

PS LA 2002/18 - MOUs and other non-legally binding arrangements to which the ATO is a party

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ATO Practice Statement

Law Administration

PS LA 2002/18

This practice statement has been replaced by PS CM 2007/05 Memoranda of Understanding with Australian federal, state territory and local government bodies, which was endorsed on 11 October 2007..

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: MOUs and other non-legally binding arrangements to which the ATO is a party

PURPOSE: To notify procedures and drafting standards for non-legally binding arrangements and particularly MOUs to which the ATO is to be a party, with the aim of protecting the interests of the ATO.

This Law Administration Practice Statement is not concerned with MOUs or other types of arrangements with the Governments of countries other than Australia, or with international organisations (for example, the OECD) or other similar overseas bodies.

This Law Administration Practice Statement is not intended to require the re-negotiation of arrangements already concluded between the ATO and other parties.

STATEMENT

Roles of the Accredited Procurement and Contract Management Unit and the Lines

1. Memoranda of Understanding (MOUs) are managed by the Accredited Procurement & Contract Management unit (APCM) in ATO Resource Management (ATORM) while ATO Legal Practice (ATOLP) ensures compliance with relevant Commonwealth legislation and policy. APCM has the prime responsibility for co-ordinating MOUs and must be consulted as soon as the need for an arrangement between the ATO and another party is identified.
2. APCM will determine whether the arrangement should be in the form of an MOU or a legally binding format and who should sign the agreement on behalf of the ATO. Where required, APCM will consult with the ATO Legal Policy and Co-ordination Unit (LCP Unit) to determine the appropriate format.
3. MOU templates have been developed and are available from APCM. Where there are special requirements which are not covered in the MOU template, APCM may consult or recommend that lines consult financial, legal and/or other areas of the ATO to assist in formulating the MOUs.

4. The relevant ATO lines are primarily responsible for determining the substantive content of MOUs in respect of the specific requirements (subject matter) between parties.

Role of the ATO Legal Practice

5. The LPC Unit in ATOLP has the prime responsibility for monitoring the compliance of MOUs with Commonwealth legislation and policy, from a legal perspective, and protecting the interests of the ATO.
6. ATOLP will assist APCM with determining whether an arrangement should be recorded in an MOU or in an appropriate legally binding format.
7. ATOLP can assist with drafting appropriate or alternate provisions (for example, protecting information, termination, dispute resolution and other technical matters) where it is determined that the provisions in the MOU template do not meet the requirements needed.

Register of arrangements

8. APCM maintains a register of non-legally binding arrangements to which the ATO is a party. All existing and new MOUs are to be reported to APCM.

EXPLANATION

9. The ATO is part of the legal personality of the Commonwealth. The ATO has no legal personality of its own; it is the Commonwealth that enters into a legally binding agreement with other entities. However, it is permissible for a Government Department or agency, including the ATO, to enter into a non-legally binding arrangement with another Commonwealth agency or, more rarely, with a private company. This Law Administration Practice Statement is to provide guidance on when to use MOUs and the procedures for the drafting and termination of such arrangements.

Determining whether a non-legally binding format is appropriate

10. One of the threshold decisions to determine is whether the arrangement should be cast in a legally binding form or a non-legally binding form. Some of the factors to be taken into account in making this decision are:
 - whether the other party has a separate legal personality – for example the ATO and another Commonwealth Government Department are not separate legal entities (they are part of the same legal entity, namely, the Commonwealth) and are not capable of entering into a legally binding arrangement other than as the Commonwealth. A non-legally binding arrangement is the only option in the case of an arrangement between Government departments;

- whether it is desired that future disputes be resolved in a Court of law – if the answer to this is yes then a legally binding arrangement will be necessary. However, in some cases an alternative dispute settling procedure will be appropriate;
 - whether the arrangement contains commercial provisions which commit the ATO to the payment of money for services rendered or goods provided to the ATO – such arrangements are usually in the form of legally binding contracts;
 - whether the arrangement seeks to determine other legal rights and obligations between the parties on such matters as indemnities, waiver, third party interests;
 - the wishes of the other party to the arrangement.
11. The most important criterion to apply when considering whether to cast an arrangement in a non-legally binding format is whether a future dispute about the arrangement can or needs to be settled in a court of law. If such a resolution might be desired, a non-legally binding form should not be adopted and a binding agreement should be drafted and the usual clearances should be obtained. However, as set out above, two parts of the Commonwealth cannot enter into a legally binding arrangement between themselves. If there is any doubt about whether the arrangement should be legally binding, the LPC Unit should be consulted through APCM. Examples of arrangements which need not be in legally binding format are as follows:
- all arrangements between the ATO and another Commonwealth Government Department;
 - most non-commercial arrangements between the ATO and Commonwealth statutory authorities the majority of which are separate legal entities capable of entering into contracts (there is often little likelihood of litigation because both parties are funded out of consolidated revenue);
 - non-commercial arrangements between the ATO and State Governments or their instrumentalities (in many cases there is no real prospect of settling a dispute about the arrangements in a court of law);
 - non-commercial arrangements between the ATO and private companies where it would not be appropriate to settle disputes about the arrangements in a court of law – normally, however, arrangements with private companies should be in the form of legally binding contracts.

Determining whether to use the MOU format

12. If it is determined that a non-legally binding arrangement with another agency or body is appropriate then a decision should be made whether to enter into ordinary correspondence or an MOU. Not every item of business between the ATO and an outside body needs to be in the form of a formal MOU. Often a mere exchange of

written correspondence will be sufficient. Examples of non-legally binding arrangements that should be in MOU format are:

- arrangements with the other party that commit significant resources of either party to the performance of the arrangements;
- arrangements that are intended to govern activities between the ATO and the other party over a significant period of time;
- arrangements contemplating activities which are likely to come under later external scrutiny by such bodies as the Australian National Audit Office (ANAO), Parliamentary Committees, the Office of the Federal Privacy Commissioner, the Ombudsman or even the media;
- arrangements which are contemplated by legislation;
- arrangements which involve the transfer between the parties of sensitive information such as personal information about individuals, or commercial information of a valuable nature;
- arrangements involving the exchange or secondment of staff between the parties on a continuing basis;
- arrangements where the ATO wishes to get a formal commitment from the other party as to the obligations contemplated by the arrangements.

Language of MOUs

13. As an MOU is not legally binding, the language of the MOU should reflect this. Mandatory language should not be used. For example, the word “agree” should not be used, instead the word “will”, “understand” or “accept” should be used.

Content of MOUs

14. Usually MOUs will have content along the following lines:

Heading - Every MOU should have a heading describing the parties to the MOU and the subject matter of the MOU. For example “*Memorandum of Understanding between the Australian Taxation Office and Centrelink – Delivery of Family Assistance Office*”. Generally speaking the Australian Taxation Office should be described a party to an MOU, not a sub-unit of the ATO.

Background and Purpose– a paragraph briefly setting out the background to the MOU and the purpose of the MOU.

Status - a paragraph should always be inserted stating that the MOU is not intended to create legal relations between the parties. This avoids any misunderstanding about the status of the document when disputes arise. Such a statement will not detract from the seriousness of the undertakings.

Relationship with other MOUs – a paragraph setting out the relationship between the MOU and other MOUs that the other party has entered into with the ATO. It may be necessary in an appropriate case to state that the MOU effectively revokes previous MOUs.

Future Subsidiary Arrangements – in appropriate cases a paragraph referring to the possibility of concluding future subsidiary arrangements in the form of attachments to the MOU. This is an important provision as it reduces the complexity of content and negotiation in future arrangements between the ATO and the same party.

Functions of the Parties – in appropriate cases the functions of the ATO as an agency in relation to the subject matter and the functions of the other party can be set out. For example, there may be cases where a statement of the basic functions of the parties will assist in a delineation of the obligations of the parties under the MOU.

Date of Effect – a paragraph indicating when the MOU is to come into effect, for example, whether on date of signature by both parties or at some future date. Generally speaking an MOU should not be expressed to come into effect on a past date.

Interpretation – a paragraph or paragraphs explaining what acronyms mean and explaining the use of technical terms of the MOU.

Subject Matter – this is the most important content and is primarily a matter for the relevant line.

Applicability of Government Policy – a paragraph recording the applicability of Government policy pertinent to the subject matter and referring to relevant policy documents.

Applicability of Legislation – a paragraph may be inserted recording the parties' understanding of what legislation applies to the subject matter of the MOU. Some examples concerning privacy and secrecy legislation follow.

Applicability of Privacy Legislation –The Information Privacy Principles (IPPs) in the *Privacy Act 1988* (Commonwealth) set out strict safeguards for any personal information handled by the ATO. These rules cover the collection, storage, use and disclosure of this information. Where information about individuals is to be passed between the parties to the MOU, mention should be made of the ATO's obligations under legislation to comply with the IPPs. This is especially important if the other party is not an agency to which the *Privacy Act 1988* applies. If there is any doubt about what the wording of the MOU should be, and whether information can be passed, the LPC Unit in ATOLP can assist. It may be necessary for the paragraph in the MOU to be expressed to survive after the termination of the MOU as privacy obligations are imposed by statute and continue after the termination of a MOU.

Applicability of Secrecy Legislation – There are a number of provisions in taxation legislation which protect information collected by the ATO and this includes information other than personal information. Where sensitive information can be passed between the parties, mention of these provisions will be appropriate.

The LPC Unit in OCTC can assist with the drafting of paragraphs dealing with the secrecy provisions and with advice on the application of the secrecy provisions. Also the agency which is the other party to the MOU may be bound by its own secrecy provisions. It may be necessary for the paragraph in the MOU to be expressed to survive after the termination of the MOU.

Protection of Information Generally - In addition to privacy and secrecy understandings, in appropriate cases it may be advisable to insert paragraphs which commit the parties to the protection of each other's information where that information is not protected by privacy or secrecy legislation.

Physical Security and Use of Material Information of Services - In the case of an MOU under which information is to be provided to the ATO, a provision to the effect that the information will be used only for the purposes of the administration of taxation laws will usually be appropriate. A provision may also be inserted requiring that only ATO officers with a need to know the information should have access to the information. In appropriate cases the Security Section should be consulted about the wording of paragraphs obliging the observance of security measures.

Funding arrangements - while an MOU cannot form by itself a legal basis for the payment of money to or from the ATO, there may be cases where the arrangements for funding the performance of the terms of the MOU may need to be described. Such a description could include an explanation of the legal basis for the funding. In many cases involving the payment of money by the ATO to another government organisation, the only authority may be the Commonwealth's executive power combined with the ATO's appropriation. Reference should be made to the Finance Minister's directions under section 177-1 of the *A New Tax System (Goods and Services) Tax Act 1999* in respect of notional liability for the GST. Some of the procurement principles in the ATO Chief Executive's Instruction on Spending of Public Money may be relevant to MOUs which record understandings about the provision of services by one Commonwealth agency to the ATO.

Financial Responsibility for meeting claims - Before it is decided to insert a paragraph allocating financial responsibility for meeting claims for compensation (for example, for injury or for loss or damage) arising out of the performance of obligations under the MOU, APCM's advice should be sought. APCM will then decide whether other areas of the ATO, for example legal or financial policy areas, should be consulted. Generally, it is not appropriate for a non-legally binding document in the form of an MOU to deal with financial responsibilities of this kind but there may be cases where the parties may wish to indicate their understandings of what their responsibilities will be even though such indication will not create any legal rights or obligations. Generally, technical legal assistance will be required for the drafting of the appropriate paragraphs. Claims could be made by ATO officers, officers of the other agency, the parties themselves or by third parties. In some cases it might be necessary for a separate legally binding arrangement to cover these matters.

Feedback and Reporting - where appropriate a paragraph providing for regular feedback on the working efficacy of the MOU, a formal review of the MOU and for some form of regular reporting on the performance of the provisions of the MOU.

Review – a paragraph entitling either party to initiate a review of the operation of the MOU by written notice from that party’s contact officer to the other party’s contact officer and indicating that such a review will be jointly undertaken by the contact officers. Reviews ensure that MOUs that are obsolete are terminated. They can also assist in reducing disputes between the parties arising out of changed circumstances.

Variation - a paragraph indicating how the MOU may be varied. Generally, but not necessarily, this is done by an amending MOU signed by the signatories to the original MOU. In appropriate cases the MOU may require that notice be given by either party that a variation is requested and the reasons for the request.

Duration of the MOU – usually it is appropriate to include a paragraph indicating when the MOU is intended to cease operation independently of termination at the option of either party.

Termination of the MOU – usually it is appropriate to include a paragraph giving either party the option of bringing the MOU to an end. This is appropriate partly because MOUs are not legally binding. It may also be appropriate for the paragraph to require the terminating party to give notice of the termination.

Dispute Resolution – paragraphs on dispute resolution should always be included in an MOU unless there are good reasons to the contrary. It is a good idea for such a paragraph to nominate people of both parties who are to be contacted in the event of a dispute and if they are unable to resolve it to specify people in higher positions to whom the dispute is to be referred. In accordance with modern practice concerning dispute resolution, the paragraph can commit the parties to consider mediation if the dispute becomes protracted. The ATO’s policy on mediation is contained in Law Administration Practice Statement PS LA 2002/9. The dispute resolution paragraph should not refer to the initiation of legal proceedings.

Notices – a paragraph indicating that a notice (for example to terminate the MOU) to be given in relation to the MOU must be in writing and addressed to the contact officer(s). The paragraph can specify how the notice is to be given (for example, by post by facsimile, e-mail etc) and can specify in what circumstances the notice is deemed to be received by either party. This will ensure that the correct people in either party are contacted and will assist in the efficient administration of the MOU.

Contact Officers – a paragraph nominating positions in each agency who will be responsible for the day-to-day administration, interpretation, management, variation or dispute of the MOU. The paragraph should also nominate by name the persons who are the contact officers at the commencement of the MOU. Phone numbers, fax numbers and e-mail addresses may be included.

Other – depending on the nature of an MOU it might be appropriate to include other paragraphs, for example, dealing with access to premises. APCM can provide further advice.

Signature Block – at the foot of the MOU there should be clear provision for signature by the persons to sign the MOU on behalf of each party. The signature block should clearly indicate the positions of the parties. The signature block should also clearly indicate the date on which the MOU is signed. ATO officers should

have clear authority by delegation, authorisation or otherwise to sign the MOU on behalf of the ATO.

Inappropriate provisions in MOUs

15. As an MOU is not intended to create legal relationships between the parties it is not appropriate to include paragraphs of the following kind in MOUs:
- A paragraph to the effect that intellectual property in all ATO material vests or will vest in the ATO. However, a paragraph may be inserted explaining the parties' understanding of what the existing intellectual property legal rights (under legislation and other legally binding agreements) are so long as it is understood that such a paragraph will have no effect on legal rights of the parties;
 - warranty provisions;
 - third party interests;
 - waiver of legal rights;
 - assignment and novation of legal rights;
 - severability;
 - a paragraph expressing the MOU to be a deed;
 - a paragraph identifying a law of a State or Territory governing the interpretation of the MOU.
16. MOU templates drafted in accordance with paragraphs 14 and 15 are available from APCM.

Signing of MOUs

17. Where an MOU involves financial consideration, the MOU should be signed by an officer who has the appropriate financial delegation in accordance with the *Financial Management and Accountability Act 1997* (that is, section 44 or section 31) and ATO policies and guidelines. Irrespective, it will be necessary to assess the importance and sensitivities associated with the MOU to determine if the document should be signed by an NPM or higher level officer. The APCM can provide assistance in determining the appropriate level officer to be signatory to the MOU.

Attachments to MOUs

18. If the MOU is to have attachments, they should be clearly referred to in the main body of the MOU. The attachment should clearly refer to the heading of the MOU.

Desirability of concluding umbrella MOUs with agencies

19. Where the ATO has a high level of interaction with another agency it may be desirable, where practicable, to enter into an umbrella MOU which facilitates subsidiary arrangements at a future time. This will obviate the requirement to negotiate common paragraphs such as dispute resolution, termination and review when an arrangement on a new subject matter is required. Further information will be provided by APCM when determining whether a non-legally binding format is appropriate.

Negotiation of MOUs

20. This Law Administration Practice Statement may be made available to an agency or other body with whom the ATO intends to enter into an MOU for the purpose of explaining the ATO's approach to MOUs.

subject references: agreements; contracts; legally binding agreements; memorandum of understanding; MOU; procurement

legislative references: ANTS(GST)A 99 177-1
FMAA 97 31
FMAA 97 44

related practice statements: PS LA 2002/9

file references: 2002/017552

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