



Australian Government

Department of Foreign Affairs and Trade

SIGNED, SEALED AND DELIVERED

**TREATIES AND TREATY MAKING:
AN OFFICIALS' HANDBOOK**

**Treaties Secretariat
Department of Foreign Affairs and Trade
Canberra**

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PART I: OVERVIEW

Introduction

1. This booklet has been written to assist officials who work with treaties. It seeks to define terms; explain the domestic and international legal framework supporting treaties; set out the steps involved in treaty making, and in so doing, to indicate where departments' and agencies' responsibilities lie as the process goes forward.

What is a Treaty

2. The Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' The word 'treaty' is, however, a generic term covering all instruments governed by international law and giving rise to international rights and obligations. Treaties may also be called agreements, conventions, exchanges of notes and letters constituting agreements, and protocols.

3. Whatever their designation, treaties have a characteristic form. Except in notes or letters, this follows the pattern: title; preambular recitals expressing the background, object and purpose of the treaty; articles covering the substantive provisions; the final provisions of the treaty; an attestation clause and a signature block. Sometimes the treaty will have further documents attached to it, such as protocols, exchanges of letters, agreed minutes, annexes or schedules. Exchanges of notes and letters, when intended to constitute a treaty, contain a paragraph usually at the end, which states that the notes and letters when exchanged will 'constitute an agreement between the two governments' or words to that effect.

4. A treaty cannot be secret since it must be published and be capable of registration with the United Nations. A treaty does not include an arrangement which the parties intend should have political or moral weight, but not be legally binding. Nor is an 'agreement' a treaty if it is expressed to be governed by the domestic law of a country; such a document is a contract.

Treaties and the Law

5. The power to enter into treaties is an executive power within Section 61 of the Australian Constitution. Under the Constitution, treaty making is the formal responsibility of the Executive rather than the Parliament. Decisions about the negotiation of international agreements, including determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet.

6. International law on treaties is set out in the Vienna Convention on the Law of Treaties, (the Vienna Convention) done at Vienna on 23 May 1969. Australia is a party to this Convention. It entered into force on 27 January 1980 and applies to all treaties concluded by Australia since then with other countries which are also party to it. Where the Vienna Convention does not apply, it is necessary to refer to customary international law. Even then the Convention may well be relevant since in a large measure, it codifies customary law and thus is evidence of the law on the subject.

7. In Australia, bilateral agreements that conform to a model text previously approved by Cabinet are normally not subsequently referred to Cabinet. These types of agreement include: investment promotion and protection; mutual assistance in criminal matters; extradition and aviation. They are, however, considered by Ministers prior to receiving the approval of the Federal Executive Council (Ex Co, see paras 86-90 below) for signature.

8. While the Executive retains its constitutional powers on treaty making, political practice has conferred on the Commonwealth Parliament, and due to their involvement in formal and informal consultations about treaty issues, to the State and Territory Governments, sectoral interest groups and non government organisations, a more active role in recent years. As a part of this enhanced consultation process, except for those the Government decides are urgent or sensitive, all treaties are tabled (generally after they have been signed for Australia) in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken. Such action would include entering into a new treaty, negotiating an amendment to an existing treaty or withdrawing from a treaty.

9. Treaties are tabled in the Parliament with a National Interest Analysis (NIA) which notes the reasons why Australia should become a party to the treaty. NIAs include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty action and whether the treaty provides for withdrawal or denunciation (see paras 127-128 below).

10. Treaties which affect business or restrict competition are also required to be tabled with a Regulation Impact Statement (RIS) (see paras 34, 63 below).

11. The Joint Standing Committee on Treaties (JSCOT) considers tabled treaties. The Committee can also consider any other question relating to a treaty or international instrument that is referred to it by either House of Parliament or a Minister.

Implementing Treaties

12. The legislative power to implement treaties in domestic Australian law is granted in Section 51 (xxix) of the Constitution and is known as the external affairs power. Bilateral treaties usually enter into force *via* an exchange of notes, or a single Australian note, once Australian domestic processes are completed. Some countries, however, require ratification for their domestic processes. In these cases, the parties first exchange instruments of ratification. They then sign another document known as a *procès-verbal* of ratification, which in most cases determines the date from which the treaty enters into force.

13. Multilateral treaties usually allow for full adherence by signature alone (known as definitive signature), or signature within a certain period followed by the deposit of an instrument of ratification, acceptance or approval. If the treaty is not signed within the stated time, there are usually arrangements for single step accession later. Some multilateral treaties, including amendments and protocols, have a single step process.

14. All ratifications require Executive Council approval. The Department of Foreign Affairs and Trade's Legal Branch prepares instruments of ratification for the Minister for Foreign Affairs to sign. Instruments for multilateral treaties are usually lodged with the

depository by the relevant Australian Embassy/High Commission, usually with a *procès-verbal* of ratification.

15. If a State Party to a multilateral treaty finds an aspect of it unacceptable, the state may lodge a reservation - a mechanism by which the state seeks to exclude or modify the legal effect of a specified provision

16. The Government's policy is that ratification of a treaty does not give rise to a legitimate expectation that an administrative decision will be made in conformity with the treaty. Ratification does not impose upon the Government a legal obligation to comply with a treaty's provisions until the necessary implementing legislation has been passed, either by the Commonwealth or by State or Territory Governments.

Role of the Department of Foreign Affairs and Trade

17. Reflecting the fact that any treaty necessarily involves an element of Australia's foreign relations, the 'treaties' function is listed in the Administrative Arrangements Order as the responsibility of the Minister for Foreign Affairs and the Department of Foreign Affairs and Trade (DFAT). Substantive issues are often, however, primarily the concern of others; DFAT therefore exercises its treaties role in close consultation with other departments and agencies.

18. DFAT's Legal Branch is responsible for, and should be consulted on, all aspects of the negotiation, conclusion, collection, formatting, tabling, publishing and interpretation of treaties and arrangements of less than treaty status (see paras 29-30 below). DFAT's Treaties Secretariat (TSC) is located in the Legal Branch and is responsible for printing signature texts, conducting signing ceremonies; arranging tabling in Parliament; archiving treaties and arrangements and publishing and distributing treaty information. The Legal Branch, with the Attorney-General's Department, clear texts of National Interest Analyses which are tabled with the treaty text. Other DFAT branches have functional responsibility for treaties in areas such as nuclear transfers and humanitarian law.

19. DFAT will, when practicable, provide an officer or officers to attend treaty negotiations (or negotiations for important lesser documents) and advise on the form and drafting of the proposed instrument. When the department cannot be represented, it will provide appropriate briefing.

The Role of Other Departments

20. The Federal Executive Council (Ex Co) Secretariat is located in the Department of the Prime Minister and Cabinet (PM&C) and administers all matters submitted for the approval of the Governor General in Council (Federal Executive Council) including all treaties entered into by Australia. PM&C advises on the role of Federal Cabinet and Ministers in processes leading to the authorisation of Australian participation in particular treaties. It administers the Commonwealth-State Treaties Council and Standing Committee on Treaties (SCOT) and coordinates the provision of information to the States and Territories on treaties and arrangements of less than treaty status.

21. The Attorney General's Department is responsible for, and should be consulted on, all questions on the domestic legal aspects of treaties, especially the requirement for

legislation. It also administers treaties covering issues for which the Attorney General and the Minister for Justice have prime carriage, such as extradition and criminal justice. Attorney General's has particular responsibilities for contracts entered into on behalf of the Australian Government. If an international agreement is to be governed by the domestic law of Australia or another country, then it is a contract and the Attorney General's Department should be involved in its conclusion.

22. Once a treaty has been finalised and is in force, the responsible department or agency administers its provisions in ways similar to the exercise of its other functions.

Treaty or Arrangement

23. It is desirable that as early as possible in a negotiation, the parties agree on the status of the document in which their intentions are to be recorded. In Australian practice, 'agreement' is the general term used to denote an instrument of treaty status. DFAT's Legal Branch and the Attorney General's Department should be consulted at an early stage when an international instrument becomes a policy option.

24. In determining the appropriate status of a proposed instrument, departments/agencies will need to consider the following:

- i. Certain subjects are generally of such legal significance (e.g. defence, civil aviation, communications, customs, trade and human rights) or of such a character when reflected in domestic law (privileges and immunities of personnel, double taxation, social security, extradition) that they will require conclusion of a legally binding instrument to give effect to the international commitment. Certain other matters, however, because of customary practice or their limited scope, are not generally governed by treaty. Australian bilateral aid arrangements for particular projects fall into this latter category although in recent years bilateral umbrella aid ('development cooperation') treaties have been concluded with several countries.
- ii. Agreements involving actual or potential significant financial commitments owed to Australia, including liability for damage, should be treaties.
- iii. As all treaties concluded by Australia are tabled in Parliament, published, and registered with the United Nations (which publishes them in the United Nations Treaty Series), national security classified material should not be included in a treaty. Such material may be included in a classified subsidiary document to a treaty such as an implementing arrangement, correspondence or agreed minutes.
- iv. Where it is probable that either prompt or frequent amendments will be needed, some simple form of amending procedure should be included in an agreement. Quick or frequent changes could be effected, for example, by means of a provision which empowers designated authorities of the parties to regulate a certain matter from time to time 'by mutual arrangement'.
- v. Where the subject matter relates to a single event of short duration, a treaty would rarely be appropriate, unless liability for damage were an important element.

25. Not all countries follow the same practice regarding the status and designation of international instruments. A misunderstanding about the status of an instrument could lead to an unnecessary dispute about intention. Australia could find it does not have the legal redress expected, or alternatively it may face legal proceedings it had not intended. Either situation may affect the national interest. In extenuating circumstances, both sides may agree to differ on status but this is most undesirable.

26. Other states with different constitutional arrangements may subdivide 'treaties' into various categories, according to the internal procedure that must be followed before they may be concluded. For example, the United States, Japan and a number of countries which require parliamentary approval of 'treaties', also have other categories of international agreements which can be concluded without parliamentary approval but which are still intended of their own force to impose international legal obligations (and are therefore 'treaties' governed by the Vienna Convention). In the United States these are often called 'executive agreements' and in Japan 'administrative agreements'.

27. If the parties intend that the document under negotiation should extend rights or impose obligations under international law, a treaty is required. If it is intended to create such rights and/or obligations under the law of Australia or another country, a contract is required.

28. If the negotiated document seeks to impose a moral and political commitment without being legally binding, it will be an arrangement of less than treaty status (see below).

Arrangements of Less Than Treaty Status

29. Most countries, including Australia, use instruments which are not intended to create (of their own force) legal rights or obligations, or legal relationships. These instruments, whether in the name of the government or agencies, are termed 'arrangements of less than treaty status'. The most appropriate form for an arrangement of less than treaty status is often a Memorandum of Understanding (MOU), although records of discussion, joint communiqués and exchanges of notes or letters recording understandings are also common.

30. The intention not to create legally binding rights and obligations should be reflected in a document of less than treaty status, thus:

- i. There should be a specific reference to the fact that the arrangement embodies the understandings of the parties. In a MOU, this should occur in a recital at the commencement of the document. In an exchange of correspondence, this should be proposed in the final substantive paragraph of the initiating piece of correspondence and be confirmed in the complementary reply.
- ii. The words 'agree', 'agreement' and 'agreed', which in Australian practice signify a treaty, should be avoided. Constructions such as 'mutually arrange', 'mutually decide', 'mutually consent' or 'jointly determine' should be used instead. (It is permissible to speak of the 'agreement' of delegations in an arrangement of less than treaty status, such as a record of discussion, if it is clear that the agreement is only to refer a matter to governments.)

- iii. The mandatory 'shall' used in treaties should be avoided and 'will' used instead.
- iv. Arrangements should avoid formal preambles, although informally phrased opening recitals may be appropriate.
- v. Any provision for the settlement of disputes should generally be in terms of amicable resolution, not formal arbitration.
- vi. Subdivisions of the document should be referred to as paragraphs rather than articles.
- vii. The arrangement should be expressed to 'come into effect' rather than to 'enter into force'.
- viii. The attestation clause should read 'SIGNED at on 'rather than 'DONE at on '.
- ix. It is not necessary to alternate texts for arrangements of less than treaty status; but the other party will often insist on this. Where it is decided to alternate texts, the Australian 'alternate' of the arrangement must - by definition - show 'Australia' first in the title, and in the opening recital (if any), and in the signature block. We would also expect that the 'alternate' of the other party would have the name of the other party first in the title, opening recital (if any), and signature block. However, it is left to the other party to decide what 'positioning' is adopted in its own alternate. Consequently, we will not object if the positioning that the other party adopts in its own alternate does not accord with Australian practice.

Inter-agency Agreements and Arrangements.

31. While it is not Australian practice for treaties to be entered into in the name of agencies of government, some countries follow different practices with the result that for them 'agreements' between agencies of government may constitute treaties. Interagency 'agreements' should, therefore, be viewed with caution and their status clearly established. Sometimes it is necessary or desirable to specify an agency of government for each side. This can best be done by providing that the parties are the governments and that the agencies concerned are given a central role in the implementation of the agreement as 'cooperating' or 'implementing' agencies.

Exchanges of Notes or Letters Constituting Treaties

32. Correspondence often passes between a Head of Mission (HOM) and a Foreign Ministry or between a HOM and a Minister for Foreign Affairs and occasionally directly between agencies of government other than through a diplomatic mission. This correspondence may record an arrangement or reach no point of understanding at all. If it records an arrangement, it should observe the drafting guidelines referred to above.

33. On the other hand, an exchange of notes or letters may be just as much a treaty as a more formal document: the real test is what the exchange purports to be. If it states that it is

to constitute an agreement between the two governments concerned, it is an agreement of treaty status and nothing less. The advantage of such an exchange of correspondence is its simplicity and the lack of ceremony with which it can be concluded. The corresponding danger is that the requirement for tabling and Executive Council approval might be overlooked.

PART II: NEGOTIATING TREATIES AND ARRANGEMENTS

Initiative and Mandate to Negotiate

34. The initiative for a treaty, if it does not come from the other state or international organisation, may be taken by DFAT, or by another department or agency which has responsibility for the subject matter. When a treaty becomes a policy option, the lead department or agency should consult the Department of the Prime Minister and Cabinet on requirements for interdepartmental coordination and the referral of matters to Cabinet. The relevant DFAT policy area and its Legal Branch should always be consulted. If the proposed treaty has a potential impact on business, including the effect of reducing competition, so should the Office of Regulation Review, (ORR) which will advise whether a Regulation Impact Statement (RIS) is required.

35. It is important to obtain a ministerial mandate to begin formal negotiations on a treaty. Ordinarily this would entail the responsible Minister writing to the Minister for Foreign Affairs outlining the proposal and seeking the minister's approval to the formal commencement of negotiations. In some circumstances it will be appropriate to seek Cabinet level approval to commence negotiations. Relevant ministers and the Prime Minister should be consulted on the nature and objectives of the proposed treaty and informed of progress toward its completion.

Credentials

36. Whenever Australia is represented at a diplomatic conference, credentials, issued under the seal and signature of the Minister for Foreign Affairs, are required to be presented to the organising body, either at the conference itself or at some time before it begins. Although it would be unusual, this requirement may be varied or added to by the rules of procedure for a particular conference.

37. Departments/agencies requiring credentials for any diplomatic conference should contact DFAT's Legal Branch. Sufficient time should be allowed before the date on which the credentials are required to be presented for them to be submitted to the Minister for Foreign Affairs. Legal Branch should be informed of:

- i. the full name of the diplomatic conference;
- ii. the dates between which the conference will be held;
- iii. the city in which the conference will be held;
- iv. the full name of each Australian representative; and
- v. the formal position which each Australian representative will fulfil at the conference (for example, 'representative', 'alternate representative', or 'adviser').

Drafting Treaties

38. The department or agency primarily responsible for the subject matter of the treaty (or the foreign party to the negotiations) generally prepares a first draft of a bilateral treaty, often with the assistance of DFAT's Legal Branch. This draft must be cleared with the Legal Branch before it is passed to the other party or before a response is made to a draft

prepared by the other party. Model agreements are available for some subject areas.

39. The Attorney General's Department should be consulted in relation to any:
- i. contract for the supply or acquisition of goods or services;
 - ii. loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction, or of any other financial obligation;
 - iii. agreement intended to operate directly in domestic law, including but not limited to such agreements in the fields of defence, science, transport, taxation, health and social security; and
 - iv. other arrangement, transaction or activity (whether of a legislative, commercial, trading, business, professional, industrial or other like or similar character) which may affect the rights or obligations of the Australian Government or any appropriate government agency.
40. When a lead department approaches Attorney General's directly, it should still send the draft to DFAT's Legal Branch for consideration, especially in relation to matters such as form, final provisions and application to territories.
41. Where a draft arrangement of less than treaty status is likely to be repeated (as is often the case with joint communiqués), arrangements can be made with the Legal Branch for clearance of a standard form which can subsequently be used without prior reference to the Branch. This procedure will never apply to a treaty.

Negotiations

42. DFAT has an interest in all treaty negotiations because of their bearing on Australia's foreign relations. The department will conduct many major negotiations but others will be conducted by other departments or agencies augmented by DFAT representation. When DFAT cannot be represented, it will provide appropriate briefing. Legal Branch advice may be obtained by cable during negotiations overseas.
43. The question of the status of the document should be raised expressly with the other delegation if it has not been settled in advance, and should be borne in mind and clarified where model texts for subsidiary instruments under a treaty are being developed.
44. DFAT Legal Branch advice should also be sought on the text of model subsidiary agreements or arrangements under multilateral treaties, prior to their adoption by a conference of Parties or international organisation, established by the treaty. Parties to such a treaty will usually be required to enter an Agreement or Arrangement which conforms with those models, and it is important that Australian treaty making requirements and practice are taken into account in determining whether a particular model is suitable.

Style

45. While the language and style of a bilateral instrument cannot be rigidly prescribed in advance of negotiations, it is Government policy to use internationally the title 'Australia' rather than 'Commonwealth of Australia' and 'Australian Government' rather than 'Government of the Commonwealth of Australia'. In a number of subject areas, e.g.

extradition and double taxation, model agreements have been developed and gained wide acceptance. When enumerating the divisions and subdivisions of a treaty, Australian preference is for articles and paragraphs to have Arabic numerals, subparagraphs to have bracketed, lower case alphabet letters and sub-subparagraphs to have bracketed, lower case roman numerals. In subsidiary or amending texts it is preferred that articles have upper case roman numerals.

Involvement of the Australian States and Territories

46. The *Principles and Procedures for Commonwealth-State Consultation on Treaties* require, in appropriate cases, that the State and Territory Governments be represented in treaty negotiations. Departments and agencies should, therefore, consider including Members of Parliament and representatives from non-government organisations, peak industry bodies and State or Territory Governments in delegations to provide expertise on particular matters.

47. The *Principles* also require that State and Territory Governments be kept informed of any treaty discussion in which Australia is considering participating through biannual meetings of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) and the updating of a Schedule of Treaty Action (some arrangements of less than treaty status are also included) which is circulated to SCOT members before each meeting. A treaty can be listed on the SCOT Schedule either through the SCOT contact officer in each department or directly through the International Division of the Department of the Prime Minister and Cabinet.

48. Although Norfolk Island is an external territory, the Norfolk Island Government exercises legislative and executive authority in a number of areas which could be affected by Australia's treaty obligations. Guidance on consultation with the Norfolk Island Government should be sought from the Regional Development, Territories and Local Government Division of the Department of Transport and Regional Services.

Settlement of Final Text

49. In the case of a bilateral treaty, it is a common procedure for the head of each delegation to initial the negotiated text when it has been settled. The initialled text is often attached to a covering memorandum recording the date, place, subject and atmosphere of the negotiations and signed by the delegation leaders.

50. The general, although not universal, practice for initialling is for the head of each delegation to initial the bottom left corner of each page of the copy which his or her government is to retain and the bottom right corner of each page of the copy which the other government is to retain. No specific authority is needed for this since initialling simply identifies the text as the one agreed during negotiations. The initialling procedure does not involve signature of the treaty itself and gives rise to no legal rights or obligations. It is usually understood and often explicitly stated that the text will be referred to each government for consideration. Originals of texts initialled for Australia may be deposited with TSC (see para 132 below).

Final Acts Recording Texts of Multilateral Treaties

51. The text of a multilateral treaty negotiated at an international conference is often incorporated into what is known as the Final Act of the conference. This is, in effect, a record of the proceedings of the conference at which the text was drawn up and includes, besides the text of the treaty, such matters as the way in which the work of the conference was organised, the countries represented, the names of the delegates and any resolutions adopted by the conference. It is customary for the Final Act to be signed by the leader of each delegation present. Since in all but two cases signature is no more than an acknowledgment of the accuracy of the record, it does not require specific authority.

PART III: CONCLUDING TREATIES AND ARRANGEMENTS

52. When the text of a treaty is finalised and the relevant Australian authorities are satisfied with it, the treaty is ready for conclusion. The procedures necessary to adhere to a treaty and to bring it into force may vary, but they will be set out in its final clauses. In all cases, the proposed treaty action must be tabled in both Houses of Parliament to facilitate public consultation and scrutiny by the Joint Standing Committee on Treaties (JSCOT).

53. Under Australian practice, treaties are divided into two categories, as set out in Annex 1. Category 1 treaties are of major political, economic or social significance which are likely to attract considerable public interest. These treaties are tabled for 20 days.

54. Category 2 treaties are for the most part uncontroversial in nature and relatively routine in form, and are tabled for 15 sitting days.

55. Treaty texts and NIAs tabled in Parliament are automatically referred to JSCOT. Shortly after tabling, JSCOT will invite administering departments to nominate officers to give evidence at public hearings concerning the treaty. Within 15 or 20 sitting days from the date the treaty was tabled, depending on whether the treaty falls into Category A or B, JSCOT will report on the proposed treaty action (unless it advises otherwise).

56. Departments may be required to draft a response to the JSCOT report. This will be included in the formal Government response, which is usually coordinated by the Executive Director of the TSC, if more than one department is involved. JSCOT reports are printed and are available from Government Info shops and on the Internet at

<<http://www.aph.gov.au/house/committee/jsct/ppgrep.htm>>

Tabling of Treaties and National Interest Analyses (NIAs)

57. Generally, bilateral treaties are tabled in Parliament after signature and prior to binding treaty action being taken (e.g. an exchange of diplomatic notes). Tabling prior to signature is usually avoided, as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed, unless both parties agree to disclosure. Where it is not possible to wait until after signature of a bilateral treaty to table it, the line Department should obtain the written agreement of the other party to tabling.

58. Multilateral treaties may be tabled at any stage before binding treaty action is taken, once the text of the treaty has been finalised. It may be preferable to table a treaty before seeking Executive Council approval for Australia to become a party. Occasionally a treaty is required to enter into force by a certain date, and time constraints will mean that Executive Council approval is sought during the period that the treaty is lying on the table. Also, it may be useful to have prior Executive Council approval as an indication of the Government's commitment to the taking of treaty action.

59. The TSC arranges the tabling of treaties on specific days during the Parliamentary sitting program. TSC advises nominated contact officers in writing of the tabling dates, together with deadlines for the clearance of NIAs by the TSC and the Office of International Law, Attorney-General's Department, and provides specific printing and delivery requirements to meet Parliamentary guidelines. If necessary, the TSC can try to arrange separate or *ad hoc* tablings in consultation with the line department or agency, but this is often difficult and if possible departments should meet the set dates.

60. The department or agency with primary carriage of a treaty is responsible for preparing a NIA for tabling in Parliament at the same time as the treaty (see guidelines at **Annex I**). Additional copies of the pro forma NIA, setting out the required format and structure for final submissions, are available from the TSC. The NIA will include a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty and how it provides for withdrawal from the treaty.

61. Under the *Principles and Procedures for Commonwealth-State Consultation on Treaties*, line departments and agencies should consult State and Territory governments at an early stage in the preparation of NIAs in relation to those treaties in which they have a major interest. Such treaties will have been identified during the SCOT process.

62. Where it is in Australia's national interest to proceed with an urgent treaty action or where there is particular sensitivity attached to a treaty, the 15 or 20 day tabling requirement may be varied or waived. Guidance on treaties qualifying for exemption should be obtained from the Executive Director of the TSC. Exemptions are rare and the failure by departments or agencies to progress treaties for which they are responsible in a timely fashion will not be sufficient reason to avoid prior tabling. Any exempt treaty is tabled as soon as possible before or after binding treaty action has been taken, with an explanation in the NIA as to why the normal treaty processes were not complied with. Where a treaty has been tabled but it becomes apparent that it will not after all be possible for it to lay on the table for the full 15 or 20 (as appropriate) sitting days before binding treaty action is required to be taken, the TSC must again be consulted as soon as possible.

63. Departments and agencies may also need to table a Regulation Impact Statement. They should be aware that the Office of Regulation Review (ORR) scrutinises and reports annually on RIS compliance. A copy of the adequacy criteria used by the ORR can be found at **Annex III**.

64. Provisional application of a treaty before formal tabling, as envisaged in Article 25 of the Vienna Convention, should be avoided. This action should only be contemplated when there are compelling reasons for provisional application pending a treaty's formal entry into force. If it is intended that a treaty will be provisionally applied from the time of its signature, then this point should be drawn to the attention of relevant Ministers when Executive Council agreement is sought for approval to sign. The advice of the TSC should be sought when provisional application may be appropriate.

Verifying Foreign Language Texts

65. The verification of foreign language versions of treaty texts is an integral part of the treaties process undertaken in Australia by translators accredited by the National Accreditation Agency for Translators and Interpreters (NAATI). The process seeks to minimise the potential for future disputes over interpretation by providing impartial confirmation that the texts in additional languages are in complete accord. Even if the substance of the agreement has been settled, the requirement for verification may demand an entirely new negotiation to reconcile differences about meanings in translation. In cases where there are 'cultural' issues (regarding the proper use of language in the context of

domestic legislation) it has the potential to create tensions.

66. The following guidelines have been drafted recognising that in most cases, line agencies are represented by Australia-based staff at the primary phase of most bilateral treaty negotiations. Frequently however, once the main issues of principle have been agreed, details of process and other subsidiary matters are covered in second phase negotiations, possibly by e-mail.

General Guidelines for Departments and Posts

- i. Before substantive negotiations begin on a bilateral treaty, the Australian delegation should obtain the other party's agreement that at the language verification stage, each side will provide the other with fully annotated and clearly-defined texts. These texts should indicate those passages in the other side's text where change is deemed as *essential* (those sections which unless changed, alter meaning) and those where change is *desirable* (style, semantics, grammar, felicity of expression, etc).
- ii. If a bilateral treaty is to be signed in a language or languages additional to English, the other side should be requested to provide a full translation.
- iii. Should a treaty text be negotiated in a language other than English, Australia will provide an English language translation. In that event, verification of the English text is the responsibility of the other party.
- iv. For reasons of consistency and clarity, negotiations commenced in one language should not be concluded in another. Irrespective of the number of languages that the other side may require, translation into those languages should be done only after the parties have agreed on the text in the language in which the negotiations were conducted.
- v. Staff at posts may verify foreign language versions of an English text *provided* the post confirms to DFAT's Treaties Secretariat, that the staff member's English meets the appropriate local translating qualification standards. Alternatively, posts may wish to employ an appropriately qualified translator or translation agency.
- vi. In rare cases Australia will be negotiating bilateral treaties where the other side requires more than one foreign language text. Where this happens it is critical that the base language remain constant throughout the course of the negotiation. Ideally, to ensure consistency, the same person should verify both foreign language texts.
- vii. While in no circumstances should line agencies conduct or continue negotiations with foreign counterparts on the substance of treaties outside diplomatic channels, they may liaise directly on aspects of the verification process provided all such communications are copied to DFAT's Legal Branch, the relevant DFAT geographical branch and the relevant post, and that the steps in the flow chart below are followed.

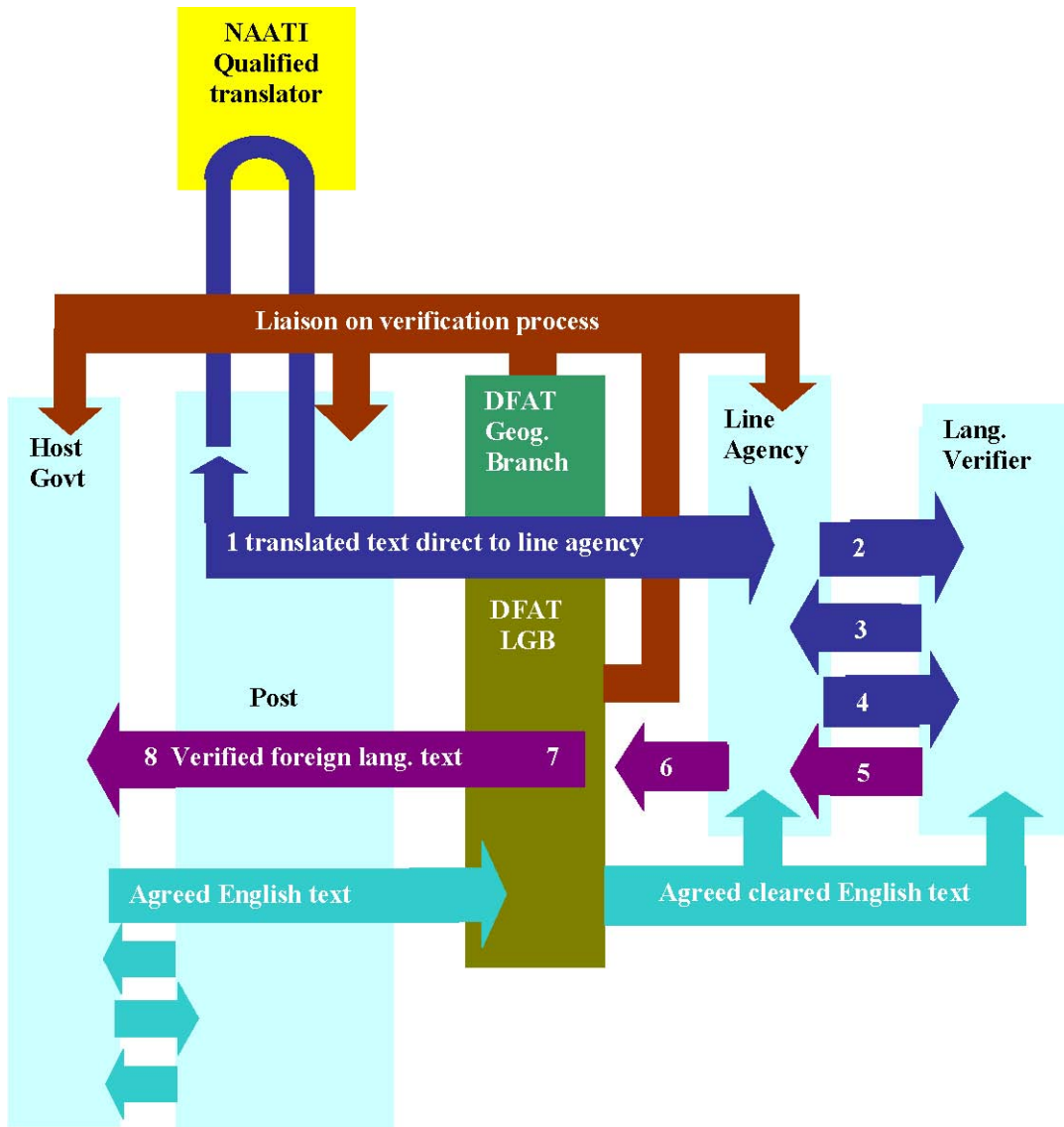
viii. Agencies must complete language verification before seeking Executive Council approval for signature. Until Executive Council approval has been granted, no comments should be made to the other side about when Executive Council approval is expected or when a signing should be scheduled.

The Language Verification Process

- At the conclusion of negotiations the post sends the foreign language version of the agreed text direct to the line agency or in the case of DFAT treaties, to the Treaties Secretariat (step 1). DFAT's Legal Branch will already have sent the agreed, cleared English language version to the line agency (or relevant DFAT branch) and to the language verifier, who will use the text as the basis for checking the foreign language version.
- The line agency will forward the foreign language text to the verifier (step 2). The line agency will liaise with the language verifier until it is satisfied that the proposed textual changes are acceptable (steps 3-5). The line agency may liaise directly with post regarding specific language verifiers' comments - provided it copies all communications to DFAT.
- The line agency will advise DFAT's Legal Branch that the foreign language text has been verified and forward the text (step 6).
- DFAT Legal Branch will forward the verified text to the Post (step 7) with instructions that it notify the host government that the text has been verified.
- Post will present verified text to host government (step 8).

The advantage of this approach is that the responsibility for managing the process lies with the department with the most at stake at any point. Thus, while DFAT is responsible for ensuring the English language version of the agreement is in proper 'treaty form' (which has implications for interpretations under international law) the line department responsible for implementing the treaty has the most at stake should any dispute arise over how the treaty should be implemented domestically and interpreted by the parties once it is in force.

The Language Verification Process



Alternation of Texts

67. In a process known as alternation, the final text of a bilateral treaty is prepared for signature in two versions or alternates: one will have Australia first in the title, in the preamble and in the signature block at the end of the treaty; the second alternate will have the other side's name first in these places. This is repeated for all language texts in which the treaty is to be signed. Australian practice is to confine alternation to the locations mentioned above but some countries require more thorough alternation, which should be complied with. When bound with ribbon and sealed with wax, each country applies its seal to the left hand side of its alternate/s and the other side's seal to the right hand side. Australia retains the alternate/s of the signed text with its name first. Alternation may also be applied to arrangements of less than treaty status.

Formatting Texts

68. The final texts of treaties commonly comprise sets of articles of coherent legal effect but of disparate appearance. The Legal Branch, to the extent possible, follows general formatting rules based on the formatting of the original Vienna Convention to unify the appearance and presentation of signature texts. The rules include:

- i. title of the treaty is capitalised and placed on a separate title page;
- ii. text flows as a whole on numbered pages, with single line spacing and single return breaks between blocks of text (each article does not begin a new page as occurs in a negotiating text);
- iii. articles are left-justified to the margin (except for titles of articles, which are centred); paragraphs are numbered at the margin and the first line only is indented; subparagraph identifiers are indented and the text is then further indented; no text is right-justified;
- iv. bolding, underling and adornments are eliminated to the extent possible.

Covers for Treaties and Arrangements

69. The question of which side will provide the formal covers in which the signature texts of the treaty are to be bound and sealed must be settled early, as it can affect where and on what paper the texts are printed. (Treaty paper is usually specific to the dimensions and characteristics of covers.) The convention followed by Australia is for the host government to provide all covers but this is not uniformly observed internationally. The most common variant is for each party to provide the cover for its own alternate.

70. Arrangements of less than treaty status can be concluded without adhering to most of the formal procedures described here. Indeed, records of discussion are often initialled rather than signed. Crested covers are available from TSC, into which signature texts of arrangements are loosely tied with ribbon prior to signature. The Secretariat can assist in the signing of the arrangement if requested.

Signature and Full Powers

71. If the initialled text of a treaty is acceptable to each government, arrangements are then made for signature. Signature should occur at one place and at the same time. It is

general practice that treaties are signed by Ministers or Heads of Mission (HOMs). When there is no Ministerial visit, the Head of Mission will sign with the appropriate Minister of the country to which he or she is accredited. Decisions regarding who will sign a particular treaty for Australia are made in consultations between relevant Ministers and their offices.

72. Executive Council approval must be sought before the text of a treaty is signed for Australia. The text of the treaty must be approved by Federal Cabinet or by all relevant Ministers before it is submitted. The Legal Branch can advise which Ministers' approval should be sought, but the Department of the Prime Minister and Cabinet is the final arbiter of such questions. It is not possible to authorise a delegation to sign a treaty before the text is final and has been submitted to Ministers and to Executive Council. (The only exceptions to this rule are multilateral postal and telecommunication treaties which traditionally are signed at the end of the conference that negotiates them.)

73. After Executive Council approval, the person nominated to sign the treaty is issued with appropriate full powers signed by the Minister for Foreign Affairs. For bilateral treaties, the instrument of full powers is exchanged prior to the signing ceremony for a similar document held by the person authorised to sign for the other side. (For multilateral treaties, see paras 80-85). It is Australian treaty practice (consistent with Article 7 of the Vienna Convention) that the Prime Minister and Foreign Minister may sign treaties without an instrument of full powers being issued, although Executive Council approval for signature is still required.

74. Where a treaty provides for an action subsequent to signature to bring it into force, signature itself creates an obligation to refrain from actions which would defeat the object and purpose of the treaty but does not make the specific provisions binding. The general obligation comes to an end if and when the signatory country makes clear that it will not become a party to the treaty.

75. Executive Council approval is not required for signature of arrangements of less than treaty status, but the relevant Minister's approval should be sought or the text cleared with his or her office if necessary.

Ratification and Bringing into Force of Bilateral Treaties

76. Although there is no requirement under Australian law to ratify treaties, this practice has become more common, primarily to accommodate countries where a formal ratification process is necessary to give force to a bilateral treaty. In such cases, in a formal ceremony similar to a treaty signing, an instrument of ratification signed by Foreign Ministers is exchanged in the city specified in the treaty or as agreed between the parties. Prior Executive Council must be obtained before the instrument of ratification can be drawn up and exchanged; departments and agencies should note the time required to meet this obligation (see paras 89, 90 below).

77. Those completing the exchange will usually sign a further instrument, known as a *procès-verbal*, which records the fact of the exchange and the date. The *procès-verbal* is important as it determines, in most cases, the date of entry into force of the treaty. The TSC prepares Australian instruments of ratification, and when the exchange takes place in Australia, it also prepares the *procès-verbal*.

78. Australia prefers a simpler means of bringing a treaty into force: signature in one

country and an exchange of notes in the other. Departments/agencies should seek to ensure that the final clauses of a treaty provide for entry into force when each party has sent a third person note advising that all domestic requirements have been completed. If the other side indicates during negotiations that the treaty can enter into force for it on signature, then the entry into force provision can be reduced to unilateral notification by Australia that its requirements for entry into force of the treaty have been satisfied. By either means, the Australian requirement for two-step entry into force will have been met. Ex Co approval for the *procès-verbal* is not required.

79. When Australian Parliamentary requirements have been met, the line department or agency notifies DFAT's Legal Branch, which drafts the diplomatic note and arranges for it to be delivered to the other party's diplomatic mission in Canberra or for the relevant Australian mission overseas to deposit it with the Foreign Ministry of the other party.

Ratification, Acceptance of, or Accession to Multilateral Treaties

80. Most multilateral treaties provide for full adherence by:

- i. signature alone (e.g. definitive signature)
- ii. signature followed by the deposit of an instrument of ratification, acceptance or approval; or
- iii. the deposit of an instrument of accession

81. Modern multilateral treaties are typically subject to ratification or similar treaty action described as acceptance or approval. They are usually open for signature only for a specified length of time, or by a specified group of countries. Countries that have not signed within the time limit, and countries not specified, may become party to the treaty by the process of accession only. Accession is the single step of becoming party to any existing treaty which allows countries additional to the 'original' parties to accede to it. The step requires the same procedures as for other treaty action which has the effect of bringing a treaty into force for Australia.

82. Some multilateral treaties allow amendments to be made to certain, usually technical, provisions which then typically enter into force on a certain date for all parties to the head treaty, except for those parties depositing formal objections. Such amendments do not normally require Executive Council approval but may need to be tabled. The TSC should be consulted in this regard.

83. Ratification, accession or any other equivalent step is carried out by depositing an instrument with the government or international organisation that the multilateral treaty specifies to be the depositary.

84. Signature of a multilateral instrument sometimes occurs at the end of the diplomatic conference at which it was adopted. The Australian signatory will pass to the conference host his or her instrument of full powers authorising Australian signature and will then be guided by the procedures laid down by the host for the ceremony. When signing, the signatory will add to the instrument the text of any reservations, declarations or statements instructed to be so included. As appropriate, the signature can also be dated.

85. In most cases, a multilateral instrument will allow for a certain period after the diplomatic conference at which it was adopted during which further signatures can be

added. If an Australian signature is to be added during this period, or if an instrument of ratification, accession or acceptance is to be deposited, an appointment is made with the depositary, usually the Foreign Ministry of the government named in the instrument as depositary or the secretariat of the relevant international organisation, which then makes the necessary arrangements. The deposit of an instrument is sometimes accompanied by the signature of a *procès-verbal*, arrangements for which will be made by the depositary.

Federal Executive Council

86. Where it is desired to sign a treaty or take some action subsequent to signature (see paras 99-100 below) Federal Executive Council approval will be required. DFAT's Legal Branch, in consultation with other departments and agencies, prepares and submits the appropriate documents to the Ex Co Secretariat. These documents normally are:

- i. an Executive Council minute stating precisely those matters on which authorisation is sought;
- ii. an explanatory memorandum providing information on the proposed treaty; and
- iii. the settled text of the treaty.

87. The department or agency concerned should provide the information for the explanatory memorandum, preferably in the form of an electronic draft, and the text of the treaty to DFAT's Legal Branch. The explanatory memorandum must be clear and concise. The following points should be covered in narrative form:

- (a) the background of the proposed treaty, including, as appropriate:
 - i. the subject matter;
 - ii. the meeting or conference at which it was drawn up;
 - iii. its relationship to existing treaties;
 - iv. its purpose;
 - v. the effect of its principal provisions;
 - vi. other countries which are parties or are contemplating becoming party to the treaty;
 - vii. the rights Australia will acquire under it; and
 - viii. the obligations Australia will accept under it.
- (b) that all necessary preparations have been made to have Australian law conform with the treaty by the time of entry into force of the treaty for Australia and
- (c) either that Federal Cabinet has approved the final text of the proposed treaty or assurances that:
 - i. the matters concerned fall within the scope of existing policy;

- ii. all relevant Ministers have agreed to it; and
- iii. the Prime Minister has agreed to, or been informed of, the action proposed.

88. The line department or agency is responsible for taking the action and obtaining the approvals mentioned above and should, if the treaty has not been approved by Cabinet, confirm the scope, approval and notification referred to in points (c)(i) to (iii) when sending documents to the Legal Branch for action. This confirmation should include photocopies of the Ministerial letters seeking approval and photocopies of the signed Ministerial letters in reply. Departmental approval of a treaty text is not a sufficient basis on which to seek approval from Executive Council.

89. The information, draft explanatory memorandum and documents referred to above should be supplied to DFAT's Legal Branch at least three weeks prior to the desired date of Executive Council approval. Where a foreign language check is required, up to six weeks extra may be required. Where timing is critical, the draft explanatory memorandum can be forwarded to the Legal Branch in advance of Ministerial or Cabinet approval.

90. As a general rule, at least three weeks should be allowed between the obtaining of Ex Co approval and the performance of the action authorised. This period is necessary for the signing of full powers or other relevant instruments (such as ratification or accession), their transmission to the authorised signatories or depositaries and the making of arrangements for the appropriate ceremonies. Accordingly, it should not be assumed that a treaty ceremony in Australia or overseas will take place on a firm date without full consultation with the Legal Branch. In light of the lead time required for Executive Council approvals and the preparation of full powers, the Legal Branch will need to be given early advice of signature prior to arrangements being made.

Legislation

91. The Minister for Foreign Affairs cannot recommend to Executive Council that Australia become party to a treaty where the Federal or State/Territory legal position would be at variance with obligations to be assumed under the proposed treaty when it enters into force for Australia. Any legislation (Federal/State/Territory) required for Australia to meet its treaty obligations must be in place by the time Australia consents to be bound by the treaty. This means that any new legislation must be passed before that time – the assumption cannot be made that the relevant Parliament/s will necessarily pass implementing legislation after consent is given.

92. The Attorney-General's Department is responsible for determining whether existing legislation is sufficient, or new legislation is necessary, to give effect to a treaty, and must be consulted by the department or agency concerned over any questions in this area. The States/Territories are also generally consulted in this process. Details of all consultations must be included in the explanatory memorandum.

93. In some cases new legislation or amendment of existing legislation may be required to give full effect to a treaty. Where it is proposed that Australia become bound by a treaty, this legislation should have been passed by both Houses of Parliament by the time

Executive Council meets. Where subsidiary legislation such as regulations is required, this should be ready to be put in place by that time. Where a treaty action subsequent to signature is necessary, legislation need not be in place at the time of the Executive Council submission seeking approval for signature.

94. Should there be any doubt about the requirement for legislation, including subsidiary legislation, the line department or agency must consult Attorney General's and inform DFAT's Legal Branch of the advice received.

Treaties and External Territories

95. When considering whether domestic law needs to be amended before Australia assumes a treaty obligation, the question of application to territories should be addressed. The Northern Territory and the Australian Capital Territory are equated to States in the guidelines on consultation with States (**Annex II**). Other Australian territories are Christmas Island, Cocos Islands, Coral Sea Islands, Ashmore and Cartier Islands, Norfolk Island, Heard and McDonald Islands and the Australian Antarctic Territory. (Lord Howe Island is part of New South Wales and Macquarie Island is part of Tasmania.) In relation to consultations with the Norfolk Island Government, see para 48.

96. It is current Australian practice that, in the absence of an express provision to the contrary or some other indication, a treaty will apply to all Australian territories. This is on the basis of Article 29 of the Vienna Convention which provides that:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

97. If it is decided that a bilateral treaty should not apply to a territory then express mention should be made to this effect. A provision simply excluding certain named territories would be adequate. For presentational reasons it may be desired to list the territories to which the treaty does apply. This can be achieved consistently with the general principle of interpretation by excluding all Australian territories from the application of the treaty except those listed. Any proposal to amend the territorial application of Australia's treaty obligations is subject to Executive Council approval.

98. Most multilateral treaties used to have a territorial application clause requiring declarations to be made about the application of the treaty to the territories of a party. Australia should follow the stipulation of such provisions. Territorial application clauses have colonial overtones, however, and are often now avoided in multilateral treaties. In the absence of any such provision, Australia may still declare that the multilateral treaty does not apply to specified territories. This should be done at the time Australia becomes bound by the treaty.

Media Releases

99. Although a matter submitted for Executive Council approval will of necessity have already been approved by Cabinet or the responsible Ministers, the matter is not fully dealt with until the Governor General, acting on the advice of Executive Council, has approved

the recommendation. To avoid a breach of the confidential relationship between the Crown and its advisers, the matter concerned should not be announced in anticipation of Executive Council approval. When Ministers wish to make urgent announcements of matters requiring Executive Council approval, the responsible department or agency should arrange with the Secretary to the Executive Council immediately after the meeting that the necessary approval has been given before the relevant Ministerial statement is released.

100. When compelling reasons exist for an announcement to be made prior to Executive Council consideration, the Prime Minister, on behalf of the responsible Minister, must obtain the Governor General's prior agreement to the making of the announcement. In such cases the Secretary to the Executive Council can be consulted on the terms of the proposed announcement to ensure that it does not pre-empt Executive Council approval.

Preparation of Signature Texts

101. The TSC prepares English language signature texts and binds and seals treaties concluded in Australia. If a treaty is also to be concluded in a foreign language, the foreign language text will also be prepared by the TSC or by arrangement with the other side. Sealing takes place prior to signature so that the signatories are dealing with a fully finalised text. When signature is to take place overseas, guidance is provided to posts.

102. Signature texts of multilateral treaties are prepared and retained by the government or international organisation designated as the depositary. Signature usually takes place where the depositary is located, and instruments of ratification and other instruments are left with the depositary. Instruments must be delivered by hand and the date of deposit (or signature) reported by cable. For bilateral ratifications, see paras 76-79 above.

Signing Ceremonies

103. The selection of an Australian representative and the location and timing of the ceremony are the responsibility of the line department or agency, in consultation with relevant Ministers' offices. The relevant DFAT policy desk can assist departments in making arrangements by liaising with foreign diplomatic missions. The TSC conducts signing ceremonies in Canberra for bilateral treaties and will attend ceremonies held elsewhere in Australia, subject to financial arrangements with the responsible department or agency. For signings at overseas posts, internal DFAT arrangements apply.

Reservations

104. A reservation is a means by which a state purports to exclude or modify the legal effect of specified provisions of a multilateral treaty which it finds unacceptable. Reservations are inapplicable to bilateral treaties because any concern by a party about the acceptability of a provision should have resulted in its redrafting in the negotiating process.

105. Australia's attitude to the law of reservations to treaties is reflected in Articles 19 to 23 of the Vienna Convention. According to Article 2(d), a reservation to a treaty is:

a unilateral statement, however phrased or named, made by a state [or by an international organization] when signing, ratifying, [formally confirming],

accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state [or to that organization].

Statements and Declarations Which Are Not Reservations

106. A ‘statement of interpretation’, a ‘declaration’ or a ‘statement’ are unilateral instruments. Generally they will not be reservations in that they do not purport to modify the application of a treaty. Thus a ‘statement of interpretation’ made by a party to a treaty which sets out a state’s opinion on the meaning of a provision of a treaty will not be a reservation so long as it is a plausible interpretation. So too a ‘declaration’ or a ‘statement’ about how a party intends to implement a treaty is not a reservation if the method of implementation is not constrained by the treaty itself. Federal Statements, referred to in paragraph 8 of the *Principles and Procedures for Commonwealth-State Consultation on Treaties (Annex II)*, are thus not reservations.

107. On the other hand, the definition of a reservation makes it clear that any of these unilateral instruments would be a reservation if it were to go beyond its ostensible purpose and purport to change or modify the legal effect of the treaty.

108. Furthermore, unilateral statements or declarations falling short of reservations are capable of having some effect at international law, particularly in the event of a dispute, their wording requires careful consideration. For example, declarations of acceptance of the competence of an international body to conduct inquiries, or a declaration under a treaty, into matters such as human rights (e.g. the Human Rights Committee under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination), have precise legal consequences, and the making of such declarations for Australia requires Executive Council approval.

Timing of Reservations

109. A reservation may be made only at the time a state is performing some act of legal commitment to a treaty (usually signature, ratification or accession) and it is normally lodged, together with the relevant instrument of adherence, with the depositary for the treaty.

110. Where a treaty deals specifically with the question of reservations (e.g. where only certain reservations may be made or where reservations are prohibited altogether), the provisions of the treaty must be followed. Where the matter is not so dealt with by a treaty, the rule is that reservations which are not ‘incompatible with the object and purpose of the treaty’ may be formulated by an adhering party. This test is one on which there may be considerable scope for disagreement. The reservations which are received by Australian missions overseas should be forwarded to the TSC.

Australian Policy on Lodging of Reservations

111. Australia has only infrequently made reservations to treaties and prefers that unanimity be achieved in the agreed text on an equal application of rights and obligations. Where commitments vary from party to party, a degree of uncertainty and inequality is

introduced and it can become necessary in extreme cases to examine a complex network of bilateral treaty relations within a multilateral framework in order to discover the exact rights and obligations applying between particular parties.

Position of Other Parties Concerning Reservations

112. Reservations almost invariably require acceptance by other states party to a treaty in order to be effective. Sometimes a treaty will require acceptance of a reservation by a formal act. In the vast majority of cases however, acceptance will, under the terms of the Vienna Convention, be presumed unless a state objects to the reservation within 12 months of being notified of it (or of becoming party to the treaty where the state adheres after the reservation has been made).

113. If a State Party wishes, it may decline to accept another state's reservation by lodging an appropriate notification with the depositary within the 12 month period. The notification may be in the form of:

- i. an objection to the reservation which nullifies the treaty relationship between the two states on that aspect of the treaty covered by the reservation;
- ii. an objection to the reservation which nullifies between the two states any relationship arising under the treaty;
- iii. a notification to the effect that the reservation is not validly made on the grounds of its incompatibility with the object and purpose, or with a provision, of the treaty.

Objections to Reservations

114. The legal effect of an objection of the types referred to in sub-paras 113 i. and ii. above is that the parties' relations on that matter are governed by the rules of customary international law - in the case of i, on the particular subject of the reservation and objection and, in the case of ii, the whole subject matter of the treaty. A notification of the type mentioned in sub paragraph 110 iii would often be made in conjunction with an objection of the type described in i or ii and would require judicial resolution where a dispute arose between the parties as to whether the reservation was permissible or not.

115. If the reservation were held to be incompatible with the object and purpose of the treaty, the effect would be to restore the operation, as between the two parties, of the provisions to which the reservation had been made. Where a state accepts the reservation of another, the treaty relations which apply between them are modified only to the extent of the reservation. The reservation does not modify the treaty's provisions as between the other parties to the treaty.

Withdrawal of Reservations and Objections

116. Reservations and objections to reservations may be withdrawn at any time and normally do not require the consent of the objecting or reserving party respectively. The withdrawal or modification of Australian reservations requires Executive Council approval and observance of Parliamentary tabling procedures.

Lodging Reservations

117. When a treaty is being examined with a view to Australian adherence, it may be found that Australian laws or policies cannot or should not be altered to accord entirely with the requirements of the treaty and that a reservation may be the only way in which Australia can become a party. Reservations should be carefully prepared to ensure that they are necessary and are permissible under the terms of the treaty. The Legal Branch advises on these aspects and will provide assistance with drafting of the text.

118. Executive Council approval must be sought for the reservation at the time of seeking approval for Australia's adherence to the treaty. The resulting authorisation will be for Australia to enter into the treaty subject to the reservation proposed. Proposals for lodging declarations or statements do not require Executive Council approval.

Responding to Reservations

119. Where reservations are made by other states, there are two main situations in which Australia may wish to object to them:

- i. where Australia is about to adhere to a treaty which is the subject of a reservation by another state party; and
- ii. where another state makes a reservation to a treaty to which Australia is already a party.

120. In the first situation, the responsible department or agency should examine the reservations of existing parties and determine whether Australia's legal and policy interests require objections to be made. DFAT's Legal Branch will provide advice if requested. Since a reservation by another state is effectively a derogation from the rights to be obtained by Australia under the treaty, the substantive reservations together with a resume of their implications for Australia, should be drawn to the attention of Cabinet or Ministers and Executive Council.

121. Line departments and agencies should take similar steps when reservations of other states come to their notice after Australia has become a party. There are only 12 months from official notification of a reservation for Australia to lodge an objection. States which remain silent may be considered to have accepted the reservation. Where reservations made by another state are unacceptable to Australia, discussions should be initiated by the responsible department or agency with DFAT's Legal Branch to prepare recommendations to the Ministers involved.

122. If it is desired to lodge an objection, the Legal Branch prepares and lodges it with the depositary within the required period. Although reservations should be brought to the attention of Executive Council when approval is being sought to adhere to a treaty, it is not necessary to obtain the approval of the Executive Council to lodge an objection, since an objection involves only a reassertion of Australia's treaty commitment.

Providing for Reservations in Treaties Under Negotiation

123. The reservations clauses adopted in the final articles of new treaties are important to the potential success or otherwise of a treaty. A clause allowing a degree of latitude to states in making reservations may help to ensure wider adherence than one restricting or

barring reservations altogether. However, such a clause may effectively give rise to such a network of bilateral treaty relations within the multilateral framework that certainty and reciprocity of treatment are substantially sacrificed.

124. Generally speaking, it is preferable that instruments establishing international organisations be drafted so as to deter or bar states from making reservations, if the institution is to operate effectively. Other treaties can often afford to be more tolerant, or to leave the matters to be settled by the general rules of customary law or the Vienna Convention on the Law of Treaties.

PART IV: FOLLOWING THE CONCLUSION OF TREATIES AND ARRANGEMENTS

Rectification of Errors

125. Treaties, once signed, must never be corrected by simply crossing out or inserting words in the text. When an error is discovered in a bilateral treaty it may be corrected by a procedure known as rectification. The most convenient means of rectification is by an exchange of diplomatic notes, the texts of which are settled between the Legal Branch and the other side prior to the exchange. It is usually agreed in the notes that the correction will replace the defective text *ab initio* ('from the beginning'). The Legal Branch should be advised of any defects as soon as possible and should be consulted at all stages of the rectification procedure.

126. Rectifications of multilateral treaty texts are coordinated by the depositary for the relevant treaty which executes a *procès-verbal* of the rectification of the text and forwards a copy to relevant parties. Such rectifications are usually subject to the tacit approval, or written disapproval, of signatory states.

Termination, Withdrawal and Denunciation

127. A treaty usually includes provision for its termination, denunciation, or for the withdrawal of a party from the treaty. Multilateral treaties typically provide that parties may withdraw on 12 months' notice. Some bilateral treaties terminate automatically after a fixed period or when the projects they deal with are completed. The time between notification of termination and when it takes effect will usually be the minimum required for an orderly winding up of activities under the treaty. Where a treaty does not include a termination or withdrawal provision, the Vienna Convention provides guidance in relation to circumstances where this may be achieved.

128. DFAT's Legal Branch should be consulted when it is proposed that Australia's consent to be bound by a treaty be withdrawn. This is important, as all actions to terminate Australia's consent to be bound by treaties must be approved by Executive Council and should follow the Parliamentary tabling procedures. Where it is proposed that the termination, or supersession, or replacement, of an existing treaty will be achieved within the terms of a new treaty, Executive Council approval for such action is obtained within the terms of approval for the later treaty.

Interpretation and Compliance

129. Matters involved in the interpretation of treaties, whether Australia is a party or not, should be referred to DFAT's Legal Branch. The Attorney General's Department may also be consulted. It is very important that the interpretation of treaties is consistent and coordinated. No interpretation should be put forward unless cleared with the Branch, which may need to consult the Minister for Foreign Affairs.

130. Where any question arises of compliance by Australia with its treaty obligations or the compliance of any party to a treaty to which Australia is party, the Legal Branch should be consulted and its advice included in submissions to Ministers or Cabinet. If international

litigation is considered possible, the Branch will consult the Attorney General's Department.

Depositary Functions

131. The functions of a depositary for a treaty are described in Article 77 of the Vienna Convention. The depositary archives the original text and provides certified true copies of it. It receives and registers instruments authorising signature, instruments of ratification and similar treaty action and notifications of reservations, declarations and statements related to the performance of the provisions of the treaty. It notifies the parties and interested states of the foregoing and the date of entry into force of the treaty, and performs any other functions specified in the treaty.

132. The Australian Government is depositary for a small number of multilateral treaties. These functions are administered by the TSC which should be consulted on any question related to their performance.

Reporting Responsibilities

133. Both bilateral and multilateral treaties may provide/stipulate that States Party provide reports on a periodic or *ad hoc* basis to a body nominated in the treaty. The department or agency with primary responsibility for the treaty should ensure that such reports are prepared and delivered and at the same time notify the Executive Director of the TSC, Department of Foreign Affairs and Trade, of details.

Archiving and Registration

134. The originals of all bilateral treaties concluded by Australia, and certified true copies received from the depositaries of multilateral treaties to which Australia is a party or is eligible to become a party, should be sent to the TSC for retention in DFAT's treaty collection. It is important that these be kept at one central point so that in the event of a dispute there is no difficulty in producing the authentic text. It is also necessary to produce them to the Office of Parliamentary Counsel where legislation or regulations include the text of the treaty. The texts of draft treaties initialled for Australia may also be forwarded to the TSC for storage.

135. Posts should not sent certified copies of multilateral treaties directly to the department or agency concerned with the substance of the treaty. While authentic copies may be required by those departments or agencies for their use, it is essential that the Australian Government's certified copy be sent to the TSC. The Secretariat will forward copies to relevant departments and other agencies.

136. In the case of an exchange of notes or exchange of letters, the original of the note or letter from the other party and a copy of the Australian note or letter should be sent to the TSC. At the foot of the copy should appear 'certified true copy', the signature and designation of an officer who witnessed the exchange, and the date.

137. TSC arranges for the registration of treaties in force with the Secretary-General of the United Nations in accordance with Australia's obligations under Article 102 of the United Nations Charter and also registers air services agreements with the International Civil Aviation Organisation. The United Nations publishes treaties registered with the

Secretary-General in the *United Nations Treaty Series*.

138. Notes or comments are never written on the originals of treaties.

139. TSC also collects and registers arrangements of less than treaty status. After the conclusion of any such arrangement, concerning which the Legal Branch should have been consulted as described in Parts II and III, the original, preferably, or a copy of the arrangement should be sent to the unit for registration and retention in the central collection. Copies can be provided, depending upon security classification.

140. Departments and posts are asked to send to the TSC details, including copies of texts wherever possible, of all existing arrangements, whatever their form, establishing or modifying relationships with foreign governments or agencies, other than contracts governed by domestic law.

Publication of Treaties

141. Information about treaties is published in several sources, the most convenient of which is the Australian Treaties Database (ATD) at <www.info.dfat.gov.au/treaties> and <<http://www.dfat.gov.au/treaties/index.html>>. The website is searchable and documents may be freely printed from it. Copies of treaties included in the Australian Treaty Series may be purchased from Australian Government Info Shops.

142. The Australian Treaties Library at <www.austlii.edu.au/au/other/dfat> is linked to the ATD and contains the following material:

- the *Australian Treaties Series* (full text);
- Australian Treaties not yet in force;
- Status Lists (parties to multilateral treaties for which Australia is the depository)
- Lists of multilateral treaty actions under negotiation or consideration
- National Interest Analyses
- Links to other related sites including:
 - Joint Standing Committee on Treaties;
 - Department of Foreign Affairs and Trade;
 - Hansard Internet Publishing Service;
 - AustLII Australian (and World) Links to Treaties and International Agreements
- Other information including:
 - Australian and International Treaty Making Information Kit;
 - Australian Senate Legal and Constitutional References Committee Report;
 - Updates to Treaty Actions tabled in both Houses of Parliament.
- The *Australian Treaty List* is a listing of all treaties to which Australia is or has been a party, or which are of interest to Australia. It does not include treaty or other texts, these are accessible in other areas of the website, particularly in the Australian Treaties Series or Australian Treaties not yet in force. The Bilateral treaty list may be browsed or searches may be undertaken by country names. The Multilateral list may also be browsed or searches can be made by the year in which the treaty was done. Monthly updates to the *Australian Treaty List* are made available on the website.

Keyword and subject indexes are provided to assist in locating treaties of interest, however, these are not linked to treaties as yet.

Treaty Information

143. Overseas Posts should send copies of any pamphlets, brochures and booklets containing information on treaties issued by depositaries, as well as formal notifications, to the TSC. Depositaries are also making status information increasingly available on the Internet. In the case of the United Nations, this is on a 'user pays' basis, but member governments of the United Nations have been issued with user names and passwords to allow free access. Those for Australia are available to government departments or agencies for official use by request sent to TSC (Email: "treaties@dfat.gov.au").

144. In the event that other departments or agencies receive treaty notifications or information on treaties which the TSC has not noted, they should provide copies. For its part, the TSC regularly circulates to other departments and agencies responsible for the substance of treaties copies of treaty notifications.

PART V: STAGES IN THE DEVELOPMENT OF TREATIES

PROCESS	BILATERAL	MULTILATERAL
Initiative	Either side can initiate. In Australia the initiative is coordinated by the Federal department/agency with portfolio responsibility for the subject matter, acting within approved Ministerial/Cabinet guidelines.	Usually taken by a country or group of countries within an international organisation. Participation is subject to Ministerial/Cabinet approval.
Regulation Impact Statement (RIS)	If the treaty could affect business regulation or restrict competition, the responsible department/agency may be required to submit a RIS. The Productivity Commission's Office of Regulation Review should be consulted from the outset.	
Public information	Information on treaties under consideration, whether new or existing treaties or amendments thereto, is provided by responsible departments/agencies quarterly to International Division, PM&C, which notifies States/Territories through SCOT. A list of multilateral treaties derived from this information, together with details of contact officers, is tabled by DFAT in both Houses of Federal Parliament approximately twice a year and is published on the Internet.	
Composition of delegation	Delegations to negotiations are composed of representatives of responsible departments/agencies. Participation by Members of Parliament; State/Territory and NGO representatives, is arranged according to subject matter.	
Consultation	Line departments/agencies consult with other interested departments/agencies, the States/Territories, NGOs and the general public at this stage, or at several stages in the process. Briefings for interested parties should be arranged as appropriate.	
Negotiations and final text	<p>The text is often based on a standard model previously approved by Cabinet. The draft is cleared with Legal Branch, DFAT, at appropriate stages. Once drafted/negotiated, the treaty may be initialled to signify the intention of the negotiators to submit it to their respective governments for approval.</p> <p><i>Notes:</i> 1. Unless urgent (when the treaty may provide for entry into force on signature), the treaty provides for entry into force after signature, and the satisfaction of legal or other requirements, by an exchange of diplomatic notes. In some cases, one side will have already satisfied all requirements at signature and the treaty will allow for the other side, alone, to provide a diplomatic note. Some countries require the formal exchange of instruments of ratification as the second step.</p>	<p>The treaty is usually negotiated at one or more international conferences and concluded by the text being annexed to the Final Act of the plenipotentiary conference at which it is adopted. The draft text is cleared with Legal Branch, DFAT, at appropriate stages. Signature of the Final Act implies no commitment to the text beyond submission of it to governments for consideration. (In the case of the International Telecommunication Union and the Universal Postal Union, signature of the Final Acts of plenipotentiary conferences does have a binding effect and requires Ex Co approval.)</p> <p><i>Note:</i> The text may provide one step, eg definitive signature, accession or acceptance, or two steps, eg, signature followed by ratification, for a country to become bound.</p>

PROCESS	BILATERAL	MULTILATERAL
	Treaties can take the form of an exchange of letters or third person notes, particularly amendments to existing treaties. For entry into force of such treaties, see Note 1 - however, ratification is not applicable.	
Declarations	Generally not applicable.	Declarations are unilateral statements, made at signature/ratification/accession, often taking the form of an interpretation or explanation. Declarations are formulated in consultation between the responsible department/agency, AG's and DFAT, with particular care concerning legal effects. Declarations of acceptance of additional obligations under existing treaties which modify Australia's international legal obligations require Ex Co approval.
Reservations	Not applicable	Reservations, where permitted, modify the legal effect of specified provisions of a treaty. Formulated in consultation between the responsible department or agency, AG's and DFAT, they are subject to Ex Co approval. Reservations can be made on signature (by inscription on the treaty) and/or ratification/accession (by inclusion in the instrument). They are subject to objection or rejection by the depositary or parties to the treaty.
Implementation	It is a requirement that any treaty entering into force for Australia be able to be implemented in Australia. Thus, legislation (Federal/State/Territory) will need to be in place when the treaty enters into force for Australia, as will any changes to the practices of Departments/agencies necessary to conform to the treaty. AG's can advise on whether existing Federal, State or Territory law conforms with the provisions of the treaty or whether new or amending legislation is needed.	
Language verification	Where a treaty is concluded in a language additional to English, the other side provides a translation in that language. Responsible departments arrange for verification before signature. This can take up to six weeks.	Verification is supervised by the international organisation responsible for the treaty.
Government approval	The responsible department/agency submits the treaty for the approval of all relevant Ministers or Cabinet. Cabinet approval is required if the matter falls outside existing policy guidelines, or in special circumstances concerning which PM&C can advise. When Cabinet approval is not required, the approval of the Minister for Foreign Affairs and the Attorney-General, is necessary, with advice to the Prime Minister. Once approval has been obtained, the Minister for Foreign Affairs submits the matter to Ex Co. Any treaty submitted to Ex Co for a second or further step is again subject to these procedures.	

PROCESS	BILATERAL	MULTILATERAL
Executive Council - First Submission (ExCo)	Ex Co authorisation for signature is required for all treaties. Treaties providing for formal ratification as a second step are again required to be submitted to ExCo. Documents submitted to Ex Co are prepared by Legal Branch, DFAT, drawing on information provided by responsible departments/agencies, particularly for the Explanatory Memorandum, which accompanies each treaty.	As for BILATERAL. Multilateral treaties may require one or two steps before becoming binding on Australia and each step is subject to ExCo approval. (See <i>Note</i> under Negotiations and final text - Multilateral above.) Legal Branch, DFAT, should be consulted regarding treaty-status amendments to, or elaborations of, existing treaties where they provide for entry into force unless an objection is deposited for Australia.
Preparing signature texts	Responsible departments/agencies provide the final text in hard copy and electronic form to the TSC, DFAT, which prepares a signature text (printed, bound and sealed, as appropriate). Where a treaty is to be signed in a language additional to English and the text is not available in electronic form, DFAT will coordinate preparation.	The preparation of the signature text is the responsibility of the depositary. The depositary provides a certified true copy of the text to DFAT which copies it to Departments/agencies as required. (If the certified text is sent direct to the Department/agency, it should be forwarded to the TSC.)
Signatory	Selection of the signatory is arranged by the responsible department in consultation with relevant ministers and their offices. The Minister for Foreign Affairs signs the instrument of full powers authorising the nominee to sign the treaty. The instrument is handed to the other side prior to signature of the treaty. No instrument is required if the Governor-General, Prime Minister or Minister for Foreign Affairs is the signatory but ExCo approval for signature is still required.	Same as BILATERAL, except that the instrument of full powers is deposited with the depositary for the treaty before signature takes place.
Signing ceremony	The time and venue of the signing ceremony are determined by the responsible department/agency. TSC, DFAT, presides over the actual ceremony if it is held in Canberra and assists with arrangements, or attends, ceremonies held elsewhere in Australia. Where signature is in another country, DFAT coordinates arrangements.	The depositary arranges the ceremonial signing. Where a treaty is to be signed for Australia subsequent to the ceremonial signing, DFAT makes separate arrangements with the depositary. The depositary may arrange for a <i>procès-verbal</i> of the signature to be signed or alternatively issues a formal notification recording the fact.
Rectifying errors	Errors found prior to signature can be rectified by amending the signature text; the amendments are initialled by the signatories. Thereafter, the text cannot be amended - errors are rectified by an exchange of note.	Errors are rectified by the depositary in consultation with relevant governments.

PROCESS	BILATERAL	MULTILATERAL
Publication prior to entry into force	Texts remain confidential to the parties until signed. DFAT publishes on the Internet < http://www.austlii.edu.au/au/other/dfat/ > signed treaties which have not entered into force. For treaties which have entered into force see <i>Australian Treaty Series</i> below.	Final texts of treaties not yet in force for Australia are published in the Australian Treaties Library on the Internet.
Tabling	The texts of treaties are tabled in both Houses of Parliament prior to any binding treaty action. Treaties are tabled with National Impact Analysis (NIA, see below) and a RIS may also be required. Responsible departments/agencies deliver the required number of documents to TSC, which coordinates the tabling process.	
National Interest Assessment (NIA)	Responsible departments/agencies prepare NIAs, which are cleared through the Office of International Law, AG's, and TSC, DFAT. States/Territories are also consulted, and their views recorded in the NIA. The line department/agency is responsible for the final content of the NIA. See also RIS above. DFAT publishes all NIAs on the Internet when tabled.	
Joint Standing Committee on Treaties (JSCOT)	JSCOT examines and reports to Parliament on the treaty (usually within the 15 or 20 sitting day period), and can make recommendations to Government. JSCOT may hold public hearings. Its reports are tabled, printed and made available on the Internet. Final treaty action is not usually taken until the report is tabled.	
Government Response to JSCOT Reports	JSCOT reports may contain recommendations which require a formal Government response. Where only one department/agency is concerned, that department/agency prepares the Government response, obtains Prime Ministerial approval, and arranges its tabling in Parliament. Where a DFAT response is required, or where the recommendations concern more than one department/agency, the TSC coordinates the Government response and arranges its tabling.	
Executive Council - Second Submission	When a signed treaty is to be ratified it is again submitted to ExCo, in conformity with the steps set out above for its first submission to Ex Co.	
Final treaty action by:		
- Exchange of notes;	Either side may initiate. If convenient, notes exchanged in the country where the treaty was not signed. DFAT issues the diplomatic note in accordance with instructions from the responsible Department/agency.	Not applicable.
Unilateral note	Similar to exchange of notes, except Not applicable. that only one side provides a note.	Not applicable.
Ratification	The instrument of ratification, to which the TSC, DFAT, binds and seals a copy of the signature text of the treaty, is signed by the Minister for Foreign Affairs. The instrument is then exchanged for a similar instrument, prepared by the other side, in a formal ceremony where a procès-verbal is	The Minister for Foreign Affairs signs the instrument of ratification which is deposited through the relevant overseas mission. The depositary may arrange for a procès-verbal of the deposit to be signed or, alternatively, will issue a formal notification recording the fact.

PROCESS	BILATERAL	MULTILATERAL
	usually signed by the participants as a record of the exchange. The exchange is usually arranged in the country where the treaty was not signed, and it can take place at officials level.	
Accession, acceptance	Not applicable.	Similar to ratification (above), except that the relevant instrument refers to accession or acceptance.
Entry into force	A treaty will enter into force on a date calculated in accordance with its provisions – usually when notes are exchanged or following a predetermined elapse of time after the exchange. On occasions the date is actually specified in the text.	Entry into force is governed by the provisions of the treaty and will usually occur a set time after a minimum number of ratifications/accessions has been deposited. For treaty-status amendments, it will usually require a minimum number of acceptances.
Records of treaty action	All Australian treaty action is recorded in monthly summaries, published on the Internet. Annual summaries are printed in issue No 1 of the <i>Australian Treaty Series</i> for each year). TSC, DFAT, maintains a telephone information service on treaties.	As for BILATERAL. The Australian Government is depositary for certain multilateral treaties: the status lists of parties to these treaties are published by DFAT on the Internet and are available on request in hard copy. DFAT maintains status lists for other multilateral treaties on the basis of information provided by depositaries -hard copies are available on request. Some of these lists are also published by their depositaries on the Internet.
Archiving	The signature texts of all bilateral treaties, and multilateral treaties for which Australia is depositary, are archived by TSC, DFAT, which can provide certified true copies thereof. Certified true copies of multilateral treaties provided to Australia by depositaries for other treaties are also archived.	
Australian Treaty Series	Any treaty entering into force for Australia is printed in the <i>Australian Treaty Series</i> which is available from Government Info Shops. The series is held in major public and university libraries and is also published on the Internet.	
Registration with United Nations	Treaties in force for Australia are registered by DFAT with the United Nations in accordance with Article 102 of the UN Charter. Air service agreements are registered with ICAO.	Any multilateral treaty for which the Australian Government is depositary is registered with the United Nations. Any subsequent action affecting the treaty is also registered.
Termination	A treaty is governed by its terms and will usually provide for formal termination or the withdrawal of parties From it. In Australia such action requires Ex Co approval and to be tabled with an NIA and considered by JSCOT in the same way as new treaties or treaty amendments. Similarly, the withdrawal or modification of a reservation (multilateral only) requires Ex Co approval.	

NATIONAL INTEREST ANALYSIS (NIA)

This paper provides guidance to drafters on the **structure, content and format** of the National Interest Analysis (NIA), which is the key working document used by the Joint Standing Committee on Treaties (JSCOT) in its role scrutinising Australian treaty action.

Once tabled in Parliament, the NIA is also a valuable public reference document. It is important, therefore, that drafters have a good understanding of the proposed treaty action, the treaty text and the implications of the action for Australia and that they communicate this understanding as clearly as possible in the NIA. *Avoid legalese and jargon.*

Although NIAs are required by DFAT and the Attorney-General's Department in final form, drafters are encouraged to contact the DFAT's Treaties Secretariat (TSC) with any queries earlier in the drafting process if necessary.

The tabled documents comprise a cover sheet, the NIA with attached information on the consultation process, the treaty text, a Regulation Impact Statement where one is required, and background information. Bilateral treaties require background information on the other treaty party and lists of other treaties, while for multilateral treaties a status list of parties is all that is needed.

Examples of tabled NIAs may be found on at: <www.austlii.edu.au/dfat>. JSCOT reports may be found at <www.aph.gov.au/house/committee/jsct>.

Category

Most NIAs fall into Category 1 and are tabled for 20 Parliamentary sitting days. Category 2 (previously Category A – see attached list) treaties are tabled for 15 Parliamentary sitting days.

Format

Except in exceptional circumstances, which should be discussed with TSC, NIAs are limited to **six** pages, plus the attachment on consultation. Note that the text under each heading in this pro forma is for guidance only and should not appear in the final document, nor is it indicative of the appropriate length of each section. NIAs should be in 12 point Times New Roman font, Word for Windows format, using paragraph numbers for ease of reference. Page numbers are optional. Either left or right-justified margins are acceptable. When referring to any treaty, please add the Australian Treaty Series (ATS) number or the Australian Treaties not in Force (ATNIF) number.

Please provide the **FINAL** document (as cleared by TSC and Attorney-General's Department) and the Cover Sheet and annexed documents via email to <ruth.blunden@dfat.gov.au> as an attached document (Word or Rich Text Format) with tracking turned off, changes accepted etc prior to transmission, or on DOS formatted disk, Rich Text Format or Word.

DFAT NIA Co-ordinator and Tabling Officer:

Ruth Blunden,
Treaties Secretariat:
ph: (02) 6261 2636;
fax (02) 6261 2144;
email: <ruth.blunden@dfat.gov.au>

Attorney-General's Department Treaties Co-ordinator:

Mark Zanker,
Assistant Secretary, International Trade Law and General Advising Branch,
Office of International Law:
ph: (02) 6250 6647;
fax (02) 6250 5931;
email: <Mark.Zanker@ag.gov.au>

Category 1 and Category 2 Treaties

Because the Government believes that the scrutiny of treaties should be thorough, most treaties are tabled for 20 parliamentary sitting days. By definition, treaties with this 20 day tabling period are **Category 1** treaties (previously called ‘Category B treaties’). The Joint Standing Committee on Treaties is supposed to table its reports on Category 1 treaties in that period.

Category 2 treaties are for the most part uncontroversial in nature and relatively routine in form. They are tabled for only 15 parliamentary sitting days. The Joint Standing Committee on Treaties is supposed to table its reports on Category 2 treaties in that period.

Prima facie, the treaty actions:

- a) Not listed below are Category 1 treaties;
- b) Listed below are Category 2 treaties.

Category 2 Treaties: Tabled for 15 sitting days

BILATERAL

Air Services

Defence:

- Protection of Classified Information
- Status of Forces

Employment of Spouses of Diplomatic Representatives

Extradition

Investment Promotion and Protection Agreements (IPPA)

Mutual Assistance in Criminal Matters

Prisoner Transfer

Taxation

- Double Taxation
- Taxation Information Exchange

MULTILATERAL

Communications, including:

- Intelsat
- World Radio Conference

Postal, including:

- Asia/Pacific Postal Union
- World Postal Union

Example of cover page for treaty action material to be tabled. Cover page will go on top of the other documents which will then all be stapled together in the top left hand corner in the usual way. Applicable documents are to be arranged in the order indicated below.

**NAME OF THE TREATY ACTION AS IT APPEARS
ON THE TOP OF THE NATIONAL INTEREST ANALYSIS,
INCLUDING THE ATS OR ATNIF NUMBER**

[upper case, 14 point, bold and centred]

Documents tabled on 4 March 2005:

[14 point bold and centred]

National Interest Analysis [2005] ATNIA XX

(Treaties Secretariat will allocate ATNIA number)

with attachment on consultation

Text of the proposed treaty action

Regulation Impact Statement

(If required)

Background information: *(for bilateral treaties)*

Country political brief and country fact sheet

List of other treaties with that country

List of treaties of the same type with other countries

OR

Background information: *(for multilateral treaties)*

Current status list

NATIONAL INTEREST ANALYSIS: CATEGORY TREATY

(Insert 1 or 2 in line above)

SUMMARY PAGE

(1 page limit)

**(Name of the treaty action as it appears exactly in the final text,
including ATS or ATNIF number)****Nature and timing of proposed treaty action**

1. Refer to relevant articles of the Agreement to explain what treaty action is proposed, eg ratification, accession, acceptance, definitive signature, consent to be bound, entry into force through an exchange of notes or letters, withdrawal, termination, denunciation, etc. Where it is difficult to describe precisely the proposed action, consult TSC for appropriate wording.
2. Indicate when the action is proposed to be undertaken (eg before .../ after .../ as soon as practicable after...) and when it will enter into force. For a multilateral treaty action, state whether it is in force generally and when it is likely to enter into force for Australia and/or generally. Give dates of signature/exchange of notes if this has already occurred.
3. Explain if this treaty action terminates an existing treaty upon entry into force. If the treaty action is a revision of, or a Protocol or amendment to, an existing treaty or will replace an existing treaty, this should be explained. The NIA should clearly establish the treaty action's relationship to the existing treaty.
4. In the case of a bilateral agreement that is being tabled prior to execution (signature/ first exchange of Notes), state that it is with the agreement of both parties.
5. Include any territorial limits or any interim application of treaty provisions. In the case of multilateral treaties, include any reservations or declarations by Australia.

Overview and national interest summary

6. This section should state the purpose of the proposed action and summarise why it is in the national interest.

BODY OF NIA

Reasons for Australia to take the proposed treaty action

7. The section should address in detail the advantages of proceeding and the disadvantages of not taking the action. In weighing these pros and cons, canvass the potential economic, political, social, cultural and environmental effects arising from the proposed treaty action. Put it in the context of the domestic policy environment. If it is a bilateral treaty action, Australia's relationship with the proposed treaty partner should be considered. In the case of a multilateral treaty, Australia's interests in the international organisation under whose auspices the treaty has been negotiated should be canvassed.

8. While this section should not duplicate the information provided in the background information, it may be appropriate to refer to key judgments and data contained in them.

9. Where a large amount of diffuse information is covered in this section, consider the use of sub-headings.

Obligations

10. An obligation is, in essence, something that Australia will be required by the treaty to do or refrain from doing. This section should describe the legal obligations that will, or may be imposed on Australia as a result of the treaty action. In the case of amendments, protocols, etc, this may necessitate reference to provisions of the head agreement. Include the obligations owed to Australia by other countries under the treaty.

11. Not all treaty obligations will be framed in mandatory language (such as the word 'shall') and it will be important to examine closely the text of the treaty and perhaps also the negotiating history, to assess which treaty provisions contain obligations.

12. It may not be feasible or necessary to describe each provision of the treaty, but this section must not merely list provisions without describing the obligations that they impose on Australia. Nor should it simply repeat the text of a provision containing an obligation. It may, however, be appropriate to group obligations by type (eg financial) and list the articles that fall within that type.

13. List any *substantive* variations to the template of a Category 2 treaty here.

14. If the treaty action is a withdrawal from, or a denunciation or termination of, an existing treaty, the NIA must describe the obligations of the head treaty and must identify any of those obligations that will remain in effect after the treaty action enters into force.

Implementation

15. This section should describe succinctly what will be, or has been, done to implement the obligations that will be imposed on Australia by the treaty action (that is, the

obligations identified in the previous section). If implementation of the treaty action requires changes to domestic laws or policy, both the effect of the change as well as how the changes will be implemented (i.e. by Commonwealth or State legislation or regulation) must be explained.

16. If no new legislation is required, explain how the obligations are met by existing legislation. Any changes to the existing roles of the Commonwealth Government and the State and Territory governments as a result of the implementation action must be identified and described.

Costs

17. This section should note *any* foreseeable financial costs (even if difficult to estimate) to Australia of compliance with the treaty action. It may include, but is not limited to: contributions to international organisations (including the costs of conferring privileges and immunities in Australia) provided for in the treaty action; costs of establishing/administering any new domestic agency as a direct result of taking the treaty action; or any other financial implications for the federal or State and Territory governments, business or industry.

18. In the case of a Protocol or amendment to an existing treaty for example, such costs should also be set in the context of those of the head agreement.

Regulation Impact Statement

19. The Government requires a Regulation Impact Statement (RIS) for any proposed treaty action which would affect business or restrict competition. Please specify whether or not a RIS is required, as follows:

EITHER: The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

OR A Regulation Impact Statement is attached.

Future treaty action

20. Describe the amendment procedures set out in the treaty – would any amendments enter into force automatically for the Parties or would their separate approval be required?

21. Does the treaty provide for the negotiation of future related legally binding instruments such as protocols and/or annexes? If possible, indicate what areas these future instruments are likely to address.

22. Describe how such future instruments are to be made binding on the parties (eg would approval be automatic/by provision of the treaty/by executive action/ require legislative approval?). Explain if such future instruments could expand or contract our

obligations under the treaty, whether they would have domestic implications and whether future instruments would be subject to the Australian treaty process.

23. For multilateral treaties, detail provisions dealing with **reservations** or **declarations** if and when they can be made, or any limitations.

24. If the proposed treaty action (such as an amendment or annex) is made under an existing treaty, refer also to the amendment provisions in the treaty.

25. Where appropriate, set out that the future treaty action would be subject to Australia's domestic treaty process, including tabling and consideration by JSCOT.

Withdrawal or denunciation

28. This section should indicate whether the treaty action provides for withdrawal or denunciation and, if so, what procedures apply and under what conditions. As in the section above, it should be made clear whether the decision to withdraw or denounce will be subject to the domestic treaty process. Where known, include the reason behind the notice period specified in the treaty (i.e. why is the notice period one year, five years etc). If any provisions/obligations continue after withdrawal or denunciation, mention them here.

29. If there is no express withdrawal or denunciation provision, indicate whether the treaty implies the right to withdraw or denounce. That right can be implied where the parties intended it or where the nature of the treaty implies that right (Article 56, Vienna Convention on the Law of Treaties).

30. If there is neither an express nor an implied right to withdraw from or denounce the treaty action, you should indicate that withdrawal is possible only with the consent of [all/both] the parties (Article 54, Vienna Convention on the Law of Treaties).

31. If the proposed treaty action (such as an amendment or annex) is made under an existing treaty, refer to any withdrawal or denunciation provisions in the treaty.

Contact details (*names and telephone numbers are not required*)

Section

Division

Department responsible for the treaty action.

**(Name of the treaty action as it appears exactly in the final text,
including ATS or ATNIF number)**

CONSULTATION

1. JSCOT has requested that the consultation process be fully documented in an attached document. Please include the following information:
 - who has been consulted;
(ie the organisation or company – not the name of the person)
 - at what stage they were consulted;
 - what form the consultations took;
 - what contributions were made, including support, concerns, suggestions and criticisms;
 - how the feedback from consultations has been incorporated into the negotiations or text, and if feedback has not been integrated, why.

2. Where a major impact is likely, or where States or Territories have indicated a special interest the attachment should start in the following terms:
This proposed action will have an impact on the States and Territories. The impact will be ...

3. In the rare cases where there has been no consultation, this should be noted and explained.

BACKGROUND INFORMATION**BILATERAL TREATIES**

1. For bilateral treaties, the background information comprises:

Political Brief on (name of country)

2. Ask the geographic branch of DFAT that covers the bilateral relationship to provide a focussed political brief, preferable one page in length. The Treaties Secretariat can provide the name of the contact officer within DFAT.
3. The brief will include the current political and economic situation and the bilateral relationship.
4. In addition, download and add as the final page the Country Fact Sheet, from: www.dfat.gov.au/geo

List of other treaties with that country

5. To obtain a list of other treaties with the bilateral treaty partner, go to: www.info.dfat.gov.au/treaties
6. Email the list to Ruth Blunden <ruth.blunden@dfat.gov.au> for checking.

List of treaties of the same type with other countries

7. Please also obtain this list from the above website, and email to Ruth Blunden for checking. In some cases, there will be no similar treaties and in this case, state this at the foot of the list of other treaties with the treaty partner.

MULTILATERAL TREATIES

8. The only background information required for a multilateral treaty is the current status list of parties to the treaty. Most international organisations provide these on their website. For United Nations treaties, there is a Username and Password to allow Australian Government officials free access to the databases on its website. Contact the Treaties Secretariat if you do not know this Username and Password.
9. In some cases of treaty amendments, it may be necessary to list the parties to the head agreement.

**PRINCIPLES AND PROCEDURES FOR COMMONWEALTH-STATE
CONSULTATION ON TREATIES¹**

Part A: Introduction and Principles

These principles and procedures are adopted subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.

1 *Introduction*

1.1 The Council of Australian Governments agreed at its meeting in June 1996 that this set of Principles and Procedures should be adopted in order to achieve the best possible outcome for Australia in the negotiation and implementation of international treaties. They update those adopted in 1992.

2 *Instruments covered by these Principles and Procedures*

2.1 These Principles and Procedures relate to treaties of sensitivity and importance to the States and Territories.

2.2 Treaties are multilateral, limited party (plurilateral and trilateral) or bilateral agreements which create legally binding obligations under international law. Treaties pertaining to matters of national security are excluded from these Principles and Procedures.

2.3 Having regard to these Principles and Procedures, the Commonwealth will inform the States and Territories of other international instruments where they cover matters of sensitivity and importance to the States and Territories such as the United Nations Draft Declaration on the Rights of Indigenous Peoples.

3 *Principles*

3.1 In the interests of achieving the best possible outcome for Australia, and where a treaty or other international instrument is one of sensitivity and importance to the States and Territories, the Commonwealth should, wherever practicable, seek and take into account the views of the States and Territories,

- . in formulating Australian negotiating policy, and
- . before becoming a party to, or indicating its acceptance of, that treaty or instrument.

The Commonwealth should then also keep the States and Territories informed of the determined policy.

3.2 The consultative process will be continued through to and include the stage of implementation, if any.

3.3 The States and Territories will each be responsible for the timely development of their own whole of government position with respect to any aspect of the

¹ Adopted by the Council of Australian Governments, Canberra, June 1996

- consultation and, where they choose, for the development of a consolidated States and Territories position.
- 3.4 The States and Territories will establish and advise the Commonwealth on the appropriate channels of communication, and persons responsible for consultation, to ensure that the Commonwealth can discharge its international responsibilities in a timely manner.

Part B: Procedures

4 *Information*

- 4.1 The Commonwealth will inform States and Territories in all cases and at an early stage of any treaty discussions in which Australia is considering participation. Where available, information on the long-term treaty work programs of international bodies will be provided to the States and Territories.
- 4.2 There will be various ways in which information on treaty negotiations is provided to the States and Territories.
- (a) Information about treaty discussions is forwarded to Premiers'/Chief Ministers' Departments or Cabinet Offices on a regular basis through the Department of the Prime Minister and Cabinet and the Treaties Secretariat of the Department of Foreign Affairs and Trade. One vehicle for making information about current treaties and negotiations available will be the Treaties Schedule.
 - (b) The Commonwealth will provide the States and Territories every six months with a list of current and forthcoming negotiations (forecasting 12 months ahead) and of matters under consideration for ratification, accession etc. Updates of this list will be provided at three monthly intervals.
 - (c) National Interest Analyses (NIAs) will be prepared by the Commonwealth for all treaties. States and Territories will be consulted at an early stage in the preparation of NIAs in relation to those treaties in which they have a major interest. NIAs will be finalised in time for tabling in Parliament. NIAs will represent the best understanding of the Commonwealth at the time they are prepared. A National Interest Analysis which includes the elements in the NIA *pro forma* (Appendix 1 [to *Principles and Procedures*].)² will accompany each treaty tabled in Parliament.
 - (d) The Commonwealth will whenever practicable provide States and Territories with a report on the outcome of international negotiating sessions which are of sensitivity and importance to the States and Territories. These may be provided on a confidential basis.
- 4.3 The provision of the above information will not affect the flow of information on treaties to the States and Territories which occurs on an ongoing basis from the time that negotiations begin.

5 Consultation mechanisms

The Treaties Council.

² See Annex I to this document.

- 5.1 There will be a Treaties Council consisting of the Prime Minister, Premiers and Chief Ministers. The Treaties Council will have an advisory function.
- 5.2 The role of the Treaties Council is to consider treaties and other international instruments of particular sensitivity and importance to the States and Territories either of its own motion, or where a treaty is referred to it by any jurisdiction, a Ministerial Council, an intergovernmental committee of COAG or by SCOT. Senior Officials will co-ordinate and prepare the agenda for the Treaties Council. The Treaties Council will also be able to refer treaties to Ministerial Councils for consideration.
- 5.3 The Treaties Council will meet at least once a year. The Prime Minister will chair the meetings, with the Minister for Foreign Affairs in attendance when appropriate. Meetings of the Treaties Council will normally take place at the same time and place as COAG.

Standing Committee on Treaties

- 5.4 There will be a Standing Committee on Treaties consisting of senior Commonwealth and State and Territory officers which will meet twice a year, or more often if required, to identify treaties and other international instruments of sensitivity and importance to the States and Territories and:
- decide whether there is a need for further consideration by the Treaties Council, a Ministerial Council, a separate intergovernmental body or other consultative arrangements;
 - monitor and report on the implementation of particular treaties where the implementation of the treaty has strategic implications, including significant cross-portfolio interests, for States and Territories;
 - ensure that appropriate information is provided to the States and Territories; and
 - coordinate as required the process for nominating State and Territory representation on delegations where such representation is appropriate.
- 5.5 In identifying treaties and other international instruments of particular sensitivity and importance to the States and Territories, the Committee should have regard to their potential to affect the finances or current or future policy decisions of the States and Territories or the need for State and Territory participation in implementation, including legislation.

Ministerial Councils and other consultation mechanisms

- 5.6 Subject to any recommendation of the Standing Committee, as a general practice, consultation will be conducted by the functional Commonwealth/State and/or Territory Ministers for Departments concerned. Exceptions will exist where there are significant cross-portfolio interests.

- 5.7 In general, existing Commonwealth/State and Territory Ministerial Councils and consultative bodies will be used as the fora in which detailed discussions of particular treaties and other international instruments take place.
- 5.8 When issues are to be discussed that are of particular significance to either State and Territory or Commonwealth authorities other than those directly represented on the Commonwealth/State and Territory consultative bodies, representatives of such authorities may be invited to attend the meetings in an observer role.
- 5.9 The protocols relating to the operation of Ministerial Councils will apply to these consultations - including those relating to Representation of Constituent Governments and Liaison between Councils (*Commonwealth-State Ministerial Councils, A Compendium, May 1994*).
- 6 *Participation on international delegations*
- 6.1 In appropriate cases, a representative or representatives of the States and Territories may be included in delegations to international conferences which deal with State and Territory subject matters. Subject to any special arrangements, the purpose is not to speak for Australia, but to ensure that the States and Territories are well informed on treaty matters and are always in a position to put a point of view to the Commonwealth. However, State and Territory representatives will be involved as far as possible in the work of the delegation.
- 6.2 The States and Territories will normally initiate moves for inclusion in a delegation, but the Commonwealth should endeavour to keep State and Territory interests in mind.
- 6.3 Unless otherwise agreed, the costs of the State and Territory representatives are a matter for State and Territory governments.
- 7 *Implementation*
- 7.1 Before the Commonwealth becomes a party to any international treaty of particular sensitivity and importance to States and Territories, the Commonwealth and the States and Territories will consult in an effort to secure agreement on the manner in which the obligations incurred should be implemented.
- 7.2 Where the preparation of reports to international bodies on implementation action is required, States and Territories will be consulted and their views taken into account in their preparation.
- 8 *'Federal-State' aspects*
- 8.1 The Commonwealth does not favour including federal clauses in treaties and does not intend to instruct Australian delegations to seek to include them. In the Commonwealth's view, the international community sees the pursuit of federal clauses in treaties generally as an attempt by the 'Federal State' to avoid the full

- obligations of a party to the treaty. The Commonwealth's experience at a number of International Conferences has shown that these clauses are regarded with disfavour by almost the entire international community. Further, its experience is that a federal clause tailored to the needs of one federation will be unacceptable to other federations. The Commonwealth believes that instructing an Australian delegation to press for a federal clause only diverts its resources from more important tasks.
- 8.2 The Commonwealth does not object to Australia making unilaterally a short 'Federal Statement' when it signs or ratifies certain appropriate treaties, if this statement clearly does not affect Australia's obligations as a party. An 'appropriate' treaty would be one where it is intended that the States and Territories will play a role in its implementation. An appropriate form for a statement like this is at Appendix 2 [to *Principles and Procedures*] attached.³
- 8.3 The normal practice is that Australia does not become a party to a treaty containing a federal clause until the laws of all States and Territories accord with the mandatory provisions of the treaty. However, where a suitable 'territorial units' federal clause is included in a treaty, the possibility of Australia acceding only in respect to those States and Territories which wish to adopt the treaty might be considered on a case by case basis where appropriate, perhaps in some private law treaties.
- 8.4 The Commonwealth will consider relying on State and Territory legislation where the treaty affects an area of particular concern to the States and Territories and this course is consistent with the national interest and the effective and timely discharge of treaty obligations. However, the Commonwealth does not accept that it is appropriate for the Commonwealth to commit itself in a general way not to legislate in areas that are constitutionally subject to Commonwealth power.

³ See Attachment following.

Attachment to Principles and Procedures for Commonwealth-State Consultation on Treaties (see paragraph 8.2)

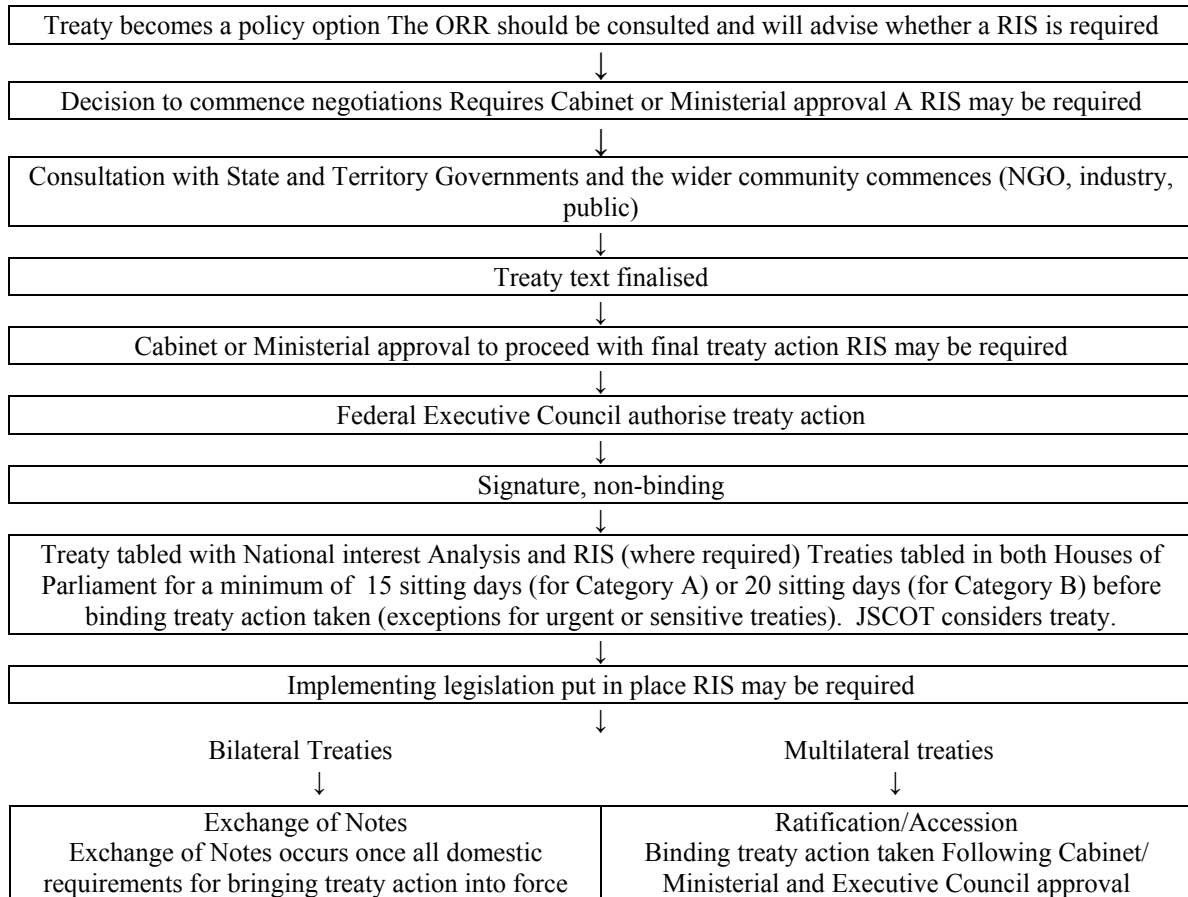
FEDERAL STATEMENT

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central, State and Territory authorities.

The implementation of the treaty throughout Australia will be effected by the Federal, State and Territory governments having regard to their respective constitutional powers and arrangements concerning their exercise.

REGULATION IMPACT STATEMENTS

Regulation Impact Statements and the treaty making process



Office of Regulation Review Adequacy Criteria for Regulation Impact Statements

1. Is it clearly stated in the RIS what is the fundamental problem being addressed? Is a case made for why government action is needed?
2. Is there a clear articulation of the objectives, outcomes, goals or targets sought by government action?
3. Is a range of viable options assessed including, as appropriate, non-regulatory options?
4. Are the groups in the community likely to be affected identified, and the impacts on them specified? There must be explicit assessment of the impact on small businesses, where appropriate. Both costs and benefits for each viable option must be set out, making use of quantitative information where possible.
5. What was the form of consultation? Have the views of those consulted been articulated, including substantial disagreements. If no consultation was undertaken, why not?
6. Is there a clear statement as to which is the preferred option and why?
7. Is information provided on how the preferred option would be implemented, and on the review arrangements after it has been in place for some time?

Relevant to all seven criteria (which correspond to the seven sections of a RIS) is an overriding requirement that the degree of detail and depth of analysis must be commensurate with the magnitude of the problem and with the size of the potential impact of the proposals.

Finally, for proposals which maintain or establish restrictions on competition (such as barriers to entry for new businesses or restrictions on the quality of goods and services available), it must be established that:

- the benefits to the community outweigh the costs; and
- the Government's objective can be achieved only by restricting competition;

both of which are requirements under the *Competition Principles Agreement*.

GLOSSARY OF TERMS⁴

1. **Accession** - Accession is a single act whereby a State expresses its consent to be bound, if for some reason it is unable to sign and ratify an agreement while it is open for signature. Accession is only used in the case of multilateral agreements.
2. **Agreed Minute** - Agreed Minutes usually record briefly decisions reached between two delegations. It may be annexed to an agreement to deal with administrative details.
3. **Agreement** - International agreements are binding documents under international law. These agreements may take a variety of forms and titles, for example, "convention", "protocol", "treaty", "executive agreement", "exchange of notes", "exchange of letters" or simply "agreement". They can be bilateral (between two parties) or multilateral (among more than two parties). A particular agreement is binding under international law if the parties to it intend it to be so.
4. **Arrangements of less than treaty status** - Most countries, including Australia, in dealings between states, governments and agencies of government and international organisations use instruments in which the parties do not intend to create, of their own force, legal rights or obligations, or a legal relationship, between themselves. Such instruments, whether in the name of the government or agencies, are termed "arrangements of less than treaty status". The most appropriate form for an arrangement of less than treaty status is often a memorandum of understanding, although records of discussion, joint communiques and exchanges of notes or letters recording understanding are common.
5. **Consent to be bound** - A party is obliged to observe the provisions of a treaty once it has consented to be bound by it, or from a specified time after that consent. There are several ways of consenting to be bound by a treaty:
 - signature alone (definitive signature);
 - signature confirmed later by the exchange of third person Notes;
 - the exchange of Notes or Letters which together constitute a treaty;
 - signature confirmed by a later step such as ratification or approval;
 - accession (also sometimes called acceptance or adhesion).
6. **Contracting State** - Contracting State means a State which has consented to be bound by a treaty whether or not the treaty has entered into force.
7. **Convention** - This term is frequently employed for agreements to which a large number of countries are parties.

⁴ This paper is based on Appendix 2 "Glossary of terms used in connection with international instruments" to the UK Foreign and Commonwealth Office's *International Agreements: Practice and Procedures - Guidance Notes*, published in September 1992, and has been expanded and adapted to reflect Australian practice. (Appendix 2 of the "Guidance Notes" is cited in the *British Yearbook of International Law*, Vol 63, 1992 at page 629.)

8. **Exchange of Notes constituting an Agreement** - As a general rule this form is used for inter-Governmental agreements of lesser importance. The exchange may be used to make a new agreement, to modify, amend, terminate or extend an existing bilateral agreement, etc. The Exchange of Notes consists of an exchange of diplomatic correspondence in formal terms usually between a Minister and the Ambassador/High Commissioner or Chargé d'Affaires. Notes are drafted in consultation with the Department of Foreign Affairs and Trade Legal Adviser, and it is customary for both Notes to be approved in draft by the Governments before they are exchanged.
9. **Full Powers** - Full powers are formal instruments signed by the head of State or Government or the Foreign Minister empowering the person (or persons) named to sign a treaty on behalf of the State he or she represents.
10. **Initialling** - Initialling signifies provisional assent to the text of a treaty by delegates following negotiation. It authenticates the text but does not bind governments to its provisions.
11. **Memorandum of Understanding (see paragraph 29)**
12. **Negotiation of Treaties** - The text of a bilateral treaty is negotiated by officials of the two countries; that of a multilateral treaty is usually negotiated at a diplomatic conference.
13. **Notification of completion of procedures** - Bilateral agreements are sometimes signed before a Government has the necessary legislation in place to enable it to implement the provisions. In such cases the text will provide for each country to notify the other when the internal procedures required to be undertaken have been completed. These agreements usually come into force on the date of the Note containing the later notification.
14. **Obligations under a Treaty** - Once a treaty has entered into force, the parties' obligations are those set out in the text of the treaty. A signatory of a treaty which has not yet entered into force is obliged to refrain from acts which would defeat the purpose and object of the treaty.
15. **Party** - Party means a State which has consented to be bound and for which a treaty is in force.
16. **Procès-verbal** – A document used to set out agreed corrections to a treaty already signed. This procedure is also known as rectification.
17. **Protocol** -This usually denotes an agreement amending or supplementing an existing convention or agreement.
18. **Ratification** - Ratification is confirmation of signature and signifies the intention to be bound by the provisions of a treaty.
19. **Registration of treaties** - In accordance with Article 102 of the United Nations Charter, treaties are registered with the United Nations, which publishes the texts and maintains treaty records.

20. **Reservations** - A reservation is a means by which a state purports to exclude or modify the legal effect of specified provisions of a treaty. Reservations arise in practice only in connection with multilateral treaties when there is an aspect of the treaty which a state finds unacceptable. Some multilateral treaties may expressly prohibit the making of reservations. They are inapplicable to bilateral treaties because any concern by a party about the acceptability of a provision should have resulted in its redrafting in the negotiating process.
21. **A Signatory** - A signatory is a State which has signed an agreement. The agreement may not necessarily be in force for that State, or generally.
22. **Signature** - Signature is the act whereby a State expresses its consent to the text of a treaty but not necessarily its consent to be bound by its provisions. Once a State has signed a treaty it is not obliged to ratify it. However, the Australian government's policy is not to sign a treaty without the intention to ratify it at a later date.
23. **Statements and declarations which are not reservations** (see also paragraph 20) - A "statement of interpretation", a "declaration" or a "statement" are unilateral instruments. Generally they will not be reservations in that they do not purport to modify the application of a treaty. Thus a "statement of interpretation" made by a party to a treaty which sets out a state's opinion on the meaning of a provision of a treaty will not be a reservation so long as it is a plausible explanation. So too a "declaration" or a "statement" about how a party intends to implement a treaty is not a reservation if the method of implementation is not constrained by the treaty itself. On the other hand, the definition of a reservation makes it clear that any of these unilateral instruments would be a reservation if it were to go beyond its ostensible purpose and purport to change or modify the legal effect of the treaty. For this reason, their wording requires careful consideration.
24. **Treaty** - a treaty is an international agreement concluded in written form between two or more States (or other entities such as an international organisations having international personality) and governed by international law. A treaty, which (see above) may take the form of a convention, an agreement or a protocol, usually consists of a title, a preamble, recitals, a series of numbered articles and a conclusion, which is immediately followed by the signatures.
25. **Withdrawal from a Treaty** - A treaty usually includes provision for its termination or for the withdrawal of a party, as appropriate to the subject matter of the treaty. Multilateral treaties typically provide that parties may withdraw on twelve months notice. Some bilateral treaties terminate automatically after a fixed period or when the projects they deal with are completed. Notice periods for termination by one side will usually be the minimum required for an orderly winding up of activities under the treaty.