GUIDING PRINCIPLES FOR NEGOTIATING JOINT PROJECTS UNDER THE CHARLES DARWIN UNIVERSITY/NORTHERN TERRITORY GOVERNMENT PARTNERSHIP AGREEMENT

Version 2
Effective as of 28 August 2012
1. PURPOSE OF DOCUMENT

The purpose of this document is to establish a set of guiding principles on the commercial and other components of Joint Projects developed under the Charles Darwin University/Northern Territory Government Partnership Agreement. The document also aims to provide options, examples and information on where to obtain further advice on specific issues. A summary of contacts in both CDU and the NTG is set out in section 3 below.

When developing Joint Projects, the overarching aim of the CDU/NTG Partnership should underpin discussions and negotiations.

The overall objective of the Partnership Agreement is that the economic, social and environmental development of the Northern Territory is supported by a robust and resilient University working in partnership with government agencies and the wider community.

2. APPLICATION OF GUIDING PRINCIPLES

The guiding principles set out in this document apply to Joint Projects as defined in the Glossary in section 4 below, that is, projects that involve contributions by both CDU and the NTG, whether through contributing funding or providing in-kind resources.

The guiding principles are not intended to apply to:

- projects when the NTG has engaged CDU as a service provider on pure commercial terms, following a procurement process. In such cases standard procurement contract documents should be used; or

- collaborative projects where third parties have contributed funding or resources (including the Commonwealth Government).

Where a third party has contributed funding or resources to a project which CDU and the NTG will participate in, CDU and/or the NTG may use the guiding principles in this document as a starting point for negotiations with the third party.

3. USEFUL CONTACTS

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>CHARLES DARWIN UNIVERSITY</th>
<th>NORTHERN TERRITORY GOVERNMENT</th>
</tr>
</thead>
</table>
| Intellectual property      | Office of Research and Innovation 8946 7366 ORI@cdu.edu.au | Solicitor for the Northern Territory through:
|                            |                           | • Individual agency’s legal unit; or
|                            |                           | • Director, Commercial: 8935 7424 or sfntlegal services.doj@nt.gov.au |
| Risk assessment and allocation | Office of Research and Innovation  
8946 7366  
ORI@cdu.edu.au | Individual agency’s risk management area; or  
Solicitor for the Northern Territory through:  
• Individual agency’s legal unit; or  
• Director, Commercial:  
8935 7424 or sfnt legal services.doj@nt.gov.au |
|-----------------------------|---------------------------------|-----------------------------------|
| Goods and Services Tax      | Finance and Asset Services  
8946 6078 | Department of Business and Employment – Taxation Services  
8943 6284  
taxationservices@nt.gov.au |
| Dispute resolution          | Partnership Secretariat  
http://www.cdu.edu.au/government/contact.html  
89466 044 | Partnership Secretariat  
http://www.cdu.edu.au/government/contact.html  
8999 5205 |
| Media and publicity         | Director, Media, Advancement and Community Engagement  
8946 6551  
0439 675 567  
robyn.mcdougall@cdu.edu.au | Strategic Communications Department of the Chief Minister  
8946 9544  
StrategicCommunications.DCM@nt.gov.au |
| Conflict of interest and confidentiality | Office of Research and Innovation  
8946 7366  
ORI@cdu.edu.au | Northern Territory Public Sector Code of Conduct  
| Variations and terminations | Partnership Secretariat  
http://www.cdu.edu.au/government/contact.html  
89466 044 | Partnership Secretariat  
http://www.cdu.edu.au/government/contact.html  
8999 5205 |
| Legal arrangements          | Office of Research and Innovation  
8946 7366  
ORI@cdu.edu.au | Individual agency’s risk management area; or  
Solicitor for the Northern Territory through:  
• Individual agency’s legal unit; or  
• Director, Commercial:  
8935 7424 or sfnt legal services.doj@nt.gov.au |
4. GLOSSARY

Terms used in this document are defined as follows:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Background IP</td>
<td>Any IP created independently by either CDU or the NTG and owned by the Party that created it.</td>
</tr>
<tr>
<td>CDU</td>
<td>Charles Darwin University</td>
</tr>
<tr>
<td>IP or Intellectual Property</td>
<td>Includes all current and future registered and unregistered rights (whether or not registrable or patentable) in respect of copyright, designs, circuit layouts, trade marks, trade secrets, know-how, confidential information, plant varieties, business and domain names, patents, invention and discoveries and all other intellectual property rights.</td>
</tr>
<tr>
<td>Joint Project</td>
<td>A project which CDU and the NTG are both contributing to, whether through funding or providing in-kind contributions or resources. “Joint Project” does not include collaborative projects where third parties have contributed funding or resources, or projects when the NTG has engaged CDU as a service provider on pure commercial terms, following a procurement process. For the avoidance of doubt a “third party” includes the Commonwealth Government.</td>
</tr>
<tr>
<td>Moral Rights</td>
<td>Rights of individual authors or creators of material forming part of Project IP arising under the Copyright Act 1968 (Cth).</td>
</tr>
<tr>
<td>NTG</td>
<td>Northern Territory Government, including its agencies.</td>
</tr>
<tr>
<td>Parties</td>
<td>CDU and the NTG.</td>
</tr>
<tr>
<td>Partnership Agreement</td>
<td>The partnership agreement entered into by CDU and the NTG on 18 June 2012 and commenced on 1 July 2012 with the overall objective discussed in section 1 of this document.</td>
</tr>
<tr>
<td>Project IP</td>
<td>Any IP created or developed in the course of and as a direct result of a Joint Project.</td>
</tr>
</tbody>
</table>

5. MATTERS COVERED

This document sets out guiding principles in relation to the following matters:

- Intellectual Property;
- Risk Assessment, Risk Allocation and Indemnities;
- Goods and Services Tax;
• Dispute Resolution;
• Publications, Media and Publicity;
• Conflict of Interest;
• Confidentiality;
• Variations; and
• Termination.

6. INTELLECTUAL PROPERTY

Whilst developing and commercialising IP is not the usual business of governments, developing commercial IP opportunities from research is not just common amongst universities but is actively encouraged. However, internationally, there is a growing move by universities towards the ‘Easy Access IP model’. This model aims to make it easier for organisations to engage with universities to gain access to the high quality inventions and innovations being developed. The primary driver for Easy Access IP is to put university IP into the hands of organisations that can develop products and services for the benefit of the economy and society. Further information on the model is available at http://www.nsinnovations.com.au/

a. Background IP

In Joint Projects each Party will be and will remain the owner of its Background IP.

For the avoidance of doubt, a Party’s ownership of Background IP will not be affected in any way by a Joint Project, unless otherwise agreed by the Parties in writing.

For the purpose of Joint Projects:

• CDU will grant the NTG a royalty-free, non-exclusive licence to use CDU’s background IP for the purposes of carrying out the relevant Joint Project, for the period of the Joint Project; and

• the NTG will grant CDU a royalty-free, non-exclusive licence to use the NTG’s background IP for the purposes of carrying out the relevant Joint Project.

The Parties will each warrant to each other that, to the best of their knowledge, their respective Background IP will not infringe the IP rights of any third parties, or, if it may infringe the rights of any third parties, that the Party giving this warranty has been granted a lawful right to use the third party’s IP for the purposes of the Joint Project.
b. Project IP

In considering how to apportion ownership of Project IP consideration should be given to:

- the overarching objective of the CDU/NTG Partnership Agreement;
- the contributions made to the Joint Project by each Party, including the contribution of any Background IP; and
- the potential for commercialisation of the Project IP.

Project IP ownership may be proportioned in one of the following ways:

- tenants in common in equal shares (that is, each Party owns a distinct 50% share of the IP);
- tenants in common on a shared percentage (%) basis, negotiated based on each Party’s contribution to the Joint Project (for example, one Party owns a distinct share of 30% of the IP and the other Party owns a distinct share of 70% of the IP);
- one Party owns all Project IP and licenses its use to the other Party.

The Parties may negotiate alternative Project IP ownership arrangements.

Each Party will provide the other Party with a licence to use its proportion of the Project IP for the following purposes:

- The purposes of carrying out and completing the Joint Project;
- For inclusion in materials for dissemination to, in the case of CDU, students, employees and clients and in the case of the NTG, to NTG agencies, employees or clients of the NTG;
- For use in future research or future projects;
- For academic publication.

c. Commercialisation of IP

When negotiating rights to commercialise IP, the Parties will take into consideration the information contained under heading 6 above in relation to the ‘Easy Access IP Model’.

Neither CDU nor the NTG will take any steps to commercialise Project IP or use Project IP for commercial gain, without the written consent of the other Party.

If any commercial benefit has the potential to arise from the Project IP, the Parties will negotiate and agree appropriate arrangements regarding the commercialisation.
d. Moral Rights

When using Project IP in which Moral Rights exist, except in cases where Moral Rights may have been waived by individual authors or creators, each Party will:

• attribute (or credit) individual authors or creators for their work;

• ensure that the work of an individual author or creator is not falsely attributed; and

• ensure that work of individual authors or creators is not treated in a derogatory way.

e. Student Rights

The Parties acknowledge that when undertaking Joint Projects consideration needs to be given to protecting the rights of students of CDU in their academic work (for example, thesis or project work).

In negotiating rights to Project IP the Parties will bear in mind that:

• a student will require the results of their academic work to be published;

• IP in the student’s academic work will in most cases vest in the student;

• any restrictions placed on publication of a student’s work should be reasonable; and

• a student should have the right to have their work examined and consideration may need to be given to obtaining a confidentiality undertaking from the examiner.

7. RISK ASSESSMENT, RISK ALLOCATION AND INDEMNITIES

a. Risk Assessment

The Parties agree that, prior to commencing a Joint Project, they will carry out a risk assessment on the Joint Project. The risk assessment to be carried out will include the following steps:

• Risk identification – to identify risks arising out of the Joint Project;

• Risk analysis – to determine the details and consequences of the risks identified;

• Risk assessment – to determine the likelihood of the risk occurring, whether it be low, medium or high and any steps that can be taken to eliminate, minimise, manage or control the risks identified; and
b. General Principle of Risk Allocation

The general principle to be borne in mind by the Parties when negotiating risk allocation is that the risk will be allocated to/borne by the Party that is best placed to manage the risk.

c. Risk Allocation and Indemnities

Risks can be allocated or transferred between the Parties by the use of indemnity clauses.

An indemnity is a legally binding promise by which one party agrees to accept the risk of loss or damage that another party may incur, as a result of a certain event occurring.

Following the risk assessment, the Parties may agree that one Party is best placed to manage and therefore bear the risk in relation to a particular element of the Joint Project. Where this occurs, the Party that will bear the risk will provide an indemnity in favour of the other Party in respect to losses arising as a result of that particular risk.

For example, the Parties might agree that the NTG is best placed to manage and bear any risks arising in relation to damage to property owned by a third party which is being used for the Joint Project. Whilst the NTG may agree to bear this risk, the NTG is unlikely to want to be responsible for damage to the third party’s property where the damage has been caused or contributed to by CDU, or CDU’s employees or contractors. This is because the NTG can manage its own employees and contractors to ensure they do not damage the third party’s property, but cannot manage or control the actions of CDU’s employers or contractors to ensure they do not damage the third party’s property.

In such a case the contract or agreement will include a clause which states that the NTG will indemnify CDU for any costs or expenses incurred by CDU that arise as a result of loss or damage to the property of the third party, except where the loss or damage to the property is caused or contributed to by CDU, its employees or contractors.

The above is an example only and should not be applied without each Party giving due consideration to the risks identified and the risks the Parties’ can manage, or are willing to bear. Section 8 below provides guidance in relation to the allocation of specific risks.
Indemnity clauses should only be used where the Parties wish to allocate or transfer a particular risk or risks to one Party. Indemnities may not be necessary where the specific allocation or transfer of a risk is not required.

d. Indemnity Approvals

Where the Territory provides an indemnity in favour CDU (or any other third party), whether in a clause in the contract or agreement or in another form (e.g. a separate deed or letter), the Territory must seek approval for that indemnity in accordance with section 34 of the Financial Management Act. The relevant Treasurer’s Direction is G2.5 and further information regarding indemnity approvals, including indemnity approval forms can be found at: [http://www.nt.gov.au/ntt/treasdir/G2.5_guarantees_indemnities.pdf](http://www.nt.gov.au/ntt/treasdir/G2.5_guarantees_indemnities.pdf) or by contacting the Northern Territory Treasury.

This approval is required to an indemnity given by any Northern Territory Government Agency and must be obtained prior to the contract, agreement, deed or letter being signed.

The above approval is not required where CDU provides an indemnity in favour of the Territory.

8. SPECIFIC PRINCIPLES OF RISK ALLOCATION AND INSURANCE

a. Relationship of Parties

In respect to the relationship of the Parties, in each Joint Project:

• The rights, duties, obligations and liabilities of the Parties will be several and not joint, or joint and several;

• Unless specifically provided otherwise, the Parties do not and will not carry on business in common with a view to joint profit and will not receive income jointly;

• The relationship between the Parties will be one of collaborative partners and nothing constitutes the Parties as agents of one another, a partnership (in the legal sense) or a trust;

• Except as specifically provided for, a Party will not have the authority or power to act for the other Party, or create or assume a responsibility, obligation or liability of the other Party.

b. Property and Assets

Each Party will bear the risk for property and assets it owns and has title to. For this purpose each Party will take out an insurance policy or self-insure its property and assets against damage. This will include insurance for property damage and public liability.
c. **Employees, Agents and Sub-contractors**

Each Party will bear the risk of its employees, agents and contractors.

Each Party will take out and maintain workers compensation insurance for its employees and comply with the relevant work health legislation, including ensuring a safe workplace for its employees.

Where employees of a Party will work from or be based in premises of the other Party, the Party that owns or has control of the premises will ensure that it provides a safe workplace for the employees of the other Party.

d. **General Liability**

Where both Parties are providing funding or an in-kind contribution to the Joint Project, the legal agreement regarding the Joint Project will contain a mutual indemnity clause under which each Party (the “First Party”) indemnifies and keeps the other Party and its employees, agents and contracts (the “Second Party”) indemnified from claims, losses, damage, suits etc that are suffered or incurred by a Party and that arise from:

- A breach of the agreement by the First Party;
- An unlawful or negligent act or omission by the First Party or the First Party’s employees, agents or contractors;
- Injury to death of a natural person or damage to real or personal property of the Second Party caused or contributed to by the First Party or its employees, agents or contractors.

Each Party’s liability to indemnify the other Party under the mutual indemnity clause will be reduced to the extent that the other Party caused or contributed to the relevant claim, loss, damage etc.

Each Party will use reasonable endeavours to mitigate any loss or damage etc suffered by it for damage, loss, cost etc that it is entitled to be indemnified against under the mutual indemnity clause.

In some Joint Projects a mutual indemnity may not be appropriate and a Party may require an indemnity from the other Party, without giving one in return. The Parties will seek legal advice in such instances.

Where a Party requires it, the other Party will ensure it has public liability insurance in place to cover risks associated with injury or death to persons or damage to property.

e. **Funding**

The risk of funding or resources being inadequate for the Joint Project will be assessed and allocated on a case by case basis for each Project.
f. NTG as a self-insurer

The NTG is a self-insurer. This means that NTG bears its own risks and meets its own costs where risks eventuate. An Agency subject to the Financial Management Act (as prescribed in the Administrative Arrangements Order, available at the following link: http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/8342f6a2c6bc3a566925760a00248e39?OpenDocument is covered by the NTG’s self insurance arrangements. An Agency may enter into commercial insurance arrangements where a net benefit to the Territory can be demonstrated.

Further information on the NTG’s self-insurance arrangements can be found in Treasurer’s Direction Section M 2.1: Insurance Arrangements which can be found at http://www.nt.gov.au/ntt/treasdir/TDM2.1_insurance_arrangements.pdf

9. GOODS AND SERVICES TAX (GST)

a. GST Compliance

GST is to be dealt with in agreements concerning Joint Projects so as to ensure that the GST arrangements comply with applicable GST laws, NTG requirements and, where grants are involved, GST grants rulings.

b. GST Clauses and Advice

Wherever possible NTG standard GST clauses will be used in agreements documenting Joint Projects.

The Parties acknowledge that there may be circumstances where the NTG needs to seek advice regarding GST from the Department of Business and Employment to ensure compliance with legislative requirements.

10. DISPUTE RESOLUTION

a. General principle regarding disputes

Where a dispute arises in relation to a Joint Project, or a matter concerning a Joint Project (“Dispute”) the Parties will engage in the following dispute resolution process prior to commencing any legal action regarding the Dispute.

b. Dispute Resolution Process

Step 1: Where a Dispute arises the Party claiming the Dispute will give written notice of the Dispute to the other Party and the notice will provide details of the matter in Dispute (“Dispute Notice”).
Step 2: Within 5 business days of the date of the Dispute Notice, the project managers of each Party will meet and negotiate in good faith to attempt to resolve the Dispute.

Step 3: If the project managers cannot resolve the Dispute within 7 business days of meeting, the project managers of each Party will refer the Dispute to the Vice-Chancellor of CDU and the Chief Executive Officer of the relevant NTG agency, who will negotiate in good faith to attempt to resolve the Dispute.

Step 4: If the Chief Executive Officer and Vice-Chancellor cannot resolve the Dispute within 14 business days of the Dispute being referred to them, the Parties will appoint a mediator. If the Parties cannot agree on a mediator to appoint, the mediator will be appointed by the President of the Law Society of the Northern Territory and the Parties will engage in a mediation process to attempt to resolve the dispute.

c. Dispute not resolved

If the dispute is not resolved within six weeks of the mediator having been appointed (or other time period agreed in writing between the Parties), a Party may commence legal action regarding the dispute.

d. Cost of Mediation

The Parties will bear the cost of the mediator equally and will provide the mediator with any materials it requires for the purposes of conducting the mediation.

e. Continuing with Project

Where a matter is in dispute and subject to a dispute resolution process, the Parties will continue to carry out their obligations in respect of the Joint Project.

11. PUBLICATIONS, MEDIA AND PUBLICITY

a. Publication Rights

The Parties acknowledge that CDU policy is that the dissemination of research outcomes is not unreasonably restricted. When negotiating arrangements for the publication of Project IP or outcomes of a Joint Project the Parties will use their best efforts to ensure that unnecessary and unreasonable delays in the publication of Project IP or Joint Project outcomes does not occur. As a general principle the Parties will aim to achieve publication within 12 months of completion of the Joint Project.
b. Acknowledgment of Funding

Each Party will acknowledge the other Party’s contribution to a Joint Project in all public statements and publicly available materials such as advertising, annual reports, publications, letterheads, websites, media releases, displays, presentations etc.

The acknowledgements will be in a manner agreed to by both parties and commensurate with the contribution.

It is recognised that both parties have approval processes associated with branding and marketing materials as well as media activities.

In giving acknowledgement:

(i) CDU will acknowledge the NTG’s contribution to Joint Projects by:

- use of the Northern Territory Government logo on all material except media releases;
- use of the phrase “supported by or in partnership with the Northern Territory Government”;
- when requested by the Northern Territory Government, include policy branding statements on all material, for example “Greening the Territory” or “Growing the Territory”;
- in such other way as the NTG may reasonably request from CDU; and

(ii) the NTG will acknowledge CDU’s contribution to Joint Projects by:

- use of the CDU logo on all material except media releases;
- use of the phrase “supported by the Charles Darwin University”
- in such other way as the CDU may reasonably request from NTG.

c. Media Statements

Announcements about Joint Projects to the media, be they joint or by one party, must be agreed to by both parties prior to their release. This includes providing a copy of materials to be released to both parties for input/comment. A Party will not unreasonably withhold or delay its consent.
d. Approving media and publicity activities

All matters relating to media and publicity activities, as defined in 12a and 12b, must be managed and approved by a representative of the CDU marketing/communication team and the relevant NTG Agency’s marketing and communication team, both of whom are responsible for gaining appropriate internal approvals.

12. CONFLICT OF INTEREST

a. Definition of “Conflict"

“Conflict” means any matter, circumstance, interest, or activity affecting a Party or any officer, member, employee, agent or subcontractor of a Party, which may, or may appear to, impair the ability of the Party or the relevant officer, member, employee, agent or subcontractor to carry out the Party’s responsibilities and obligations under the Joint Project diligently and independently.

b. Dealing with Conflicts

Prior to the commencement of the Joint Project each Party will ensure that, to the best of its knowledge, no Conflict exists or is likely to arise in the performance of the Joint Project.

If a Conflict arises, or appears likely to arise during the conduct of a Joint Project, the Parties undertake to immediately notify each other in writing of the Conflict and the steps they propose to take to resolve or deal with the Conflict.

The Parties will negotiate in good faith to resolve or deal with the Conflict. If the Parties are unable to reach a resolution with respect to a Conflict within 10 days of notification of the Conflict one of the Parties may refer to Conflict to the dispute resolution process.

The Parties undertake to treat all information regarding Conflicts as confidential.

13. CONFIDENTIALITY

a. Meaning of Confidential Information

“Confidential Information” means any information or material relating to the Joint Project provided by or for one Party to the other Party, including:

- any information that by its nature is confidential;
- any information designated as confidential by the Party by or for whom the information is provided; and
- any information that the recipient of the information ought reasonably to know is confidential.
b. Use of Confidential Information

Each Party undertakes to hold all Confidential Information of the other Party in confidence and not make any use of it, except for the purposes of performing the Joint Project.

A Party will not disclose or permit or cause the Confidential Information of the other Party to be disclosed to any person, except:

- as authorised by the other Party;
- to its employees or contractors, to the extent needed to perform a Joint Project;
- which is required to be disclosed by law or the rules and requirements of a stock exchange; and
- in the case of the NTG, within the NTG public sector in accordance with the *Public Sector Employment and Management Act* and associated Code of Conduct.

14. VARIATIONS

Any variations to Joint Projects or agreements regarding Joint Projects will be agreed in writing by both Parties prior to taking effect.

15. TERMINATION

a. Termination for Convenience

Either Party may terminate the agreement dealing with a Joint Project by giving 90 days written notice to the other Party, however, a Party will not exercise this right without first contacting the other Party to arrange a meeting to discuss the termination.

The Parties may agree that a Party terminating for convenience will meet reasonable and evidenced costs of the other Party that result directly from a termination for convenience.

b. Termination for Default

Either Party may terminate the agreement dealing with a Joint Project by giving immediate notice in writing where the other Party is in breach of the agreement and fails to rectify that breach within 30 days of being given notice to do so.

16. LEGAL ARRANGEMENTS

This document is a guide only and should not be construed as legal advice, or evidence of any legally binding agreement between CDU and the NTG.

Commercial matters in respect to Joint Projects are to be negotiated and agreed by CDU and the NTG and documented in a contract between the Parties in relation to each Joint Project.
17. ENDORSEMENT

The guiding principles in this document were endorsed by the CDU/NTG Partnership Peak Group on 14 March 2012.