

Article Information

Author: Sarah Johnson

Service: Corporate & Commercial

Sector: Not-for-Profit

Wanting to collaborate with another NFP? Is a Memorandum of Understanding or Heads of Agreement right for your arrangement?

In the first in a series of Insights on structures to assist not for profits working together, Piper Alderman considers Memoranda of Understanding and Heads of Agreement.

Even before COVID-19 began to have a profound impact on the Not-for-profit sector, NFPs faced increasing complexity in terms of legal compliance, attracting donor and government funding and the need for diversification of their service offerings. COVID-19 has exacerbated these factors by significantly increasing demand for services provided by NFPs and compliance costs whilst, in many cases, simultaneously reducing public donations.

Collaboration with other NFPs allows organisations to work together on a particular project, pool knowledge and resources, broaden the range of services they offer or the persons to whom they offer services and/or more easily attract government or donor funding.

One common way in which NFPs can record the key elements of a proposed transaction or collaboration is using a Memorandum of Understanding (**MoU**) or a Heads of Agreement (**HoA**). Generally, an MoU is the sole document governing the parties' relationship and is used to outline mutual goals and expectations of each party and set out a framework for the manner in which they intend to work together. By contrast, a HoA refers to a document that outlines key commercial terms of an arrangement as a precursor to a more fulsome contract – although the two terms are often used interchangeably.

An MoU or HoA may or may not be legally binding. A third option is a hybrid approach whereby some of the provisions, for example, confidentiality, intellectual property and/or exclusivity obligations are binding, with the balance of the document comprising the commercial terms that are not legally binding. Where the MoU or HoA does not specify its legal status and there is a dispute between the parties, a Court may be asked to decide whether or not the relevant document is void for uncertainty and is merely an “agreement to agree” or constitutes an enforceable binding agreement. Generally, the Courts have applied the following tests in determining whether or not an MoU or HoA is legally binding:

1. Did the parties intend to be bound?
2. Is the MoU or HoA sufficiently clear and certain to actually be binding in practice?

The Court typically takes an objective approach to assessing whether or not the parties' intention to be bound can be inferred from the surrounding circumstances, including considering the parties' statements and actions and any correspondence exchanged between them. Assuming an intention to be bound can be established, the Court will then assess whether the document contains all the essential terms of the agreement and describes the parties' obligations with sufficient certainty and clarity for the obligations to be enforceable.

MoUs and HoAs have a number of advantages and disadvantages. They allow the parties to record the key terms of their relationship and intentions in a simple document without having to negotiate a detailed contract and to work together flexibly within an agreed framework without having to amend the contract in future to suit the parties' evolving needs. MoUs and HoAs can also typically be negotiated in a shorter time than a legally binding contract.

However, both types of documents by their nature do not encompass all of the detailed terms included in a contract, which can lead to uncertainty and disputes at a later date. Also, the fact that many of these documents are typically not legally

binding or only partially legally binding means that they do not afford the parties the same enforcement rights as a contract and may not be appropriate in circumstances where the parties are required to provide services or products to a third party.

MoUs and HoAs provide an important tool to assist negotiating parties to reduce their proposed relationship to writing either as a precursor to a more detailed contract or as a flexible framework within which the parties can operate.

If you are planning on collaborating with another NFP and would like advice regarding the optimum structure for your arrangement, please contact [Sarah Johnson](#).

To read about whether a Head Agency Agreement is right for your arrangement? [click here](#)

To read about whether a Joint Venture or Consortium is right for your arrangement? [click here](#)