dispute resolution techniques should also be considered as a means of reducing the need for formal proceedings.

The kind of approaches that can be specified for managing disputes include:

- Setting effective, appropriate, stepped negotiation and resolution procedures that provide for the phased escalation of disputes;
- Being prepared to negotiate directly using alternative dispute resolution principles; and
- For more significant contracts, considering the costs and benefits of mediation, expert appraisal or determination as mechanisms to specify in the contract.

Duration of the contract

Early in this Handbook, we discussed the importance of clearly defining the point at which a consensus becomes legally binding – and the line is crossed from negotiations to legally binding contract. To avoid confusion in this regard, it is usual to include a clause that expressly states when the contract commences, and how long the contract will remain in force for (assuming no other events occur which would end it early).

Most commonly, a contract will be drafted to state that it commences on the date it is signed by the last party. However, in some cases, a specific commencement date may be preferred. Where the contract is for a term calculated by reference to the commencement date (e.g. 3 years from the Commencement Date), then it would be administratively more convenient to stipulate a specific commencement date.

The University's preference is not to have contracts continue for more than three years, unless there are clear advantages in doing so, or unless the contract allows for easy termination without fault (that is, a termination "for convenience").

Entire agreement clauses

These are clauses that state that the written contract represents the “entire agreement” between the parties, excluding any previous verbal or written agreements on the subject. In the United States, such clauses are sometimes called integration or merger clauses. The idea behind formalising a separate written contract is to integrate or draw together all aspects of the agreement into a single document, and a single set of terms. With an entire agreement clause, all previous discussions, representations or promises made by the parties during the negotiation – whether verbal or written – no longer have any legal effect.

This is desirable because it enhances certainty surrounding the contract terms. However, it means that you need to be careful to make sure that any representations or promises made during the negotiations that are important to the University are properly included in the written terms. Otherwise, once the agreement is signed and becomes the “entire agreement” between the parties, those earlier promises will not have any weight.

An important exception to these clauses occurs if a party makes false or misleading statements during the negotiation, which lead to the contract being agreed to, those statements can form a basis for legal recourse even when they are not included in the final written agreement.

Exclusion clauses – exclusion of liability or “liability caps”

An exclusion of liability clause is used where one party will not be liable to the other in relation to particular events, or that their liability will be capped at a fixed amount (or capped at an amount determined in accordance with an agreed formula). Exclusion clauses operate to exclude, restrict or qualify the rights (and risks) of the parties. For instance, the University might agree that in buying something from someone else (a “vendor”), it will not bring a claim against the vendor in relation to particular matters. In this way, the vendor is released from the risks associated with the matter specified and the University *assumes those risks* because it is giving up its rights to bring an action against the vendor in relation to those risks.

Similarly, the parties could agree that the liability of one of them in relation to a specified event is capped at a particular amount. This allows “worst case scenarios” identified during the preparation and negotiation phase to be catered for in some way through the contract – by deciding who will be responsible, and to what extent. Such clauses give comfort to the party unable to control the potential event, and provide some certainty to the person who is liable, as they know the maximum potential liability they may face in relation to a particular risk.

It is common to see liability capped to a dollar value that matches the total value of goods or services being provided under the agreement, or to the value of assets being transferred from a seller to a buyer. However, the dollar value being paid for the goods or services usually bears no logical relationship to the magnitude of the risk being assumed by the party acquiring them. While such a cap on liability makes sense to the seller to prevent them suffering a loss greater than the sale price they receive, if the University accepts such terms, it could be exposed to substantial risk and this should be avoided at all possible and wherever appropriate.

Before agreeing to a liability cap relating to a specific event, always think carefully through the *real* costs that would flow if the event in question happened – and if the liability cap is an overall cap for the whole contract, think carefully about the ways in which the University could lose under the contract, and ask whether the cap would cover those potential losses.

Exclusivity clauses

Sometimes clauses are included that make the relationship between the parties “exclusive” in some way – having the effect that one or more parties may be limited as to who or how they can deal with third parties in the future. For the University, with so many outside partners and collaborators, exclusivity clauses should only be agreed to in special circumstances – and consultation should be

undertaken internally, to ensure that the exclusive relationship will not adversely affect any other areas of the University. Remember, your local agreement on behalf of the University binds *everyone* in the University, not just your area.

Extensions and renewals

Where it is likely that the University will wish to continue with the contract past the expiry of the initial term, you should consider whether you would like clauses included that provide either:

- An option to renew – this will enable the University to renew the agreement by providing notice by a certain date; or
- A provision for negotiation prior to the end of the term, with a view to agreeing to an extension.

It is possible for a contract to specify that it will *automatically* be renewed unless early notice is given by one party that it wishes not to renew, or unless some event has already ended the contract before its natural end. Be sure to check any contracts drafted externally to make sure there is no automatic renewal under a contract for the other party – or if it is to be included, make sure that it is designed in so that the University's consent is required at the time of renewal, or in some other way that leaves the University with some room to move (rather than locking us in to renewing in several years, by which point the situation may have changed dramatically).

Force majeure (uncontrollable events)

This is a common boilerplate clause that is used to excuse the parties from blame in the event that some act of nature or unforeseeable external disaster disrupts the contract. Such provisions usually operate to suspend an obligation under an agreement and to remove rights of a party to bring an action against another for failure to perform an obligation where an unanticipated external event affects performance.

A force majeure clause may be defined narrowly to include extreme environmental matters (such as flood, fire, cyclone) or more broadly to encompass a wider range of matters such as industrial relations issues and even economic downturns (which are assessed according to objective criteria set out in the relevant agreement).

Governing law or jurisdiction clauses

This is a clause through which the parties specify which law – that is, the law of which state in which country – will govern the agreement for the purposes of resolving any disputes. Laws vary from place to place, so when the parties are engaging in the contract across state or country lines, it is important that the contracting parties agree at the outset which laws will be applied if things end up going wrong. Sometimes, contracts may go so far as to specify a forum (or specific court) in which cases would need to be brought. If a contract that is presented to the University has the law of any place other than South Australia proposed as its governing law, you should consult with your legal advisor on that issue before proceeding.

Indemnity and insurance clauses

Agreeing to obtain insurance against specified risks and agreeing to indemnify another party are very different things, but are often confused.

To “indemnify” someone is to secure them against a particular loss, so an indemnity clause is a contractual commitment by one party to compensate for the other party for certain potential losses under a contract. In other words, an indemnity clause is a commitment by one party to cover the liability of the other party – effectively shifting the consequences of a contract risk to a designated party.

Every contract or agreement entered into requiring a party to provide a service or product to the University should have an indemnity clause that requires that party to indemnify the University in the event of an adverse impact upon the University arising from that party's actions or lack of action.

An indemnity is only worthwhile if the other party has the money to fulfill it or is sufficiently insured for it. Consequently, an obligation to obtain insurance against specified risks for specified amounts often follows from an allocation of risk through an indemnity clause. If one party agrees to bear the loss but has no assets to compensate for it, then the indemnity will be useless. Likewise, it makes no sense to have one party agreeing to indemnify the other against losses for some event but having the other party take out the insurance – the requirement to insure should line up with any allocations of risk that relate to that insurance. Both allocation of risk and obligations relating to insurance should therefore be clearly and separately addressed in the contract.

The most common forms of insurance required under a contract are Public and Product Liability Insurance (covering liability for loss or damage to property or injury caused to persons) and Professional Indemnity Insurance (covering liability arising from negligence in providing professional advice).

Imposing an obligation on a party to obtain insurance in relation to a particular allocated risk should provide some comfort to all the parties involved that there will be funds available to compensate for a loss suffered, provided that the loss suffered falls within the scope of the insurance policy and that the insurer (sometimes referred to as an underwriter) will accept the claim.

It is always important to consider whose name insurance should be taken out in and who is to be noted on the policy as an interested party. If both parties to an agreement are named as interested parties on the insurance policy, then a loss suffered by *either* party may be covered under the insurance policy. Sometimes, it is in a party's interest to have a "cross liability" clause in an insurance policy. This means that if one insured party sues another insured party, the party sued can make a claim under the insurance policy in relation to this liability.

Insurance is a highly technical area and should be assessed and dealt with only by qualified professionals. In the first instance, any request by the University to accept or offer risk or insurance should be referred to the Risk and Insurance Branch.

Intellectual property rights

Intellectual property rights are legal rights over certain intellectual creations. Such rights may be protected by legislation (e.g. copyright, patents, registered designs, trademarks), or may be protected under case law or common law (e.g. trade secrets, unregistered trademarks, confidential information).

Where it is likely that the activities under the contract will give rise to the development of intellectual property by either the University or the other party to the contract, you must consider the position of ownership and access to those intellectual property rights – as well as future use.

Under common law (which is case made law, or the outcomes of court decisions) intellectual property rights belong to the person (or their employer) who creates the intellectual property. Therefore, any desired variation to this position needs to be clearly stated in the contract.

Where the University is paying full commercial rates for a contractor to create intellectual property, the University may need to own the intellectual property seek ownership of such the intellectual property rights – therefore, a clause would be needed to specifically assign the intellectual property rights created by the contractor under the agreement to the University. Where it is not possible to negotiate ownership rights, you should think about what access or usage rights the University needs. Where it is not necessary or essential that the University own the rights, special consideration should be given to access or uses the University needs for the future, and the contract should address those specifically.

Where the University may create intellectual property that is of commercial value, the University's preferred position is to retain ownership of that intellectual property, or at least have provision for royalties should the other party commercialise the intellectual property.

Any contracts involving the commercialisation of intellectual property should be developed in consultation with Innovation & Commercialisation Services.

Key personnel clauses

In many contracts, especially those dealing with the provision of consultancy services, the unique skills, qualifications or experience of particular personnel may have influenced your decision to engage a particular party. In such cases, those "key personnel" that you want to be engaged throughout the performance of the contract should be named expressly in the contract, and the contract should include a specified process to replace them in the event of unavailability.

If an outside party seeks to have University "key personnel" named (such as in a specific research project) then you should ensure that the person(s) named have the approval, workload capacity and support required to fulfill their role under the contract, **before** committing to the contract.

Liquidated damages clauses

Liquidated damages are fixed damages agreed to by parties to a contract which apply if a specified event occurs. This is similar to an exclusion of liability clause, but instead of limiting potential liability, they "fix a price" for compensation if a certain event occurs. The fixed damages agreed to must be a genuine pre-estimate of the loss likely to be suffered as a consequence of that event occurring, or a lesser sum – in other words, they cannot be used as an "inflation" mechanism.

If a liquidated damages clause applies in relation to a breach by a party of a provision of an agreement, the compensation to be paid to the "victim" of that breach is a fixed sum or a sum determined in accordance with a fixed formula, rather than a sum determined in accordance with the normal rules of contract. This provides some certainty – the party who is responsible for performing a particular obligation knows exactly what amount will be payable as damages if it fails to meet its obligations; the recipient of the liquidated damages knows exactly how much it will recover if the specified event occurs. However, there is a risk that if the amount of liquidated damages is substantially less than the amount of the loss actually suffered by a party as a consequence of a specified event occurring, that party will suffer a net loss, which it will then be prevented from taking any further action to recover.

Payment mechanisms and clauses

The contract must specify the amount (or a method for calculating an amount) and timing of payments.

Clauses relating to payment may involve incentives for a party to comply with its obligations in the form of increased rates or agreed one-off payments, rights to withhold payment where obligations have not been fully complied with, or provisions that payments be made in segments subject to specified conditions being met. This way a party can match its obligations to pay for goods or services with the actual provision of those goods or services so that it does not bear the risk of having paid, or being required to pay, for goods and services which are not provided, or which do not meet standards or specifications agreed between the parties. Payment mechanisms will often be expressed to coincide with a milestone date or a milestone event.

Some common types of payment arrangements are (and these are not mutually exclusive):

- **Fixed price:** A fixed amount for the entire contract. This is typically used for straightforward contracts for goods or services.

- **Variable price:** The price is calculated on the basis of a formula. This is suitable for use in longer-term contracts or where the contract costs are likely to vary due to factors beyond the contractor's control. The most common example is for a first year price to be stated in the contract, which will then be increased by a fixed rate (such as a consumer price index or other indicator) for future years.
- **Variable quantity:** Allows for a maximum contract price to be agreed with such factors as labour rates, overheads and quantities also being agreed by the parties (e.g. \$120 per hour, up to \$10,000). This payment regime is generally used where the level of labour effort required under the contract cannot be estimated with certainty.
- **Incentive payments:** These are extra payments which are generally tied to achievement of performance measures. These can be useful to encourage the contractor to achieve desired outcomes within a nominated time.

Common timing arrangements for payments are:

- **Full payment upon completion:** Payment upon successful delivery of all contract deliverables. This is suitable for straightforward contracts for goods or services.
- **Progress payments:** These are periodic payments, usually tied to time (e.g. monthly).
- **Milestone payments:** These are progress payments based on certain events or deliverables being achieved. This is a useful mechanism for ensuring that contracts are planned, progressed and delivered or performed on track.

Performance measures

Performance measures or key result areas (KRAs) are sometimes mistakenly treated as boilerplate or common clauses – but as discussed in Module 2 (see section 2.5 and 2.6), performance measures should be carefully customized for each agreement. What the performance measures look like will depend entirely on the nature of the deliverables under the contract – since the performance measures should be designed to measure the successful completion of those deliverables.

If you notice performance measures in a draft contract that are masquerading as part of the “standard terms and conditions”, be sure to check them very carefully, considering the factors raised in Module 2.

Termination rights

These can be included in a commercial agreement to provide a “way out” where a project does not go according to plan. The University might request that an agreement include rights to terminate if the other party to the agreement is in breach or if performance falls below specified levels. This means that the University can limit its further losses if the project is a failure or if another party is not complying with its obligations.

Depending on the circumstances, there may be a wish to retain the right to terminate the agreement simply for convenience (rather than any failure by the other party). Such a right could be included in a termination clauses, but would ordinarily require various steps to be taken and notice to be given, to prevent either party from losing out unfairly due to the choice to terminate.

Variation clauses

Contracts normally contain a standard clause requiring all variations to be in writing. This is perfectly adequate for minor variations that may need to occur through the life of the contract.

However, if the nature of the contract is such that more significant variations may be needed – such as variations to the scope of work (e.g. in a contract for the development of systems) – then you may

wish to consider implementing a set of procedures to enable variations to be proposed and agreed to. These variation procedures could be included as a more comprehensive “variation clause” in the original contract.

Warranty clauses

Warranty clauses govern the rights and obligations of the contractor and the acquiring entity in relation to defective goods and services. They serve to promote a minimum standard of performance. A warranty clause allows one party to vouch or promise to the other that a certain thing or fact will remain true (for instance, that some item will remain in working order). Warranties are usually accompanied by a requirement for the person giving the warranty to compensate the party relying on the warranty, if the warranted “fact” turns out to be incorrect.

Warranty clauses are usually drafted so that the party that is best placed to verify a piece of information warrants the veracity of that information to a party who must rely on it, where the party relying on the information may not be able to effectively or efficiently verify the information by itself. In this way, the “risks” associated with a piece of information being found to be incorrect (such as losses suffered by someone who relied on the information) are allocated to the person who provides the warranty. “Warranty” may also be defined more broadly as a contractual promise. In this sense, a party may warrant that it will or will not do something, in which case other parties to an agreement may have a right to sue if this contractual promise is not complied with. This means that the party making the warranty bears the risk of not being able to satisfy the obligations set out in the warranty.

From a University perspective, there are two key things to keep in mind about warranty clauses:

1. If the University is being asked to provide a warranty, be sure that you are able to verify that information and exercise control over it – for instance, it would be problematic to warrant that we will maintain the working order of an item that is not in the University’s possession or control.
2. If there is some crucial fact or circumstance that needs to remain true in order for the contract to succeed from the University’s perspective, then it may be appropriate to seek a warranty from whichever party has control over that circumstance. Your lawyer can help draft such a clause.

MODULE 8: ENTERING INTO COLLABORATIONS

Purpose of module

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.

Contents of module

Entering into Collaborations – Introduction and summary	8.2
Major sections of the checklist	8.2
Things to keep in mind when using the checklist	8.2
A. Preliminaries	8.3
B. Key elements of the collaboration	8.4
B.1 Nature of the collaboration	8.4
B.2 Relationship management and communications	8.5
B.3 Branding and reputation	8.6
B.4 Funding and contributions	8.7
B.5 Profits and losses	8.7
B.6 Academic issues – for learning and teaching collaborations	8.7
C. Intellectual property and information management	8.9
C.1 Intellectual Property (IP)	8.9
C.2 Confidentiality – including freedom of information issues	8.9
C.3 Publication	8.10
C.4 Reporting	8.11
C.5 Records management	8.11
D. Legal, governance and risk issues	8.13
D.1 Legal entities entering the collaboration	8.13
D.2 Governance, ownership and decision making	8.15
D.3 Contributing and managing assets and funds	8.16
D.4 Contributing and managing people and time	8.17
D.5 Valuing the operational contributions of the University	8.18
D.6 Obligations of the parties	8.18
D.7 Competition and exclusivity	8.19
D.8 Risk Assessment – an overview	8.19
D.9 Indemnity and insurance	8.20
D.10 Dispute resolution	8.21
D.11 Other common legal issues	8.22
D.12 Ending a collaboration	8.22
E. Formalising the agreement	8.23

Entering into Collaborations – Introduction and summary

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? (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? (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? (e.g. a joint venture, licensing arrangement, articulation agreement, twinning agreement, acquisition, merger, agency agreement, a new company, other?) Note: this is addressed in more detail in Part D 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? (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? Are there internal people with relevant expertise, who we haven't considered? Who needs to be kept in the loop on the project? How will this be done? 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) Who will keep records of the internal communications? Are any aspects of the internal communications confidential or sensitive? If so how will they be handled to maintain confidentiality? Who are the “finders, minders, binders and grinders” for the University? <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? Who are the main contacts for each party to the collaboration? What will the communications protocol be between the parties? 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?
FINDERS (find the opportunities for collaboration)				
MINDERS (handle administrative tasks, coordinate efforts of others)				
BINDERS (bring everyone together, connect people)				
GRINDERS (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"> • <i>Individual branding</i> (with each party just branding their own contributions normally and separately); or • <i>Joint branding</i> (for instance, side-by-side use of each party’s brand); or • <i>Some new and separate brand</i> (such as a new logo or business name being created for the collaboration)? <p> ALERT: 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 Brand Policy, 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> ALERT: 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 Jointly Conferred Coursework Awards Policy. 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. KEY ELEMENTS OF COLLABORATION – Issues to consider	Relevance/Evidence
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? 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 pre-existing IP brought to the collaboration by one or more parties (either at the start or during the project), and IP created 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>ALERT: 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 Freedom of Information Policy 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>ALERT: 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 University's Privacy Policy?</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>C.3 Publication</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)? What will be the process for audits and who will bear the cost?</p>	
<p> ALERT: 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 Information Management Policy summarizes the requirements for records management.</p> <p>The Records and Archives Management Handbook 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? (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 foreign entity compliance review 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 know 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 before 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? (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? (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? (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? (e.g. directors and officers training)</p>	
<i>Ownership</i>	
<p>How will the parties hold their interest in the collaboration? (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>ALERT: 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? (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? (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"> ➤ Lecture or teaching space ➤ Research areas or special access areas (laboratories) ➤ Cleaning and waste removal ➤ Security ➤ Electricity ➤ Water ➤ Library services ➤ Building maintenance ➤ Software or technology access and licenses <p>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</p> <ul style="list-style-type: none"> ➤ Car parking, if available will be accessible within the University's policy (refer website) 	
<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? (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? 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? (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? What will it look like and who will oversee it?</p>	
<p>Can the parties sub-contract their obligations to others? In what circumstances, and with what limits? Do they need to get the permission of other collaborating parties before doing so? If they are allowed to sub-contract, how will they ensure that the sub-contractor fulfils the obligation properly and satisfactorily?</p>	
D.7 Competition and exclusivity	
<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? (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? (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? (e.g. is the collaboration setting up a monopoly or excluding certain competitors in an unfair way?) <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>	
D.8 Risk Assessment – an overview	
<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
<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? (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? (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><i>D.9 Indemnity and insurance</i></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? (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 Insurance Specialist.</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
<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

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? (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? (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>	

FOR FURTHER ENQUIRIES

The University of Adelaide SA 5005 Australia

Mitchell Building,
North Terrace,
Adelaide SA 5005

ENQUIRIES helpdesklegal@adelaide.edu.au

TELEPHONE +61 8 8313 4539

 adelaide.edu.au

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CRICOS 00123M

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