

Introduction

External parties are often keen to sign a Memorandum of Understanding (MOU) or Letter of Intent with the University, to avoid the time and effort needed to negotiate a more comprehensive legal agreement. The purpose of this guide is to explain the difference between an MOU and an agreement, so that you can decide which format is most appropriate.

1 What is an MOU?

A Memorandum of Understanding (MOU) is¹ a *“written record of an understanding between two or more parties ... intended as an acknowledgment that they are ad idem [of one mind] on some matter, which they will pursue with common intent and goodwill, without necessarily demonstrating a present or future intention to create legal relations by contract or treaty, although this may also in fact occur.”*

Many people think that calling a document a “Memorandum of Understanding” means that it is not legally binding and therefore does not place the University at risk. This is incorrect. MOUs frequently contain clauses which are intended to be legally binding – for example, they often contain confidentiality clauses and sometimes even commitments to pay money. You should treat an MOU with the same care as a more formal looking legal agreement.

2 How does an MOU differ from an agreement?

Memorandum of Understanding	Agreement
A legal document which describes the terms of an understanding between two or more parties at a point in time	A legal document which sets out the rights and obligations of two or more parties; the basis on which they commit to work together to achieve a common objective. Agreement = Contract
May record the basic terms of a proposed transaction – reflects the intentions of the parties	Sets out the legal rights and obligations of each party
Often non-binding (but not always). Depends on whether the parties intend to be bound to the obligations set out in the MOU and whether the MOU provides sufficient clarity and certainty to create legally binding obligations	Is always binding upon the parties
Must be in a written form	Can be created orally or in a written form
Intention and preliminary offer and acceptance	Requires the intention to create a legal relationship, offer, acceptance and consideration (money or rights/obligations), capacity and consent. The objective of the arrangement must be legal.
The intention of the parties is evidenced by the surrounding circumstances and actions of the parties – extrinsic evidence	The intention of the parties is evidenced by the wording of the agreement
Breach – results in damage to reputation and honour	Breach – gives rise to various legal remedies including damages

¹ Australian Law Dictionary (3rd Ed), Oxford University Press (2017)

3 Who can sign an MOU on behalf of the University?

Under the University's [Signing Delegations](#), MOUs are treated in the same way as a legally binding contract. The same person must sign the document, regardless of whether it is legally binding or not.

In fact, the Signing Delegations apply to any agreement, assignment, contract, deed, declaration, expression of interest, grant, gift, heads of agreement, lease, licence, memorandum of understanding (even if not legally binding), novation, offer, release, tender, settlement, statement of cooperation, undertaking or other document to which the University is a party.

4 Things to consider before using an MOU

- What are you trying to achieve by signing a document before all the commercial arrangements have been agreed?
- Do you really need an MOU? If you only need to deal with confidentiality, then a binding Confidentiality Deed would be a better choice.
- Will signing an MOU limit your flexibility in negotiating the final commercial arrangements or affect your bargaining power?
- Do the parties intend to make the MOU legally binding? What's stopping the parties from entering into an agreement?
- If the MOU is non-binding, what are the potential risks if a court decides, having regard to the actions of the parties and surrounding circumstances, that the MOU is actually binding?
- What key terms have not yet been agreed? Is it prudent/commercial to have these terms determined by an objective mechanism or reference point if the parties are unable to reach agreement?
- Does your non-binding MOU state that it is non-binding and exclusively use non-binding language (eg. may, propose, discuss)? If the MOU uses binding language (eg. shall, must, agrees, requires) there is a risk that it might be interpreted by a court to be legally binding on the parties.