

## **INTERNATIONAL AGREEMENTS AND ARRANGEMENTS**

### **INTRODUCTION**

1. This Instruction describes the types of international agreements and arrangements that exist in Australian practice, the practice to be followed in the Defence Organisation for the coordination of international agreements and arrangements, and the Defence Organisation's Register of Agreements. [In this Instruction the term `international agreements and arrangements' is used to mean international agreements and arrangements other than commercial contracts such as those for the procurement or sale of specific property or services (which are subject to other guidance).]

### **TYPES OF INTERNATIONAL AGREEMENTS AND ARRANGEMENTS**

#### **Australian Practice**

2. In **Australian** practice, there are only three types of international agreements and arrangements:

- a. those which are legally binding in international law:
  - (1) these are concluded between countries, the governments of countries, or international organisations;
  - (2) are preferably called `agreements' or `treaties';
  - (3) contain mandatory language;
  - (4) and are unclassified;
- b. those which are legally binding in the domestic law of a country or part of a country (eg a State or Territory):
  - (1) these are concluded between parties which are legal entities under that domestic law<sup>1</sup>;
  - (2) are preferably called `agreements' or `contracts';
  - (3) contain mandatory language;
  - (4) and may be classified; and
- c. those which are not legally binding in international law or a domestic law but are politically and morally binding only:
  - (1) these can be concluded between any parties;
  - (2) are preferably called `arrangements' or `memoranda of understanding';
  - (3) do not contain mandatory language;
  - (4) and may be classified.

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<sup>1</sup> The Department of Defence, the Australian Defence Force and the single Services are **not** legal entities under Australian domestic laws but are part of the legal entity which is the Commonwealth of Australia.

3. From an Australian perspective, when an international agreement or arrangement is concluded to which the Government or an element of government (such as the Department of Defence, the Australian Defence Force, or a single Service) is a party, it will fall within one of the above categories.

#### **Differences in Practice between Countries**

4. However, it is common for the practice of other countries to differ from Australian practice. Consequently, in every case where an international document is proposed, care is required from the outset to determine the appropriate legal status from an Australian perspective and to achieve an acceptable position on legal status. This may require negotiating accommodations in the approach of each party. If this care is not taken, there are a number of risks including that international agreements and arrangements may be concluded without proper Australian legal authority, that they may be void or that they may have unexpected interpretations or consequences in international law or a foreign domestic law.

#### **Titles such as `Treaty`, `MOU`, etc.**

5. In categorising international agreements and arrangements the primary consideration is whether they are: a. binding in international law; b. binding in the domestic law of a country or a part of a country; or c. not legally binding. The title of an international agreement or arrangement (eg `Treaty`, `Agreement`, `Memorandum of Agreement`, `Memorandum of Understanding`, `Arrangement`, `Memorandum of Arrangements`, `Exchange of Letters` or `Exchange of Notes`) does **not** determine this because other countries use titles differently to Australia. The title may be an indication only. Therefore in dealing with the other party, attempts to categorise a document by its title (eg `Treaty`, `Memorandum of Understanding` etc.) should be avoided in favour of categorisation by its legal status (ie binding in international law, binding in a domestic law, or not legally binding).

### **COORDINATION**

6. It is in Australia's interests to ensure that proposed international agreements and arrangements are well-considered and consistent in language and format, and that concluded ones are consistently interpreted. This requires coordination of practice within the Defence Organisation and between Defence and other Departments. The Directorate of Agreements (DAGTS) within Legal Services Branch has a responsibility within the Defence Organisation for this coordination for all international agreements and arrangements sponsored by Defence. This includes the provision of advice on their interpretation and legal status and on Australian drafting practice. DAGTS can assist in, and is to be kept informed of, the consultation of other departments on these issues.

### **GOVERNMENT REQUIREMENTS**

7. The Government has established requirements for the clearance of the legal and drafting aspects of proposed international agreements and arrangements by the Department of Foreign Affairs and Trade and the Attorney-General's Department. DAGTS can advise on the application of these Government clearance requirements and can arrange the required clearances from other departments.

### **THE REGISTER OF AGREEMENTS**

8. DAGTS maintains the Defence Organisation's register of international agreements and arrangements (the `Register of Agreements`) which is described in Annex A to this Instruction.

### **PROCEDURES**

9. Unless other arrangements are made with DAGTS, the following procedures toward the conclusion of international agreements and arrangements are to be followed.

## Proposal

10. When a proposal for an international agreement or arrangement arises, DAGTS is to be notified. The need for and the timing of the international agreement or arrangement should be carefully considered and any relevant consultation on these questions undertaken. DAGTS can advise on other existing or proposed international agreements or arrangements which may have a bearing on the proposal. The proposal is not to be agreed with the other party until policy approval has been obtained.

## Policy Approval

11. Policy approval for the proposal, including, if required, policy approval of Ministers or of other departments, is the responsibility of the Defence area sponsoring the proposal and is to be obtained before the proposal proceeds. This usually will be sought by describing the intent of the international agreement or arrangement. However, if it is sought by also providing indicative provisions or an indicative document, it is to be made clear that this is done for the purpose of policy approval of the type of provisions or the nature of the document and not for the purpose of settling the text. This is so that drafting can proceed on the basis of a clear and approved policy position and unnecessary redrafting will be avoided. Often, an inherent part of the policy approval process will be determination of legal status.

## Determination of Legal Status

12. Determination of the legal status of the international agreement or arrangement is necessary before a proposal proceeds to drafting, and it may be necessary before policy approval for the proposal can be obtained. DAGTS can advise on the preferred Australian legal status for the international agreement or arrangement and will consult the Department of Foreign Affairs and Trade and the Attorney-General's Department as appropriate to determine this and the approach that should be adopted to achieve it. Whether the international agreement or arrangement is to be classified will be relevant to the question of legal status. If any difficulties in relation to legal status are identified when dealing with the other party, the issue is to be referred to DAGTS for advice.

## Preparation and Departmental Clearance of Draft

13. Either a first draft will be prepared within the Defence Organisation or a draft received from the other party and a counter draft prepared within the Defence Organisation. If a draft is received from the other party, a copy is to be sent to DAGTS for information. While it is primarily the responsibility of the sponsor to prepare a first draft or a counter draft, DAGTS can provide advice on the types of provisions that may be considered and the appropriate format and language. Once a first or counter draft is prepared, a copy is to be sent to DAGTS for departmental legal and drafting clearance. Input into the drafting at an early stage from all departmental areas with a responsibility for aspects of the international agreement or arrangement is likely to be of considerable value. However, at least the clearance of those areas is to be obtained by the sponsor once a first or counter draft is prepared.

14. In particular, any international policy aspects of the draft are to be cleared with International Policy (IP) Division, any security aspects are to be cleared with the Assistant Secretary Security (ASSEC) and any financial aspects are to be cleared with the Resources and Financial Programs (RFP) Division. Financial aspects that may need to be considered and cleared with RFP Division include cost recovery, billing arrangements, indemnities and insurance.

## Interdepartmental Clearance

15. Once a draft has been settled within the Defence Organisation, it is to be forwarded to DAGTS to arrange and facilitate the required legal and drafting clearances from the Department of Foreign Affairs and Trade and the Attorney-General's Department as appropriate. Times required by these departments to clear drafts vary. However, at least 4 weeks should be allowed to obtain these clearances. DAGTS will advise the sponsor of the draft of any likely delays in these clearances.

## **Negotiation**

16. Once a settled Australian draft is achieved, it can be put to the other party. Some negotiation of the draft usually will be required. This is the responsibility of the sponsor of the draft. Well before negotiations are arranged, an assessment should be made whether a lawyer will be required to assist in the negotiations. Records are to be made of the reasons for any changes made to the draft during negotiations and of any statements made about how its provisions are to be interpreted. These may be relevant to the later interpretation of the international agreement or arrangement. If significant redrafting occurs during negotiations, relevant Defence areas or other departments are to be consulted again as well as DAGTS who may need to again seek the legal and drafting clearance of the Department of Foreign Affairs and Trade and the Attorney-General's Department.

## **Approval of Settled Text**

17. Once a settled text is achieved for a document intended to be legally binding in international law, the approval of the Executive Council is required before it can be signed. At least 4 weeks should be allowed for the process required to seek this approval. DAGTS can advise on this process. If the document is intended to be legally binding in the domestic law of a country or part of a country, no formal approval process is required to enable the settled text to be signed after it has been cleared, but care should be taken to ensure the person intended to sign the settled text has legal and financial authority to do so. If the document is intended not to be legally binding in international law nor a domestic law, no formal approval process is required to enable the settled text to be signed after it has been cleared, but care should be taken to ensure that the signatory has any required financial authority and is appropriate from a policy perspective.

## **After Signature**

18. Once signed, the original of any international agreement legally binding in international law is to be either forwarded to DAGTS for onforwarding to the Department of Foreign Affairs and Trade or, after consultation with DAGTS, forwarded directly to the Department of Foreign Affairs and Trade and a copy forwarded to DAGTS for inclusion in the Register of Agreements. Preferably the original, but at least a signed copy, of any other international agreement or arrangement is to be forwarded to DAGTS for inclusion in the Register of Agreements and DAGTS will forward copies to the Department of Foreign Affairs and Trade and the Attorney-General's Department as appropriate for their records. Copies of the records made of the reasons for any changes to the draft international agreement or arrangement during negotiations and of any statements made about how its provisions are to be interpreted are also to be forwarded to DAGTS for inclusion in the Register of Agreements.

## **AMENDMENT, EXTENSION AND TERMINATION**

19. The same procedures as those set out above for the conclusion of international agreements and arrangements are to be followed in relation to the amendment, extension or termination of international agreements or arrangements.

**Annex:** A. The Register of Agreements

**Sponsor:** ASLEG

## **THE REGISTER OF AGREEMENTS**

1. The Defence Organisation's Register of Agreements is maintained by the Directorate of Agreements (DAGTS) in Legal Services Branch. The Register of Agreements was established in 1977 as the Defence Organisation's repository for all Defence international agreements and arrangements (other than commercial contracts such as those for the procurement or sale of specific property or services) with the aim of making it as comprehensive as possible.
2. The Register of Agreements consists of the originals or copies of international agreements or arrangements sponsored by Defence which have been made or, in many cases, which have been proposed. These include international agreements and arrangements made by the Australian Government, the Department, the Australian Defence Force and the single Services. Generally, some papers relating to the negotiation and conclusion of these international agreements and arrangements also are held in the Register of Agreements.
3. The Register of Agreements is thus a source of reference for:
  - a. particular Defence international agreements or arrangements, and
  - b. the nature and state of the formal defence relationship with other countries and international organisations.
4. As many of the documents held in the Register of Agreements are classified, there is no open access to the Register of Agreements. Advice on and copies of unclassified international agreements or arrangements will be provided on request. However, the clearance of the Defence sponsor of each classified international agreement or arrangement is required before advice on or a copy of it will be provided.
5. DAGTS' staff are available to respond to telephone inquiries on any aspect of the Register of Agreements. The initial point of contact is:

Executive Officer Agreements (EOAGTS)  
Telephone: 266 9169