

## MEMORANDA OF UNDERSTANDING: WHEN & WHEN NOT TO USE THEM

### WHEN IS AN AGREEMENT NOT AN AGREEMENT?

Memoranda of Understanding (“*MOUs*”, also known as Heads of Agreement or Letters of Intent) are used by parties to indicate their intention to negotiate a contract in the future.

Despite their widespread usage *MOUs* are not usually intended to be legally binding documents. However if they are improperly prepared they can give rise to contractual obligations and might also give rise to actions like misleading and deceptive conduct.

### WHEN TO USE AN *MOU*

Because of their brevity and informality *MOUs* will often not be appropriate or desirable. In limited circumstances, however, they can be a useful kick-start for contract negotiations.

Organisations often ask the University to enter into an *MOU* as an indication of our desire to explore further opportunities for collaboration. In such cases, the *MOU* is really only of symbolic value. The parties will be able to walk away from the *MOU* at any time and at their complete discretion.

*MOUs* are only appropriate at this early stage of discussion. If you are entering into arrangements that could have legal or financial consequences for the University – for example where you are accepting or making promises – you must enter into a formal contract. Legal Services can help you decide which contract is most appropriate in the circumstances.

Despite the unenforceability of *MOUs*, you should not enter into one if you have no intention of fulfilling its terms. Such conduct will reflect poorly

on the University’s reputation in the market-place. In some circumstances it could also result in an action for misrepresentation or misleading and deceptive conduct.

### WHAT SHOULD AN *MOU* CONTAIN?

If an *MOU* is appropriate in the circumstances Legal Services will assist you with its preparation.

*MOUs* will usually consist of statements regarding the areas of collaboration parties wish to explore and will typically be drafted in generalities.

An *MOU* must never contain terms which imply the document is legally enforceable (for example references to deadlines, obligations, breach or termination). They should always contain a statement which clearly negates any intention to create a binding relationship.

### MOU CHECKLIST

1. All agreements must be checked by Legal Services before signature, so contact us on ext. 2495 if you are provided with an *MOU* to sign or if you believe you need one drawn up.
2. *MOUs* are never appropriate if you are the stage of making promises to another party or accepting obligations from another party.
3. *MOUs* should contain a negation of intention to create legal relations in the following terms or similar: “This document is a Memorandum of Understanding and is not intended to create binding legal obligations for either party”.
4. *MOUs* must never contain any terms which imply the document is legally enforceable against a party.
5. *MOUs* must be signed by an authorised officer of the University in accordance with our Business and Procedures Manual: (<http://www.latrobe.edu.au/finance/bpm.html>).

*This article is intended as a general guide. Please contact Legal Services on 9479 2495 if you would like any further information regarding this guide or if you require particular advice.*