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Contract Law – Avoiding Legal Risk With MOUs & Heads of Agreement

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Presenter:
John Arthur, Barrister, Victorian Bar

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CONTRACT LAW – AVOIDING LEGAL RISK WITH MOUs AND HEADS OF AGREEMENT

John Arthur[1]

Introduction

1. Heads of agreement and memorandums of understanding are types of *preliminary agreement*[2], as are, letters of intent and even letters of comfort[3]. Some are intended to be legally binding and promissory (rather than representational)[4] and others not.

Why use preliminary agreements:

2. A preliminary agreement is utilized where for one reason or another it is desirable to enter into an interim or initial agreement or understanding pending the parties' mutual rights and obligations being set out in a formal contract. As such it is a useful tool for lawyers and business people alike in commercial life[5].

3. Preliminary agreements are used in a variety of commercial and legal contexts. In some situations such a document will not be intended to create binding contractual relations, but is rather intended as a 'declaration of purpose' to secure a moral commitment from prospective business partners or venturers[6]. Such documents may

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[1] John Arthur is a barrister and member of the Victorian Bar

[2] Such agreements are referred to as *preliminary agreements* in J Tarrant, "Preliminary Agreements" (2006) 3 UNELJ 151, and DW McLauchlan, In Defence of the Fourth Category of Preliminary Agreements: Or are there only two? (2005) 21 JCL 286. There seems to be little distinction between heads of agreement, memorandums of understanding and letters of intent (Lake & Draetta, Letters of Intent and other pre-contractual documents, B/worths, 1989, p 4). Each may be binding or non-binding depending on the circumstances. In Maroubra Pty Ltd v Murchison Queen Pty Ltd [2002] WASC 98 Hasluck J found that a MoU in relation to the transfer of a mining lease was a legally enforceable agreement as it contemplated the "mine" to be conveyed for a specified price. His Honour noted that where an agreement is made in a commercial context which contains clearly defined terms of a promissory nature supported by consideration, there is a strong presumption that the agreement was intended to be legally enforceable relying on Edwards v Skyways Ltd [1964] 1 WLR 349

[3] See Kleinwort Benson Ltd v Malaysia Mining [1989] 1 WLR 379 at 391 where a letter of comfort is described as a document under which one party would give comfort to the other party by assuming not a legal liability to ensure repayment of the liabilities of its subsidiary but a moral responsibility.

[4] Newtronics Pty Ltd (recs & mgrs appd) (in liq) v Atco Controls Pty Ltd (in liq) & Ors [2008] VSC 566 per Pagone J at [7] citing Commonwealth Bank of Australia v TLI Management Pty Ltd [1990] VR 510, 516 per Tadgell J. Newtronics overturned on appeal in Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (recs & mgrs apptd) (in liq) [2009] VSCA 238, see below.

[5] It is suggested that the letter of intent or heads of agreement is the preferred option for international joint venturers in the negotiation phase by which a statement of operating principles between the participants is obtained which is subsequently supplemented by a detailed joint venture agreement, ibid, TLA at [24.03.106]

[6] The Laws of Australia, Thomson, TLA at [24.03.106]. They may be used so that the parties feel "bound" to a greater degree by a signed piece of paper, the longer the parties wait to record their oral understandings in writing, the increased risk of misunderstandings arising; if the terms of the proposed transaction are complicated such an agreement may give each party comfort that a meeting of the minds has taken place; the letter might convince a third party, or someone within the organisation that the contemplated deal is viable;

include a confidentiality clause to aid negotiation without disclosing commercial secrets, even if no binding contractual arrangements are entered into. In this sort of situation, while no binding contractual arrangements are intended, the binding nature of the confidentiality clause is required. A negotiation may have reached a point where the parties wish to record their agreement to that point, despite that other points remain to be agreed[7]. The preliminary agreement may give the parties comfort and impetus for them to conclude their bargain[8].

4. Heads of agreement used sensibly are an asset, but used badly, or in an haphazard or ill-informed fashion, can create all sorts of difficulties. Problems can arise if the parties are ambivalent. Unless great care is taken to fully and properly record the parties' true intentions (and even if this occurs), there is a risk of difficulties and disputes arising.

5. The cases are legion in which the binding nature of preliminary agreements is at issue. One academic suggests that disputes about the enforceability of preliminary (or informal) commercial agreements (eg. leases, sale contracts) are second only to interpretation disputes being the most litigated cases in Australia and New Zealand[9]. One may querie whether rather than utilizing a preliminary agreement unaided by legal advice and assistance, parties would be better off waiting for a short period for their lawyers to draw up a formal contract which may save the parties from expensive and acrimonious court proceedings. Commercially however the parties may purposefully wish to leave the preliminary agreement vague (and may be intentionally ambivalent) so that each has an "out" or an "in" depending on what subsequent events occur.

Problems may arise if the parties' intentions are not made clear:

6. The true nature of the agreement and whether it is, or is not, intended to constitute a concluded contract, is critical. A variety of problems can arise with preliminary agreements if the parties' intentions are not made perfectly clear.

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and it may serve as an aide memoire for the draftsperson who will draft the formal contract: see, "Letters of Intent – Are they worth it", R Macey, Blake Dawson Waldren.

[7] See, J Tarrant, "Preliminary Agreements" (2006) 3 UNELJ 151 at 155-156

[8] ibid

[9] DW McLauchlan, *In Defence of the Fourth Category of Preliminary Agreements: Or are there only two*? (2005) 21 JCL 286, p 287

Australian Securities and Investments Commission v Fortescue Metals Group Ltd

7. In the well known recent case of *Australian Securities and Investments Commission* (ASIC) *v Fortescue Metals Group Ltd* (FMG) ("Fortescue Metals")[10], FMG was found to have engaged in misleading and deceptive conduct under s. 52 Trade Practices Act 1974 (Cth) and s. 1041H Corporations Act 2001 (Cth) (and FMG's chairman and CEO as a person involved in the contravention) in making various public announcements that FMG had executed binding agreements with Chinese contractors to build, finance and transfer the infrastructure for a mining project in the Pilbara in Western Australia. In fact the framework agreements were found to be merely agreements to agree with many crucial matters left to be agreed between the parties. While the subjective intentions of the parties may have been to enter into a binding agreement to build the infrastructure, the crucial question was whether such a contract was actually made which involves taking an objective view of the agreement (Keane CJ at FCR409). The contents of the agreements as to subject matter, scheduling and price was expressly left to be agreed (ibid at 411), such that the agreements contemplated the execution of further agreements and were not considered binding.

Newtronics Pty Ltd (recs & mgrs appd) (in liq) v Atco Controls Pty Ltd (in liq) & Ors; Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (recs & mgrs apptd) (in liq)

8. In another case a letter of comfort or support was given by one company (Atco) in relation to its subsidiary (Newtronics) to the effect that Atco would not call up the amount owing by Newtronics to Atco and if necessary funds or additional bank security would be provided to Newtronics or its financier to ensure that it can meet its current trading obligations that have or will be incurred. The primary judge held that the terms of a binding and enforceable contract could be found in the letters of support and gave judgment for Newtronics against Atco: Newtronics Pty Ltd (recs & mgrs appd) (in liq) v Atco Controls Pty Ltd (in liq) & Ors[11]. The primary judge's decision was overturned on appeal in Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (recs & mgrs apptd) (in liq)[12] ("Atco") the Court of Appeal holding that a non-binding commercial arrangement, rather than a legally binding agreement existed. The acid test was – "whether viewed as a whole and objectively from the point of

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[10] (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19 (special leave granted to the High Court on 29 September 2011),
[11] [2008] VSC 566
[12] [2009] VSCA 238

view of reasonable persons on both sides, the dealings show a concluded bargain"[13]. There was no intention to create legal relations and the support was never intended to be legally binding[14]. There was an absence of good consideration and a debenture by Newtronics in favour of Atco was inconsistent with the binding agreement to be inferred.

Whether the preliminary agreement is binding

9. The threshold question which arises in cases where the parties have decided to enter into a preliminary agreement before entering into a formal contract is whether the preliminary agreement is a binding contractual arrangement. In modern times the courts have been more likely to seek to fill in gaps in preliminary agreements so that they may be enforced but will not fill in gaps in incomplete agreements[15], or where the gap is too wide to be filled[16].

10. It is clear that an incomplete agreement or a mere agreement to agree is not legally enforceable[17], as is an agreement to negotiate, at least unless it is clearly and unequivocally expressed[18]. The Courts will strive to uphold bargains and to that end will be inclined to construe the terms of an agreement, to apply objective standards of reasonableness and express machinery, and to imply terms to give efficacy to the bargain, to give effect to the parties' intentions even if that intention has been obscurely expressed[19].

Completeness/certainty and intention to be bound

11. The approach taken by the Courts to determine whether a preliminary agreement is a binding contractual arrangement is two-fold[20]: first, whether, as a matter of construction, the document constitutes a binding contract, or only a basis for

[13] Vroon BV v Fosters Brewing Group Ltd [1994] 2 VR 32 per Ormiston J at p. 81 referring to what was said by Cooke J in Meates v AG [1983] NZLR 308, 377)(referred to in Atco at [34]

[14] Atco at [57]-[58]

[15] Ibid J Tarrant at p. 183 citing Kirby P in Coal Cliff Collieries, ibid at p. 20: "Courts are not well equipped, drawing on their own experience, to fill out the detail of such contracts where the parties leave gaps in their own agreement ...Courts cannot enforce such agreements because they are incapable of judging where the negotiation on particular points would have taken the parties".

[16] Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand [2002] 2 NZLR 433 at 447; see J Tarrant at pp 184-185

[17] Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600 at 604; Fortescue Metals (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19 at [121]-[123] per Keane CJ

[18] Fortescue Metals (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19 at [121]-[123] per Keane CJ

[19] Fortescue Metals at [121]-[123] per Keane CJ

[20] Masters v Cameron (1954) 91 CLR 353; 360

negotiation of a contract; and secondly, whether the parties intended to be immediately bound by the terms agreed. Whether or not a preliminary agreement constitutes a binding contract is a question of fact and the plaintiff has the burden of persuading the court that such an agreement exists[21].

12. The first issue will be determined by examining whether there has been a "voluntary assumption of a legally enforceable duty" (which is the essence of contract)[22]. For such a duty to arise all the essentials for a contact in the particular case must be present, including, that the parties must be identified, the terms must be certain, and there must generally be consideration. Yet despite the existence of these matters, the circumstances may show that the parties did not intend or cannot be regarded as having intended for their agreement to be binding[23].

13. In determining the second issue, "intention" is determined as it is always in contractual contexts in the sense that "(i)t describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened"[24].

14. In *Masters v Cameron*[25], the *locus classicus* in relation to the enforceability of preliminary agreements, the High Court identified three categories of preliminary agreements. To these should be added a fourth category identified in Sinclair's case and resurrected by McLelland J in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*[26].

15. In *Masters v Cameron* in an oft-cited passage, the majority[27] set out the three categories of preliminary agreement which have been so influential in Australian jurisprudence since as follows:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It

[21] Wesfarmers Bunnings Ltd v Angus & Robertson Bookworld Pty Ltd [1998] VSC 101 at [45] per Gillard J
[22] Ermogenous v Greek Orthodox Community of SA Inc [2002] 209 CLR 95 at [24]
[23] ibid, Ermogenous
[24] ibid, Ermogenous at CLR pp105-6
[25] Masters v Cameron (1954) 91 CLR 353; (1954) 28 ALJR 438
[26] (1986) 40 NSWLR 622 at 628 where the words "agreement in principle" did not prevail over the clear import of the words "legally binding", which case was affirmed on appeal in GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631 and see
[27] at 360-362

> may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common...
>
> Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own ... The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document ... or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed.

16. The fourth category where there is also a binding contract is where the parties are "content to be bound immediately and exclusively by the terms which they have agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms"[28].

17. One academic has suggested that there are in fact only two categories of cases, and the law would be easier to understand if this was recognised[29]. Those categories are first, agreements which are intended to be binding and are sufficiently complete (the

[28] Sinclair, Scott & Co Ltd v Naughton (1929) 43 CLR 310 at 317 per Knox CJ, Rich and Dixon JJ; the fourth category was restated by McLelland J in Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628 and affirmed on appeal in GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631; also referred to in ibid, Tarrant at 157-158 and referring to Peden, Carter and Tolhurst "When Three Just Isn't Enough: the Fourth Category of the 'Subject to Contract Cases'" (2004) 20 JCL 156, Young CJ in Helmos Enterprises Pty Ltd v Jaylor Pty Ltd Helmos Enterprises Pty Ltd v Jaylor Pty Ltd (2005) 12 BPR 23,021; (2005) Aust Contract R 90-215; [2005] NSWCA 235 stated at [69] that "an article by academics which attacks the considered view of MH McLelland J, one of the greatest equity judges of the 20th century, in a decision which was upheld in the Court of Appeal and since followed by almost every judge of the Court of Appeal and the Equity Division, as not being of any authority and contrary to what the High Court said in Masters v Cameron, does not rate serious consideration". See also ibid, DW McLachlan which discusses this issue.

[29] Ibid, DW McLauchlan

current first, second and fourth categories), and agreements which are not intended to be binding or that are not sufficiently complete (which is the current third category).

The factors for determining whether a preliminary agreement is binding?

18. If the occasion arises to consider the enforceability of a preliminary agreement what are the relevant factors. It is suggested[30] the main principles or factors in determining whether a preliminary agreement is binding are as follows:

    (a) the parties must intend in entering the preliminary agreement to be immediately bound pending execution of the anticipated formal contract. Such intention is to be ascertained objectively by "consider(ing) what reasonable persons in the position of the parties would have understood to mean by reference to the text of the agreement, the surrounding circumstances known to the parties and the purpose or object of the transaction"[31];

    (b) the main factor to consider is the language used by the parties in the agreement for if this is clear and conclusive, the court may not need to look further[32]. If the language is ambiguous[33], then the other factors referred to in (c)-(f) below will be relevant;

    (c) the presence of elements of uncertainty or incompleteness in the agreement may indicate that the parties did not intend to be bound[34] but this is not conclusive and the parties may intend to be bound notwithstanding there are gaps in what has been agreed, or that additional terms are needed.

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[30] Adapted, and derived, from the suggested summary of the main principles in DW McLachlan ibid at p. 305, as well as the cases including Fortescue Metals at [121]-[123], [131]-[132] per Keane CJ

[31] Everest Project Developments Pty Ltd v Mendoza & Ors [2008] VSC 366 per Hargrave J at [65] and casesd there cited including Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451, [22]; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165, [40].

[32] Ibid, J Tarrant at p. 164; in ibid Everest at [65] where Hargrarve J stated at [65] "(t)he Court should have regard to all of the words used in the agreement "so as to render them all harmonious with one another" and to ensure the "congruent operation of the various components as a whole" (citing ABC v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99, 109; Wilkie v Gordian Runoff Ltd [2005] HCA 17; (2005) 221 CLR 522, [16]). In Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628 McLelland J decided that the words "agreement in principle" did not prevail over the clear import of the words "legally binding". Kirby P took a similar view in Coal Cliff Collieries v Sijehama (1991) 24 NSWLR 1 at p. 21; See also Anaconda, ibid per Ipp J at 114; and Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand [2002] 2 NZLR 433 referred to in J Tarrant, ibid, at pp 166-168. However in First Church of Christ Scientist v Ormlie Trading P/L [2003] QSC 351 an offer and acceptance "in principle" for the sale and purchase a property for a specified price was held not to amount to a binding contract as it demonstrated a cautious approach by both parties (at [28]).

[33] In ibid, Everest at [65] where Hargrarve J stated at [65] "(i)n interpreting the words and resolving any ambiguity, the Court should proceed in a common sense and non-technical way and give the agreement a commercially sensible construction" (footnote omitted)

[34] Ibid Tarrant at p. 174; Anaconda at p. 110

Uncertainty or incompleteness must not render the agreement unworkable. There must be sufficient express terms to be supplemented by reasonable implication of the necessary terms[35], or by resort to considerations of reasonableness[36] to render the agreement enforceable;

(d) the more numerous and significant the areas in respect of which the parties have failed to reach agreement, or are incomplete (or uncertain)[37], the less willing will be a court to conclude that the parties had the requisite contractual intention;[38]

(e) the magnitude, subject matter or complexities of the transaction may show that the preliminary agreement was not intended to have legal effect[39] but these factors will give way to the parties' express intention to be bound immediately[40]

(f) the surrounding circumstances, including relevant and contemporaneous correspondence[41], whether there has been partial performance of the alleged agreement[42], the subsequent conduct of the parties[43], any prior dealings[44]

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[35] ABC v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540 at 548 per Gleeson CJ; Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (FMG) (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19 at [122] per Keane CJ

[36] ABC v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540 at 548 per Gleeson CJ

[37] Ibid Tarrant at p. 163 citing inter alia, Anaconda, ibid, at 110 per Ipp J

[38] ABC v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540 at 548 per Gleeson CJ cited by Keane CJ in Fortescue Metals at [132]

[39] Fortescue Metals at [121]-[123], [131]-[132] per Keane CJ at [131]; Toyota Motor Corp v Ken Morgan Motors [1994] 2 VR 106 at p. 131. The inference that the preliminary agreement is not to be binding will be drawn where it is usual for parties to execute a formal agreement such as in a sale of land or business, or even a lease: The Laws of Australia, Thomson at TLA [7.1.270] citing *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 where the Court of Appeal held that the document headed "Terms of Agreement" was intended to be a binding agreement. TLA suggest the case contains a useful discussion of the test of intention and of admissible evidence; and see Landsmiths Pty Ltd v Hall [1999] NSWSC 735 at [9] per Young J; Long v Piper [2001] NSWCA 342 at [55]

[40] Ibid, J Tarrant citing GR Securities v Baulkham Hills Private Hospital (ibid) at p. 634 per McHugh J

[41] which may show how far the parties were apart from achieving a real consensus: Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (FMG) (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563; [2011] FCAFC 19 at [121]-[123], [131]-[132] per Keane CJ at [151]

[42] Ibid, J Tarrant at p. 162; 168-9 referring to, inter alia, Anaconda Nickel Ltd v Tarmoola Australia P/L (2000) 22 WAR 101. Partial performance will be an important factor as if the agreement has been performed on both sides it will make it unrealistic to argue that there was no intention to be bound by it (ibid, J Tarrant at p. 169)

[43] Ibid, J Tarrant at p. 163; 170-174, referring to, inter alia, Anaconda Nickel Ltd v Tarmoola Australia P/L (2000) 22 WAR 101; and see Cacace v Bayside Operations P/L [2006] NSWSC 572 at [11] referring to Brambles Holdings v Bathurst City Council (2001] 53 NSWLR 153 at [25]; Gangemi v Osborne & Anor [2009] VSCA 297 at [24] which material is inadmissible in the interpretation of a written contract

[44] Ibid, J Tarrant at p. 164 referring to, inter alia, GR Securities v Baulkham Hills Private Hospital (ibid).

and any trade practice or custom, and the nature of the relationship between the parties[45].

19. These factors may assist practitioners in drawing preliminary agreements so that they will, or will not, be (depending on what their clients wish to achieve) binding contractual documents.

Points to consider when drawing a preliminary agreement

20. When drawing, or reviewing a preliminary agreement, it is suggested that practitioners should consider:

(a) whether the parties are properly identified;

(b) whether there is a statement of the transaction contemplated;

(c) whether there is a description of the products or services proposed to be sold or purchased;

(d) whether the consideration, or a formula for determining it is set out;

(e) whether there are conditions precedent or subsequent to the agreement;

(f) whether all the critical terms are set out;

(g) whether there is a time-frame for completion;

(h) whether the parties' intentions to be bound or otherwise is properly set out;

(i) whether there are any statements or representations which might create an expectation or encourage reliance[46].

Conclusion

21. Parties may ultimately be advised to seek the advice and assistance of their lawyer to draw, or settle, a preliminary agreement which they wish to enter into. It is critical in this process that the client's intentions are achieved in drawing the document. From a legal perspective this is primarily achieved by the use of clear language which covers all critical and necessary issues. Commercially the parties may have a different agenda, and each party may wish to have the other bound but be free to renegotiate or withdraw itself, or one or other may wish to be purposefully

[45] Ibid, J Tarrant at p 164 referring to Film Bars P/LK v Pacific Film Labs
[46] adapted from ibid, R Macey

ambivalent. While this may be the ‘agenda’, it is not difficult to see how such an inconsistency in expectations has commonly led to disputes and litigation.

October, 2010

John Arthur

Barrister

Isaacs Chambers

Melbourne.

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