



Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments

This Guidance Note provides general guidance on Australia's practice for concluding less-than-treaty status instruments with foreign governments. Any Commonwealth Government agency intending to enter into such an instrument should do so in consultation with the Department of Foreign Affairs and Trade's *International Law: Advising and Treaties Section* (Treaties Section) and the relevant DFAT policy desk.

What is an instrument of less-than-treaty status?

An instrument of less-than-treaty status is intended to embody a **political commitment** without creating (of its own force) legal rights or obligations. As it is not binding under international law, an instrument of less-than-treaty status is **not subject to** Australia's treaty-making process.

The most common form for an instrument of less-than-treaty status is a Memorandum of Understanding (MOU). Other forms include arrangements, exchanges of notes, letters recording understandings, records of discussion and joint communiqués.

Drafting and negotiating the text

Commonwealth Government agencies wishing to enter into an instrument of less-than-treaty status with a foreign government are responsible for drafting and negotiating the text, in consultation with DFAT's Treaties Section and the relevant DFAT policy desk. Agencies should follow the guidance on language and key provisions below.

Language

To avoid any misunderstandings over the status of an instrument, it is important that the **intention of the participants is clear**. Whilst the intention of the participants is paramount in determining the legal status of an instrument, Australia's practice is to use **non-mandatory language** in less-than-treaty status instruments. For example, under Australian practice, terms such as 'agreement', 'agree' and 'agreed' denote a treaty, while other terms, such as 'arrangement', 'decide' and 'jointly determine' denote an instrument of less-than-treaty status.

The table at **Annex 1** contains **further guidance** on language suitable for use in instruments of less-than-treaty status.



Key Provisions

Formal **preambles** should be avoided in instruments of less-than-treaty status, although informally phrased opening recitals may be appropriate.

Any provision for the **settlement of disputes** should be in terms of amicable resolution, rather than formal arbitration or any other form of binding dispute settlement.

Subdivisions of the instrument should be referred to as **paragraphs** rather than articles.

The instrument should be expressed to '**come into effect**' rather than to 'enter into force'.

The attestation clause should read '**SIGNED at** on', rather than 'DONE at on'.

A **Model MOU** including **sample paragraphs** for use in a less-than-treaty status instrument is at **Annex 2**.

Clearance

All instruments of less-than-treaty status must be sent to DFAT's Treaties Section for **clearance** prior to signature. This clearance consists principally of ensuring there is no treaty language in the text of the proposed instrument and that it does not contain anything that would imply that the instrument is binding at international law.

Retention of Original Texts

Following signature of an instrument of less-than-treaty status, the **relevant lead agency should retain the original** signed version. DFAT's Treaties Section does not maintain a collection of instruments of less-than-treaty status.


For further information, please contact:

International Law: Advising and Treaties Section
International Law Branch | Legal Division
Department of Foreign Affairs and Trade
Phone: (02) 6261 9206
Email: treaties@dfat.gov.au

Annex 1: Language for use in instruments of less-than-treaty status

Language for instruments binding under international law (i.e. treaties)	Language for non-binding instruments (e.g. MOUs)
Agreement	Memorandum of Understanding Arrangement Joint Statement / Joint Communiqué Exchange of notes/letters recording understandings
At the commencement of a treaty text a statement is made that the parties to the treaty: have agreed as follows:	State that the participants: have reached the following understanding: enter into arrangements
Preamble	Informal opening recitals (avoid formal preambles) Introduction Background
Article	Paragraph terms provisions clauses
Party	Participant Partner Government
enter into force	come into effect come into operation take effect commence

continue in force	continue to have effect remain in effect
shall	will
may not	will not
may only	will only
agree, agreement, agreed	mutually arrange mutually decide mutually consent jointly determine jointly decide understanding of the Participants / Partners accept approve decide
[legal] obligations duties	commitments undertakings
[legal] rights	advantages benefits
have the right	may be permitted to
arbitration	amicable resolution peaceful resolution
Done at...on...	Signed at... on...
equally authentic	equally valid



Annex 2: Model MOU including sample paragraphs

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE GOVERNMENT OF AUSTRALIA
AND
THE GOVERNMENT OF []
CONCERNING []**

The Government of Australia and the Government of [] ('the Participants'),

Desiring to [];

Have reached the following understanding:

Paragraph 1

Purpose

The Participants will seek to []

Paragraph 2

[heading]

The Participants will []

Paragraph []

Amendment

This Memorandum may be amended at any time by the mutual written consent of the Participants.

Paragraph []

Termination

This Memorandum may be terminated by either Participant giving at least six months' written notice to the other Participant. The Participants will consult to determine how any outstanding matters should be dealt with.

Paragraph []

Disputes

Any disputes about the interpretation or application of the Memorandum will be resolved by consultations between the Participants, and will not be referred to any national or international tribunal or third party for settlement.

Paragraph []

Duration and effect

1. This Memorandum will come into effect on the date it has been signed on behalf of the Participants and will remain in effect until terminated in accordance with Paragraph [].
2. This Memorandum represents the understanding reached between the Participants and does not create any legally binding rights or obligations.

Signed in duplicate at [place] on [date] in the English and [other language] languages, both texts having equal validity.

For the Government of Australia

For the Government of []