

AUSTRALIA

A. SUBSTANTIVE ASPECTS
I. Definitions
1. In your practice, do you use the term “non-legally binding agreement”? If so, how do you define it? No.
2. If not, what term do you use instead (e.g. arrangements) and how do you define it? <i>Australia uses the term "less-than-treaty status instruments". An instrument of less-than-treaty status is intended to embody a political and moral commitment without creating (of its own force) legal rights or obligations. Less-than-treaty status instruments are often termed "arrangements" or "Memoranda of Understanding".</i>
3. Do you consider "Memoranda of Understanding" to be legally binding or non-legally binding instruments? Or can they be both? <i>It is common practice in Australia to use the term "Memoranda of Understanding" to denote instruments-of-less than treaty status, that is, instruments which are not considered to be binding under international law and are intended to embody political commitments without creating legal rights or obligations. Australia has a very limited number of historic examples of "Memoranda of Understanding" that have been considered legally binding agreements.</i>
II. Distinction
4. How do you differentiate between treaties, international civil law contracts and non-legally binding agreements? <i>Australia differentiates between treaties, international civil law contracts and instruments of less-than-treaty status by having regard to the intention of the participants as expressed, as well as by reference to textual indicia, such as the title of the document and the language used throughout. Regard is also had to any clauses pertaining to the legal status of the document, reference to the document as being registrable with the United Nations in accordance with Article 102 of the United Nations Charter or clauses providing for compulsory binding dispute settlement.</i>
5. In your view, is there one (or multiple) essential element(s) typically qualifying an agreement as non-legally binding? If so, which one(s)? <i>Australia's practice is to use non-mandatory language in less-than-treaty status instruments. For example, under Australia's longstanding practice, terms such as, 'shall', 'agreement' and 'agree' would be reserved for binding agreements (treaties), while non-mandatory terms, such as 'will', 'arrangement', 'decide' and 'jointly determine' typically indicate a non binding commitment such as those found in an instrument of less-than-treaty status. If an instrument provides ,that it is intended to be legally binding or includes a clause stating that the document will be registered with the United Nations in accordance with Article 102 of the UN Charter, this strongly signifies its status as a treaty.</i>
6. Do you distinguish between “MoUs” and other types of non-legally binding agreements, such as “joint declarations of intent” or “arrangements”? If so, how? <i>No. All non-legally binding agreements would be considered less-than-treaty status instruments in Australia.</i>
7. If you distinguish between different types of non-legally binding agreements, do you have different internal rules applying to them? N/A

8. Do you distinguish between the type of non-legally binding agreement concluded with international organisations or States? Do you have different rules applying to non-legally binding agreements depending on whether the other side is a State or an international organisation? No.
III. Competence
9. Who, within your State/International Organisation, has the competence to sign a non-legally binding agreement? <i>A less-than-treaty instrument can be signed by any official with the appropriate delegation to commit Australia to the responsibilities and commitments contained within the instrument.</i>
10. <u>For States</u>: Are sub-national territorial units like single federal states, provinces, municipalities or public agencies competent to conclude their own non-legally binding agreements? <i>Yes. Australian state and territory governments and local governments may negotiate, and enter into, non-legally binding arrangements (noting this does not extend to treaties).</i> <i>Australian state and territory governments are subject to Australia's Foreign Arrangement's scheme. The Foreign Arrangements Scheme commenced on 10 December 2020. Its purpose is to ensure that arrangements between state or territory governments (and their entities) and foreign entities do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy.</i> <i>The Scheme provides for states and territories and their entities to notify or seek approval from the Minister for Foreign Affairs if they propose to negotiate, or enter, or have entered a foreign arrangement. It creates obligations in respect of both future arrangements and existing arrangements. It also deals with subsidiary arrangements entered into for the purposes of implementing a foreign arrangement.</i> <u>For International Organisations</u>: Are bodies/specialized agencies competent to conclude their own non-legally binding agreements (or can they sign non-legally binding agreements on behalf of the entire organisation)? .
IV. (Indirect) Legal Effects
11. Do you consider non-legally binding agreements capable of producing (indirect) legal effects, for example as preparatory acts for/in connection with a legally binding instrument or as interpretative guidance for such binding instruments? <i>Australia considers instruments of less-than-treaty status capable of being interpretative or providing practical or operational guidance for the implementation of binding agreements, and uses less-than-treaty instruments for this purpose.</i> <i>It is not necessary for a less-than-treaty status instrument to exist before Australia can enter into a binding agreement on that subject matter. In Australia an instrument of less-than-treaty status can be (and usually is) an independent, standalone document unattached to a treaty.</i> Would you consider non-legally binding agreements under certain circumstances as a prerequisite of a binding instrument of international law?
B. PROCEDURAL ASPECTS
V. Choice of Instrument

12. What factors influence or determine your decision whether to opt for a legally binding or non-binding agreement? For instance, do you sign non-legally binding agreements to facilitate the conclusion of a legally binding agreement in the future or do you conclude non-legally binding agreements in situations in which a legally binding agreement cannot be reached with the involved sides? <i>The choice of instrument will depend on the unique circumstances of each matter and the desired policy outcomes.</i>
13. Who, within your State/international organisation, ultimately decides whether to conclude a treaty or a non-legally binding agreement? <i>The relevant Government department responsible for the subject matter of the arrangement will be responsible for seeking relevant approvals from the Foreign Minister or the Prime Minister or Cabinet in order to negotiate a legally binding instrument with another Party. Instruments of less-than-treaty status are pursued at the departmental level of Government and depending on the circumstances may or may not require Ministerial agreement.</i>
14. What are the main differences in your internal procedure when concluding a non-legally binding agreement or a binding treaty? <i>Australia progresses all treaties (internationally legally binding agreements) through our domestic treaty-making process, which includes parliamentary scrutiny. There is no equivalent process for less-than-treaty status instruments.</i>
VI. Formal Assessment¹ of Non-legally Binding Agreements
<u>For States:</u>
15. In your State, is there a mandatory centralised formal assessment of non-legally binding agreements concluded by any government ministry? <i>Australia's longstanding practice is that instruments of less-than-treaty status will be reviewed by the Department of Foreign Affairs and Trade's (DFAT) Treaties Secretariat for a treaty-risk review prior to signature.</i>
16. If so, what Ministry/body performs this formal assessment? <i>Please refer to Question 15.</i>
17. At what time in the process of concluding a non-legally binding agreement is the formal assessment carried out? <i>Please refer to Question 15.</i>
18. If sub-national territorial units/bodies or specialized agencies are competent to conclude non-legally binding agreements (cf. question 9), are such agreements subject to the same formal assessment applicable for agreements of the (federal) government/international organisation? <i>Through the Foreign Arrangements Scheme (ref Question 9) established by Australia's Foreign Relations (State and Territory Arrangements) Act 2020, the Australian Government maintains oversight of non-legally binding foreign arrangements entered into by governments of Australia's states and territories. This is a discrete legal framework and does not apply to less-than-treaty status instruments entered into by the federal government.</i>
19. Do you have an internal standard/written guidance for formally assessing non-legally binding agreements, i.e. a law, a directive or internal guidelines?

¹ In this section, "formal assessment" refers to the internal procedure for checking the formal criteria of a draft agreement to ensure it is clearly identifiable as non-legally binding.

DFAT provides a publicly available guidance note on Australia's practice for concluding less-than-treaty status instruments. This is available at www.dfat.gov.au/international-relations/treaties/australias-practice-concluding-less-than-treaty-status-instruments.

20. How do you ensure all relevant actors are aware of the requirement of a centralised formal assessment of a non-legally binding agreement?

Please refer to Question 19. DFAT also routinely conducts training for whole-of-government on less-than-treaty status instruments.

21. How do you ensure that non-legally binding agreements are, in fact, submitted for the centralised formal assessment procedure?

Please refer to Question 15.

22. Does the responsible ministry/body provide guidance to other (government) departments and agencies on best practices with respect to non-legally binding agreements (e.g. workshops, information materials on how to properly draft and conclude non-legally binding agreements)?

Yes. Please refer to Question 19.

For International Organisations:

23. If such a process exists, please describe the regular process of formal assessment of non-legally binding agreements within your organisation.

N/A.

VII. Democratic Review/Parliamentary Participation

For States:

24. Is your legislature notified or consulted about the conclusion of non-legally binding agreements? If so, does parliament need to be involved for any non-legally binding agreement or are there limitations (eg only for politically significant agreements)? Who determines whether such requirements are fulfilled?

Australia's domestic treaty process, which involves formal parliamentary scrutiny, is reserved for legally binding instruments. Please . refer to Question 14..

25. If so, at what stage of the process is the legislature usually involved?

N/A.

26. Does your parliament or other legislative have a right to monitor and/or review non-legally binding agreements?

Please refer to Question 14.

27. If legislative participation is provided for, does the legislature have a (legal) remedy if it perceives a violation of its right to be consulted/to participate?

N/A

For International Organisations:

28. In case you have an internal directive/guideline on how to conclude non-legally binding agreements, has this document been approved by the member States/a statutory organ of the organisation?

N/A

VIII. Signature and Format

29. Is there a formal procedure to authorise the signature of a non-legally binding agreement? <i>The procedure followed by government will vary depending on the instrument and circumstances.</i>
30. Do the signatures of the non-legally binding agreement in question necessarily have to be on the same document? <i>No, less-than-treaty status instruments can be signed in counterpart if required.</i>
31. Do you allow for electronic signature of your non-legally binding agreements? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of non-binding agreements instead of the exchange of physical copies? <i>Australia allows for electronic signature of instruments of less-than-treaty status if required. Australia can also accept the electronic transmission of such instruments.</i>
32. <u>For States:</u> Do you always require non-legally binding agreements to be set in your own language or do you also accept them exclusively in the partner's language / in English (or any other "neutral" language)? <i>Australia requires all instruments of less-than-treaty status to be concluded in English and does not accept them exclusively set out in the partner's language. It is not uncommon for a less-than-treaty instrument to be concluded in multiple languages if desirable.</i> <u>For International Organisations:</u> What language do you usually require for the text of your non-legally binding agreements? N/A
33. Do you have any formal requirements exclusively for concluding non-legally binding agreements? (e.g. using a special kind of paper only for non-legally binding agreements) No.
IX. Registration and Publication
34. Do you have a (digital) register/archive/database for all non-legally binding agreements signed by your country? <i>No, this is managed by the responsible agencies.</i>
35. If so, what entity keeps the non-legally binding agreement after signature? <i>Following signature of an instrument of less-than-treaty status, the relevant Government department with carriage of the matter retains the original signed version.</i>
36. Do you publish your non-legally binding agreements and are they openly accessible? <i>No. Australia does not maintain an openly accessible collection of instruments of less-than-treaty status.</i>
37. Are there certain reasons (confidentiality, security, etc.) why non-legally binding agreements can be withheld from central registration/storage or (if applicable) publication? If so, which ones? <i>Please refer Question 36.</i>

X. Education/Training

38. How do you disseminate information internally regarding the differences between binding and non-legally binding agreements? For example, are there regular workshops or training sessions with the units drafting non-legally binding agreements? Are there certain standard forms ("Model MoU"), which units can use as a drafting aid?

Yes, a Model MoU, including sample paragraphs, is included in Australia's publicly available guidance on less-than-treaty status instruments (Ref Question 19). Training by government on treaties will also often include sessions on appropriate language for less-than -treaty status instruments.

C. GENERAL OBSERVATIONS ON STATE PRACTICE (AND WAY FORWARD)

39. What, in your view, is the main benefit of using non-legally binding agreements? What is your main concern?

The main benefit of less-than-treaty instruments is the flexibility it affords parties to more expeditiously conclude written commitments with one another.

40. In recent years, have you been concluding an increased number of non-binding international agreements? If so, why do you think this is the case?

We estimate the number of less-than-treaty instruments Australia has concluded would be broadly consistent in recent years.

For International Organisations:

41. How would you describe the main differences between resolutions/declarations adopted by IOs and non-legally binding agreements concluded by IOs from a legal and practical perspective?

N/A.

42. Do you attribute any law-making effect to non-legally binding agreements? Or do you see them as mere status and administrative arrangements for the purposes of international organisations?

N/A.