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Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover 'instruments of less than treaty status'?

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Summary

Many significant agreements between Australia and other countries are contained in instruments which are neither designated as nor intended to be treaties binding as a matter of international law. While some of these agreements may in fact be treaties, most are arrangements that are binding only as a matter of political or moral obligation, and their efficacy results from the shared interests of the countries which have concluded them.

This paper addresses the current state of Parliamentary and public access to the texts of formal arrangements between Australia and other countries that are of 'less than treaty status'.^{*} It argues that many of these arrangements are of considerable practical and political significance to the relations between Australia and the other countries which are parties to those agreements. At present the publication of such documents is sporadic and unsystematic, and the text of many such instruments is not available to the public on government websites. The paper argues that some of the reasons that led to the systematic approach to the publication of treaties and related information and to enhanced Parliamentary consideration of treaties also apply in relation to many of these instruments.

^{*} This paper draws on my submission to the *Inquiry into the Commonwealth's Treaty-making process* conducted by the Senate Standing Committee on Foreign Affairs, Defence and Trade in 2015 ([Submission No 77](#)).

The paper recommends that a review of the practice of (non-)publication of instruments of less than treaty status be undertaken, with a view to the adoption of a more systematic approach to the collection and publication of such instruments, with a presumption in favour of publication. It also proposes that the conclusion of such instruments should be reported on a regular basis to JSCOT and that the Committee should have the mandate to consider those instruments as it thinks fit.

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Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover 'instruments of less than treaty status'?*

Andrew Byrnes

A. Background

International cooperation in combatting international terrorism: the use of the memorandum of understanding

1. In the years following the September 11 attacks, Australia entered into a number of arrangements with countries in our immediate region and beyond to enhance cooperation in efforts to combat international terrorism. Each agreement was embodied in a document entitled 'Memorandum of Understanding' between Australia and the other government, and the conclusion of the MOUs was announced in a series of ministerial press releases.¹ By the end of 2005 Australia had entered into twelve counter-terrorism MOUs with countries in the region including Indonesia, Malaysia, Thailand, the Philippines, Fiji, Cambodia, East Timor, India, Papua New Guinea, Brunei, Pakistan, and Afghanistan.² MOUs have since been concluded with a further five countries: Turkey, Bangladesh, the United Arab Emirates, Saudi Arabia and France.³

2. Based on the relevant press releases and the few MOUs that have become available, it appears that these agreements set out a framework for cooperation

* This is a revised version of a paper prepared for the 20th anniversary seminar of the JSCOT held on 18 March 2016, upon which my presentation at that event was based. For a webcast of the seminar, see http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/20th_Anniversary (visited 19 March 2016).

¹ See, eg, Media Release, FA143 - 3 October 2002, 'Australia and Thailand Sign MOU on Counter-Terrorism', http://www.foreignminister.gov.au/releases/2002/fa143_02.html (visited 16 March 2016); Media Release, FA161 - 20 December 2005, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding', http://foreignminister.gov.au/releases/2005/fa161_05.html (visited 16 March 2016).

² Media Release, FA161 - 20 December 2005, 'Australia and Afghanistan Sign Counter-Terrorism Memorandum of Understanding', http://foreignminister.gov.au/releases/2005/fa161_05.html (visited 16 March 2016).

³ DFAT, 'Australia's international counter-terrorism efforts', <http://www.dfat.gov.au/international-relations/security/counter-terrorism/our-role/Pages/australia-s-international-counter-terrorism-efforts.aspx> (visited 16 March 2016). There are no links to the texts of any of these MOUs provided on the webpage.

between Australia and the other government;⁴ the designation of the agreements as MOUs indicated that they were not intended to create binding obligations and were thus not to be viewed as ‘treaties’ under international law.

3. The MOUs were not published by the Australian government following their conclusion (nor, it appears, by the other governments). The Department of Foreign Affairs and Trade declined requests for copies of the documents, stating that to make copies available to the public would be inconsistent with the expectations of the other parties to the agreement. Nor did the government take up suggestions that it might approach the other governments concerned to see if they had any objections to release of the documents.⁵

4. To the best of my knowledge, these MOUs have never been made public by the Australian government – or, if they have, they are not readily retrievable on any Australian government website. Yet it appears that all of these are still in force, as they are listed on the website of the Department of Foreign Affairs and Trade as among the ‘key elements of Australia’s international counter-terrorism effort.’⁶ Some of them are also referred to on the relevant Country brief webpages on the DFAT website.⁷

5. These MOUs are in fact fairly anodyne documents, containing general expressions of willingness to collaborate across a number of areas in relation to counter-terrorism efforts. There appears to be nothing in them which, if disclosed, would prejudice the national security of Australia or of other countries, or which would have an adverse impact on operational matters. Yet they were significant documents so far as Australia’s cooperation with these other governments in the field of counter-terrorism was concerned, and deserved public scrutiny. At the time when the first tranche of these counter-terrorism MOUs was negotiated, one of the concerns of civil society and academic commentators was whether these agreements contained adequate safeguards to ensure that human rights would be observed as part of any activities undertaken under the MOUs. The refusal of government to make public the text of the MOUs made such an assessment extremely difficult,

⁴ See the extracts from a number of press releases in ‘Australian Practice in International Law 2003: Terrorism – Counter-Terrorism Agreements’ (2005) 24 *Australian Yearbook of International Law* 434-436.

⁵ In fact, I obtained copies of a number of the MOUs by writing directly to the diplomatic missions of the countries concerned in Australia.

⁶ DFAT, ‘Australia’s international counter-terrorism efforts’, <http://www.dfat.gov.au/international-relations/security/counter-terrorism/our-role/Pages/australia-s-international-counter-terrorism-efforts.aspx> (visited 16 March 2016).

⁷ While four of the seventeen DFAT Country briefs refer explicitly to the individual MOUs (India, Malaysia, the Philippines, and Brunei), none of the seventeen Country briefs contains the text of the MOU or provides a link to it (DFAT website, visited 16 March 2016).

though specific references to the need to comply with human rights in responding to terrorism do not appear in those MOUs that have become available.⁸

6. These counter-terrorism MOUs are but one example of the way in which the Australian government and its agencies enters into arrangements with foreign governments and agencies which, although not necessarily creating international legal obligations, nonetheless give rise to expectations on both sides and can significantly affect the way in which Australian government agencies work with their international counterparts and may have an impact on the rights of Australian citizens and residents. As these documents are not classified as ‘treaties’, they do not have to be tabled in Parliament and brought to the attention of the Parliament’s Joint Standing Committee on Treaties,⁹ nor is there any formal requirement of general application that they be made available to the public. If they require legislative implementation, they may come to the attention of the Parliament, but in many cases legislation is not required to give effect to them, so Parliament may not get to see them at all.

7. The counter-terrorism MOUs involved the deliberate refusal by government to publish MOUs on matters of public interest and importance. However, such MOUs are only one subcategory of the large number of MOUs and similar agreements concluded by Australia across many fields of government activity. While the non-publication of MOUs relating to counter-terrorism cooperation gives rise to particular concerns, a related and equally important matter is the unsystematic approach adopted more generally to the publication of formal agreements of ‘less than treaty status’, some of which are designated as MOUs, others of which bear different titles.

8. There appears to be no consistent policy or practice in relation to the publication of such documents – whether they are published at all, when they are published, where they are published, or whether all documents of a particular type are published or are published in the same place.¹⁰ The consequence is that whether these documents are available for public scrutiny seems to be a matter of chance.

⁸ See, eg, *Memorandum of Understanding between the Government of Australia and the Government of the Republic of the Philippines on co-operation to combat international terrorism*, 4 March 2003 (on file with author).

⁹ For example, the primary focus of the JSCOT is on ‘treaties’, although it has the power ‘to inquire into and report on ... any question relating to a treaty or other international instrument, whether or not negotiated to completion’ which is referred to it by either House of Parliament or a Minister, or ‘such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.’ Joint Standing Committee on Treaties, [Resolution of appointment \(2013\)](#) (visited 16 March 2016).

¹⁰ For example, while the DFAT Freedom of Information pages on the Departmental website lists a variety of operational documents regularly made public under the Information Publications Scheme (including treaties), it contains no reference to MOUs or other instruments of less than treaty status: Department of Foreign Affairs and Trade, ‘Information publications scheme’,

9. This paper is not based on a comprehensive survey of the myriad forms and subjects of MOUs entered into by the Commonwealth; one of the issues is that we simply do not know how many there are concluded by government and its agencies. I argue that, given the increasing importance of non-treaty arrangements in regulating relations between Australia and other countries, the failure to have a systematic policy for the publication of non-treaty arrangements is cause for concern, in particular because this failure limits or makes impossible proper public and Parliamentary scrutiny of Australia's international actions in areas of importance.

B. The importance of non-treaty arrangements in international relations

10. While bilateral and multilateral treaties are an important method by which nation-States regulate their interactions with each other and other actors, they are by no means the only way in which States do this. For a variety of reasons, States have increasingly resorted to other formats: these include so-called 'soft law' instruments which are not themselves treaties but which may contain norms, guidelines or standards intended to influence behaviour; bilateral 'political' agreements to cooperate in particular areas; and political undertakings embodied in joint declarations or similar documents. In many cases these documents are intended to avoid the creation of international legal obligations, are non-binding in form, and therefore do not qualify as a 'treaty' for the purposes of international law and national law.¹¹ Accordingly, these instrument and arrangements may not be subject to legislative or other review processes at the national level that apply only to 'treaties'. Such non-treaty instruments thus bring with them the advantages of convenience and flexibility (and the possibility of confidentiality in appropriate cases),¹² but also the consequence (intended or unintended) that they may escape the level of public and Parliamentary scrutiny accorded to treaties.

11. Scholars have pointed to the growth in 'informal international law making' in international relations, pointing to the increasing use being made by States of non-

<http://dfat.gov.au/about-us/corporate/freedom-of-information/Pages/information-publications-scheme.aspx> (visited 16 March 2016).

¹¹ Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969 defines a 'treaty' for the purposes of the Convention 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...'

¹² 'MOUs', Chapter 3 in Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed 2013) 28, 40-44. Rothwell et al comment: 'Because of the informality associated with MOUs, they are capable of relatively speedy conclusion, and are flexible enough to deal with fast-developing situations where time does not permit the negotiation and conclusion of a formal treaty, including the processes associated with entry into force.' Don Rothwell, Stuart Kaye, Afshin Akhtarkhavari and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2nd ed 2014) 135.

treaty instruments in many areas of transnational or global governance.¹³ Arrangements are entered into, and 'non-binding standards' adopted, sometimes on an agency to agency basis, that can significantly influence the way in which national agencies carry out their functions. Commentators have noted that the use of such informal techniques can give rise to issues of democratic legitimacy and accountability as the agreements and instruments involved, even if available to the public, may not be subject to scrutiny by a legislature in the same way that an agreement of treaty status or ordinary legislation might be.¹⁴

12. The 'relentless rise of the MOU'¹⁵ is one dimension of this approach to regulating relations between States. Australia, like other countries, makes frequent use of agreements which are said to be of less than treaty status. As the *DFAT Treaty Making Kit* explains:¹⁶

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.

13. While the designation of an agreement as a 'memorandum of understanding' does not mean that it cannot be a treaty,¹⁷ it is generally to be taken as a clear indication that the parties to the memorandum (or at least one of them) does not intend that the document give rise to binding obligations under international law. However, to determine whether an agreement is a treaty or an agreement of less than treaty status requires examination of the terms and context; indeed there are documents which may well be treaties even though designated by a term normally

¹³ See, eg, Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When structures become shackles: stagnation and dynamics in International lawmaking' (2014) 25(3) *European Journal of International Law*, 733-763; Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, *Informal International Lawmaking* (Oxford University Press, 2012); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

¹⁴ See the sources cited in n 13 above.

¹⁵ See Aust, *Modern Treaty Law and Practice*, above n 12, 28.

¹⁶ Australia International Treaty Making Information Kit, www.austlii.edu.au/au/other/dfat/reports/infokit.html (visited 16 March 2016).

¹⁷ See Aust, *Modern Treaty Law and Practice*, above n 12, 29-39.

associated with non-binding documents. It is also possible that even non-binding MOUs can nonetheless generate legal consequences for the parties.¹⁸

C. The post-*Trick or Treaty?* reforms

14. The purposes of the treaty reforms adopted in the mid-1990s included: making more transparent the process by which the Commonwealth government undertook international commitments on behalf of Australia; informing the Parliament, the States and the public of the justification for assuming international obligations; and providing greater opportunity for providing input into that process and to scrutinise the results of treaty negotiations. While the JSCOT process has provided increased transparency, it affords almost no opportunity to influence the content of treaties (since the treaties examined are already concluded by the time the JSCOT reviews them). On the other hand, it provides a limited opportunity to influence the text of any declarations or reservations that Australia might enter to the treaty upon ratification, and to influence the content of domestic legislation implementing the treaty.

15. One of the important outcomes of the review was the establishment of the official *Australian Treaties Library*¹⁹ hosted on the website of the Australasian Legal Information Institute.²⁰ That website contains detailed information about Australia's treaties and treaty actions, including the text of treaties to which Australia is a party and have entered into force, the national interest analysis for treaties to which Australia proposes to become party, minor treaty actions (generally involving minor technical amendment to existing treaties), a list of treaties that are not yet in force for Australia, a list of multilateral treaty actions under negotiation or consideration, and other information. This material makes accessible to the public in comprehensive and systematic way the details of Australia's treaty obligations and related material.

D. Lack of a systematic approach to the publication of MOUs

16. Because they involve formal arrangements for the exercise of public power the text of MOUs and other arrangements of less than treaty status should as a matter of principle be made public. MOUs often concern important areas of international cooperation and should be open to public and Parliamentary scrutiny as is every other area of government activity. While there may be reasons for some

¹⁸ Ibid 50-52.

¹⁹ <http://www.austlii.edu.au/au/other/dfat/> (visited 16 March 2016).

²⁰ www.austlii.org. AUSTLII is a joint project of the University of Technology Sydney and the Faculty of Law at my own institution, the University of New South Wales. The *Australian Treaties Library* on AUSTLII has been significantly supported institutionally and financially since its inception by the Department of Foreign Affairs and Trade.

MOUs to be confidential, the presumption should be one of openness and publication.²¹

17. However, in contrast to the position with regards to treaties, there appears to be no comprehensive list available of the MOUs which Australia and Australian agencies have entered into with other countries or with international organisations (even of those that are still in force). There is no website where Australia's MOUs are brought together in one place so that they are readily accessible to members of the public.²²

18. Nor does there appear to be systematic approach to the publication of MOUs. Sometimes they appear on the DFAT website under a thematic page²³ or country/regional page, but not always. Sometimes they appear on a Ministerial website as part of a news item, which may be archived and thus unavailable or not readily available when there is a change of Minister or government. Some appear not to be made publically available at all. In some cases one can find the text only on non-governmental websites; in others it is only to be found on a government website in another country. Examples of the inconsistent practice are provided below.

Some further examples of inconsistent and unsatisfactory practice in relation to the availability of MOUs and other agreements of less than treaty status

19. DFAT Country Brief webpages frequently refer to MOUs with the country in question. However, mention of a MOU on a Country page does not necessarily mean that the text of the MOU will be available on that page or linked from it. For example, the Australian-Philippines terrorism cooperation MOU is mentioned on the Philippines Country brief webpage on the DFAT website, but the text is not available on or through that page (or anywhere else, it seems). Similarly, an MOU between Cambodia and Australia relating to investment cooperation concluded in 2006 is

²¹ Compare the recommendation by the Australian Law Reform Commission in relation to MOUs between domestic agencies in relation to the sharing of information as well as between Australian agencies and the agencies of other countries that 'Australian Government agencies should make such MOUs publicly available save in certain exceptional cases where this would be unreasonable or impractical.' ALRC, *Secrecy Laws and Open Government in Australia* (ALRC Report 112) (2010), Recommendation 14–4. I have been unable to find a formal government response to this recommendation.

²² My focus here is on arrangements entered into by the Commonwealth or Commonwealth agencies, and I do not consider the topic of arrangements entered into by State or Territory agencies with their foreign counterparts.

²³ See, eg, the MOUs relating to development cooperation the text of which is made available at <http://www.dfat.gov.au/aid/who-we-work-with/bilateral-partnerships/Pages/australias-development-partnerships-with-other-bilateral-donors.aspx> (visited 16 March 2016).

referred to on the Cambodia Country brief webpage,²⁴ but the text does not appear to be available on or from that page (or elsewhere on a government website).²⁵

20. The practice of publication of MOUs has also been inconsistent even in the same broad policy area or portfolio. For example, the MOUs relating to the processing of refugee applications by persons sent to Nauru and Papua New Guinea have been made available on the DFAT website under both the thematic page on 'People smuggling and trafficking' and the respective Country brief webpages.²⁶ However, the similar *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia 2014*, appears only on the DFAT People 'Smuggling and trafficking' webpage²⁷ but not on the Cambodia Country page.²⁸

21. In some cases the publication of the text of an MOU appears to be the result of external pressure. For example, the *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants 2009*²⁹ does appear on the website of the Attorney-General's Department. However, this was apparently the result of a successful FOI application rather than an example of publication of the MOU as a matter of course, and the document – made available over three years after its

²⁴ www.dfat.gov.au/geo/cambodia/Pages/cambodia-country-brief.aspx (visited 16 March 2016).

²⁵ A further example is an MOU between Australia and the UAE in relation to cooperation in the field of education: 'UAE signs education MOU to strengthen bilateral relations with Australia', 02 Jun 2014, <http://www.austrade.gov.au/Australian/Education/News/Austrade-update/uae-signs-education-mou-to-strengthen-bilateral-relations-with-australia> and <http://dfat.gov.au/geo/united-arab-emirates/pages/united-arab-emirates-country-brief.aspx> (14 March 2016) (no link to text). Yet another MOU with the UAE in the field of education was published: *Memorandum of Cooperation between Tertiary Education Quality and Standards Agency, Australia and University Quality International Board of the Knowledge and Human Development Authority, United Arab Emirates*, January 2015, <http://www.teqsa.gov.au/sites/default/files/MoUwithUQA1.pdf> (visited 14 March 2016).

²⁶ *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 29 August 2012, <http://www.dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf> (visited 16 March 2016); *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, 6 August 2013, <http://www.dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.pdf> (visited 16 March 2016).

²⁷ <http://www.dfat.gov.au/international-relations/themes/people-smuggling-trafficking/Pages/people-smuggling-and-trafficking.aspx> (visited 16 March 2016)).

²⁸ <http://www.dfat.gov.au/geo/cambodia/Pages/cambodia.aspx> (visited 16 March 2016).

²⁹ http://www.ag.gov.au/RightsAndProtections/FOI/Documents/MOU_with_Sri_Lanka_on_the_Smuggling_of_Migrants.PDF (visited 16 March 2016).

conclusion --is accessible via the Department's FOI disclosure log rather than through a thematic or country link.³⁰

22. Australia and New Zealand have entered into a number of MOUs on the exchange of criminal history information for vetting purposes: an MOU relating to a trial period was published in an assessment of its operation,³¹ but a subsequent MOU signed in February 2015 does not appear to have been published.³²

23. By contrast in other cases there appears to have been publication of an MOU at the time it was signed. For example, on 16 November 2011 the Australian and United States governments concluded an MOU on enhancing cooperation in preventing and combatting crime.³³ Unlike many other such MOUs this one was made available publically by both sides when the Australian Prime Minister³⁴ and the US President³⁵ issued a press statement. The agreement entered into force upon signature.

³⁰ 'Documents concerning legal cooperation on people smuggling and mutual assistance with Sri Lanka', 9 April 2013, <http://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureLog/DocumentsconcerninglegalcooperationonpeoplesmugglingandmutualassistancewithSriLanka.aspx> (visited 16 March 2016).

³¹ See Attorney-General's Department, *Privacy Impact Assessment: Trial exchange between the Government of New Zealand and the Government of Australia of criminal history information for vetting purposes*, 29 May 2012, Annexure A, <https://www.ag.gov.au/Publications/Documents/ExchangeofcriminalhistoryinformationwithNZforvettingpurposes/PIAonthesixmonthtrialwithNZfortheexchangeofcriminalhistoryinformationforvettingpurposes.pdf> (visited 16 March 2016).

³² Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, The Hon Michael Keenan, and New Zealand Minister of Justice, The Hon Amy Adams MP, 'Australia and New Zealand sign MoU for criminal history checks', Joint media release, 28 February 2015, <https://www.ministerjustice.gov.au/Mediareleases/Pages/2015/FirstQuarter/28-February-2015-Australia-and-New-Zealand-sign-MoU-for-criminal-history-checks.aspx> (visited 16 March 2016).

³³ *Memorandum of Understanding between the Government of the United States of America and the Government of Australia on Enhancing Cooperation in Preventing and Combating Crime*, signed 16 November 2011.

³⁴ The document appears to have been made available on 16 November 2011 on the then Prime Minister's website but that link no longer functions (<https://pmtranscripts.dpmc.gov.au/release/transcript-18275>, visited 14 March 2016). It was made available on 5 July 2012 through the Freedom of Information Register of the Commonwealth Attorney-General's Department, <https://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureLog/theMemorandumofUnderstandingbetweentheGovernmentoftheUnitedStatesofAmericaandtheGovernmentofAustraliaonE.aspx> (visited 16 March 2016).

³⁵ The document was available on the White House website on 16 November 2011, <https://www.whitehouse.gov/the-press-office/2011/11/16/fact-sheet-memorandum-understanding-between-us-and-australia-enhancing-c> (text at https://www.whitehouse.gov/sites/default/files/MOU_US_Australia.pdf, visited 14 March 2016).

24. Another example of a MOU between two government agencies that has been published on both agencies' websites is the 2008 cooperation agreement between United States Securities and Exchange Commission and Australian Securities and Investments Commission.³⁶ Indeed, ASIC appears to represent best practice in this area, reproducing the text of the MOUs and 'other international agreements' that it has entered into with over 50 partners, on its website.³⁷

25. Resort to a foreign government's website appears to be the only way to easily access the text of some other MOUs. For example,³⁸ the Australia-Indonesian *Memorandum of Understanding on Cooperation in Education and Training between the Department of Education, Science and Training of Australia and the Department of National Education of the Republic of Indonesia* 2003 is referred to on the DFAT country page for Indonesia but without further details or a link to the text.³⁹ The only place where the text of the agreement is readily available appears to be the Indonesian government's international treaty database.⁴⁰

Unpublished MOUs referred to in or relevant to the interpretation of primary or delegated legislation

26. On occasion the content of an MOU may be relevant to the meaning of an Australian statute or a piece of delegated legislation. For example, the *International*

³⁶ *Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Enforcement of Securities Laws*, 25 August 2008, available at https://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/enhanced_enforcement_mou.pdf and <http://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/> (visited 16 March 2016). Other MOUs, in the field of development cooperation, that have been published include the *Joint Declaration of Principles Guiding Relations Between Australia and Papua New Guinea 1987, as amended by exchange of letters 1992*, <http://dfat.gov.au/geo/papua-new-guinea/Pages/joint-declaration-of-principles-guiding-relations-between-australia-and-papua-new-guinea.aspx>; and the *Memorandum of Understanding (MOU) on International Development Cooperation between Australia and Japan*, 12 December 2011, text at <http://dfat.gov.au/about-us/publications/Documents/japan-ausaid-mou.pdf> (visited 16 March 2016).

³⁷ 'Memoranda of understanding and other international agreements', <http://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/> (visited 14 March 2016).

³⁸ Other examples (as of 23 March 2016) are the *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability 2009* (available only on a New Zealand government website) and the *Agreement between Ukraine and Australia on deploying Australian personnel to Ukraine in connection with MH17 Malaysia Airlines plane crash 2014* (available only on the website of the Ukrainian Parliament). Both are discussed below.

³⁹ <http://www.dfat.gov.au/geo/indonesia/Pages/indonesia-country-brief.aspx> (visited 16 March 2016)

⁴⁰ http://treaty.kemlu.go.id/uploads-pub/1866_AUS-2003-0145.pdf (visited 16 March 2016).

Development Law Organization (Privileges and Immunities) Regulations 2007 conferred on the International Development Law Organisation (IDLO) and its staff a range of immunities consistent with the status of IDLO as an intergovernmental organisation. The Explanatory Statement read:

The Regulations give effect to a Memorandum of Understanding between the Australian Government and IDLO, signed on 28 June 2005, on the establishment and operation of IDLO's Asia Pacific Regional Center (APRC) in Australia ... Under the MoU, Australia committed to provide limited, non-financial, privileges and immunities to IDLO.⁴¹

27. The text of the Memorandum of Understanding was not annexed to the Regulations⁴² nor was it attached to the Explanatory Statement. Yet regulation 3(2) provided:

3 Definitions

(2) An expression used in these Regulations and in the Memorandum of Understanding has the same meaning in these Regulations as it has in the Memorandum of Understanding.

28. Accordingly, in this instance the meaning of a term in the Regulations could have been influenced by the meaning of the term in the MOU; at the very least anyone seeking to interpret the Regulations would have needed to consult the MOU in order to determine whether any issue did arise. However, at the relevant time, the text of the MOU did not appear to be publically available through Australian government sources; it is not currently available and does not appear to be available anywhere on the web. (IDLO no longer maintains a regional centre in Australia.)

29. By contrast, the text of the *Arrangement between the Government of Australia and the Asian Development Bank regarding the Pacific Liaison and Coordination Office of the Asian Development Bank 2005* which was similar in purpose was included as a schedule to the relevant regulations⁴³ and was thus available for public scrutiny.

30. A similar approach was adopted in relation to the conferral of similar privileges and immunities on the ICRC Regional Delegation in 2013 pursuant to the *Arrangement between the Government of Australia and the International Committee of the Red Cross ("ICRC") on a regional headquarters in Australia*. While the *Arrangement* was not included as a schedule to the relevant enabling bill and was

⁴¹ See *International Development Law Organization (Privileges and Immunities) Regulations 2007* (SLI No 85 of 2007), Explanatory Statement, Select Legislative Instrument 2007 No 85.

⁴² *International Development Law Organization (Privileges and Immunities) Regulations 2007*.

⁴³ *Asian Development Bank (Privileges and Immunities) Regulations 1967*, schedule 3.

thus not available for scrutiny by Parliament when that was considered,⁴⁴ it was included as an annex to the relevant regulations (which were laid before Parliament in the usual way).⁴⁵

31. None of the arrangements with the ADB, IDLO or the ICRC to confer privileges and immunities on an international entity appears in the *Australian Treaty Series*, thus indicating that the Australian government considered them to be instruments of less than treaty status – in other words, of similar legal status to the many arrangements designated as MOUs. Yet each had an impact on Australian law and potentially the rights of Australian citizens and residents.

32. Another case in which an arrangement of less than treaty status is referred to in Australian legislation but is not annexed to it and does not appear to be available on an Australian government website is the *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability 2009*. The Arrangement is referred to in the *Superannuation Legislation Amendment (New Zealand Arrangement) Act 2012*, but does not appear to be available on an Australian government website. It is, however, to be found on the website of New Zealand Inland Revenue.⁴⁶

The lack (or adhocery) of Parliamentary scrutiny

33. As a general rule, MOUs entered into with foreign countries or their agencies will not be presented to Parliament before or after they are entered into, unless they happen to be included as a schedule to a statute or delegated legislation, or come before a portfolio committee when the subject matter of the MOUs is being considered. While most MOUs may not raise significant issues deserving of attention by the Parliament, some do (especially perhaps those that government wishes to keep confidential). My argument is that there is a need to table such MOUs and to provide JSCOT with the opportunity to review them preferably before they are finalised or enter into force.

34. The opportunity for scrutiny of significant issues may otherwise turn on the contingent decisions to embody particular arrangements in an MOU rather than in a treaty. A striking example of this is the different treatment and level of Parliamentary scrutiny afforded to agreements on preventing and combatting crime entered into by

⁴⁴ See the comments of the Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, 229.

⁴⁵ *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*, Select Legislative Instrument No. 237, 2013.

⁴⁶ *Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability, July 2009*, available on NZ IRD Department website: <http://taxpolicy.ird.govt.nz/sites/default/files/2009-other-nz-australia-retirement-savings-portability-agreement.pdf> (visited 16 March 2016).

the United States with Australia and New Zealand that permitted the citizens of those two countries to continue to take advantage of the Visa Waiver Program.

35. As noted above, the 2011 Australian and United States MOU on enhancing cooperation in preventing and combatting crime⁴⁷ was, unlike many other such MOUs, one that was made available publically by both sides when it was signed. The agreement entered into force upon signature. It was not presented to the Australian Parliament for scrutiny.

36. On the other hand, the agreement between the US and New Zealand governments, which was signed on 20 March 2013, took the form of a treaty. The provisions of that Agreement are in essence the same as those of the Australia-USA MOU (apart from the legally non-binding nature of the latter agreement). The New Zealand government submitted the Agreement to the New Zealand Parliament⁴⁸ under its procedure for review of significant treaties by the legislature.⁴⁹ The Agreement was accompanied by a detailed National Interest Analysis.⁵⁰ The Foreign Affairs, Defence and Trade Committee of the New Zealand Parliament undertook an examination of the Arrangement and reported on 31 January 2014,⁵¹ making one recommendation, namely regular reporting to Parliament to ensure monitoring of the operation of the Agreement. On 18 March 2014 the Government agreed in principle to this recommendation,⁵² and the entry into force of the Agreement

⁴⁷ *Memorandum of Understanding between the Government of the United States of America and the Government of Australia on Enhancing Cooperation in Preventing and Combating Crime*, signed 16 November 2011.

⁴⁸ See <http://www.justice.govt.nz/policy/criminal-justice/organised-crime/agreement-on-enhancing-cooperation-in-preventing-and-combating-crime> (visited 16 March 2016).

⁴⁹ New Zealand Ministry of Foreign Affairs and Trade, *The Treaty making process in New Zealand*, updated 12 January 2015, www.parliament.nz/resource/0000177495 and *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2014, <https://www.mfat.govt.nz/assets/securedfiles/International-Treaty-Making-Guide-2014.pdf>.

⁵⁰ <http://www.justice.govt.nz/publications/global-publications/n/national-interest-analysis> (visited 16 March 2016).

⁵¹ New Zealand Parliament, *International treaty examination of the Agreement between the Government of New Zealand and the Government of the United States on Enhancing Cooperation in Preventing and Combating Crime*, Report of the Foreign Affairs, Defence and Trade Committee, 31 January 2014, http://www.parliament.nz/resource/en-NZ/50DBSCH_SCR6065_1/1cb424ca88b333fad66dc60cc94ace59c333b74f (visited 16 March 2016).

⁵² Government Response to the Report of the Foreign Affairs, Defence and Trade Committee on International treaty examination of the Agreement between the Government of New Zealand and the Government of the United States on Enhancing Cooperation in Preventing and Combating Crime, 18 March 2014, <http://www.justice.govt.nz/publications/global-publications/g/government-response-nz-us-preventing-and-combating-crime-agreement> (visited 16 March 2016).

awaits the enactment of the necessary implementing legislation and the exchange of letters in that regard.⁵³

37. A slightly unusual example was presented by the bilateral arrangements that Australia entered into with the Netherlands and Ukraine to allow Australian personnel to assist, on Dutch and Ukrainian territory respectively, in the investigation into the downing of Malaysia Airlines flight MH17 in 2014. The arrangement with the Netherlands⁵⁴ was of treaty status, something which the Netherlands government stipulated was necessary as a matter of Dutch law.⁵⁵ The Australia-Netherlands Treaty, which entered into force on the day it was signed (1 August 2014), was tabled in the Australian Parliament by the Foreign Minister on 30 September 2014⁵⁶ and is published in the *Australian Treaties Library*.⁵⁷ Although that treaty did not go before JSCOT prior to its entry into force, it did so afterwards; the national interest exemption to the usual procedure was invoked because of the need for speedy action.⁵⁸

38. The position in relation to the status of the arrangement between Australia and Ukraine appears less clear. According to the official website of the Ukrainian Parliament (the *Verkhovna Rada*), at an extraordinary plenary closed meeting on 31 July 2014, that body ratified both the *Agreement between Ukraine and Australia on deploying Australian personnel to Ukraine in connection with MH17 Malaysia Airlines plane crash* and the *Agreement between Ukraine and the Kingdom of the*

⁵³ New Zealand Treaties Online, www.treaties.mfat.govt.nz/search/details/t/3773 (visited 16 March 2016).

⁵⁴ *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines flight MH17* (The Hague, 1 August 2014), [2014] ATS 30.

⁵⁵ Ms Julie Bishop MP, Minister for Foreign Affairs, 'Ukraine Air Disaster', Ministerial Statement, House of Representatives, Hansard, 30 September 2014, p 10715.

⁵⁶ *Ibid.*

⁵⁷ In its preamble the treaty also makes reference to another unpublished bilateral arrangement, the *Memorandum of Understanding between the Australia Federal Police and the National Police of the Netherlands on Combating Transnational Crime and Developing Police Cooperation*, 2 June 2014.

⁵⁸ Joint Standing Committee on Treaties, *A history of the Joint Standing Committee on Treaties*, Report 160 [JSCOT History], March 2016, p 57, paras 4.177-4.179. This treaty, which was to be in force for one year, was subsequently extended by the *Protocol Establishing the Prolongation of the Treaty between the Kingdom of the Netherlands and Australia on the Presence of Australian Personnel in the Netherlands for the Purpose of Responding to the Downing of Malaysia Airlines flight MH17*, which was tabled in Parliament on 12 May 2015, signed on 16 July 2015, and took effect on 1 August 2015. It extended the 2014 treaty for an additional year. *Ibid.*, pp 57-58, paras 4.181-4.182. See [2015] ATS 5 and *Verdrag tussen het Koninkrijk der Nederlanden en Australië inzake de aanwezigheid van Australisch overheids personeel in Nederland ten behoeve van de reactie op het neerhalen van vlucht MH17 van Malaysia Airlines*, *Tractatenblad van het Koninkrijk der Nederlanden*, 29 July 2015, 2015, No 119, <https://zoek.officielebekendmakingen.nl/trb-2015-119.html> (visited 19 March 2016).

*Netherlands on international investigation mission protection.*⁵⁹ The Netherlands-Ukraine agreement was published (in English) by the Netherlands government,⁶⁰ and was considered a treaty by both parties.

39. The Australia-Ukraine arrangement also appears to have been considered as a treaty by Ukraine, at least so far as subjecting it to the normal parliamentary procedures for the ratification of binding international agreements. The adoption of a law ratifying the agreement⁶¹ which referred to the provisions of the Ukrainian Constitution requiring parliamentary ratification of the acceptance of binding international agreements⁶² and the Law on International Agreements of Ukraine, which requires ratification of international treaties,⁶³ were both cited in the preamble of the Law.⁶⁴

40. Yet the arrangement with Ukraine does not appear to have been considered by Australia to be of treaty status, as it was not laid before Parliament or referred to JSCOT (as was the Australian-Netherlands agreement), and it was not published in the *Australian Treaty Series*. The English text of the arrangement is available on the website of the Ukrainian Parliament,⁶⁵ but the full text does not appear to have been published anywhere on an Australian government website. Although the clause sometimes found in Australian arrangements of less than treaty status -- clearly stating that the arrangement does not give rise to binding legal obligations⁶⁶ -- was not included in the 'arrangement', the language used makes it possible for Australia to argue persuasively that it is not a treaty as a matter of international law, even

⁵⁹ <http://rada.gov.ua/en/news/News%202/96548.html> (visited 19 March 2016).

⁶⁰ *Verdrag tussen het Koninkrijk der Nederlanden en Oekraïne inzake de internationale missie tot bescherming van onderzoek*, Kiev, 28 July 2014, *Tractatenblad van het Koninkrijk der Nederlanden*, 28 July 2014, 2014, No 135, <https://zoek.officielebekendmakingen.nl/trb-2014-135.html> (visited 19 March 2016).

⁶¹ *On Ratification of the Agreement between Ukraine on [sic] Australia on Deployment of Australian Personnel in Ukraine in Connection with the Crash of the Malaysia Airlines Flight MH17*, Law 2014 No 1619-VII, 31 July 2014, <http://zakon4.rada.gov.ua/laws/annot/en/1619-18> (visited 19 March 2016). The law entered into force on 12 August 2014

⁶² Constitution of Ukraine, article 85(32). This provision confers on the Ukrainian legislature the power of 'granting consent – by adopting a law – to the binding character of treaties of Ukraine and denouncing international treaties'. European Commission for Democracy through Law, Constitution of Ukraine, text provided by the Ukrainian authorities on 13 March 2014, CDL-REF(2014)012, <http://www.refworld.org/pdfid/44a280124.pdf> (visited 19 March 2016).

⁶³ On International Agreements of Ukraine, Law 2014 No 1906-IV, article 9, <http://zakon4.rada.gov.ua/laws/annot/en/1906-15> (English summary) (visited 19 March 2016).

⁶⁴ Law No 1619-VII, above n 61.

⁶⁵ <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=51824&pf35401=309354> (visited 23 March 2016). I am grateful to the Ukrainian Embassy in Canberra for providing me with this reference.

⁶⁶ See, eg, *Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants* 2009, article 2.

though Ukraine dealt with the arrangement through its domestic procedures for the ratification of treaties.⁶⁷

41. While the status of an agreement which one party appears to treat as a treaty and the other does not is an interesting question, the relevant point in this context is the anomalous situation that arises from the perspective of JSCOT review of analogous agreements. In the case of the Australia-Netherlands agreement, the matter came before the Committee; in the case of the Australia-Ukraine agreement, it did not. The text of the former is publically available through official Australian government sources, the text of latter available only on the website of the Ukrainian Parliament.

42. Among other provisions, the Australia-Ukraine arrangement contains provisions setting out ‘understandings’ about the powers to be exercised by Australian forces on the territory of another State (including authorising the use of force ‘as may be reasonably necessary to achieve the purposes of the Activity, including the use of lethal force in self-defence’⁶⁸), states that those forces ‘will be accorded the status equivalent to that accorded to the administrative and technical staff of a diplomatic mission’⁶⁹), provides for the use of Ukrainian public facilities by Australian personnel,⁷⁰ and also stipulates that Australia would pay for certain services provided to it by Ukraine.⁷¹

43. The provisions are substantially similar to those contained in the Ukraine-Netherlands treaty, and involve significant issues that are deserving of Parliamentary review and are at least as important as those contained in the Australian-Netherlands treaty relating to MH17. The fortuitous choice of the status of the instruments – in one case a treaty (in response to the needs of the Netherlands), the other an arrangement involving constructive ambiguity which served the needs of both sides (Ukraine and Australia) – meant that in one instance JSCOT reviewed the agreement, while in the other it did not.

⁶⁷ The Australian-Ukraine arrangement refers in its preamble to the ‘agreement’ with the Netherlands but denotes itself as an ‘arrangement’; Australia and Ukraine are referred to as ‘Participants’ who have reached ‘understandings’, as compared with the Netherlands-Ukraine agreement (‘Parties’ who ‘have agreed’); the Australian arrangement tends to use the word ‘will’, while the Netherlands agreement tends to use the word ‘shall’; the Australian arrangement ‘will take effect’ while the Netherlands agreement ‘shall enter into force’; and the Australian arrangement is ‘signed’, while the Netherlands agreement is ‘done’. All of these contrasts indicate an intention in the case of the Australia-Ukraine agreement to avoid the language normally associated with a binding instrument.

⁶⁸ Ibid [3.1].

⁶⁹ Ibid [2.3].

⁷⁰ Ibid [4.2].

⁷¹ Ibid [4.1].

E. Conclusion

44. This paper has sought to draw attention to the current state of Parliamentary and public access to the texts of formal arrangements between Australia and other countries that are of 'less than treaty status', in particular those designated as MOUs. I have argued that MOUs can be of considerable practical and political significance to the relations between Australia and the other countries which are parties to those agreements, and can have an impact on the way in which Australian and foreign agencies deal with information about and affect the rights and interests of Australian citizens and residents. Because they involve formal arrangements for the exercise of public power, their texts should as a matter of principle be made public and thus subject to Parliamentary and public scrutiny, unless a compelling case can be made that particular instruments or categories of instruments should not be released. In such a case, however, providing briefings to Parliament (in particular JSCOT), as is done in other sensitive areas), should be the fall-back position.

45. Based on selected examples, I have argued that at present the availability of such documents is patchy, and the practice of publication inconsistent and unsystematic. As a result, the text of many such instruments is not available to the public on government websites when they should be. The concerns that led to the mid-1990s reforms to the treaty process, in particular the need for adoption of a systematic approach to the publication of treaties and related information as a means of ensuring transparency and accountability, apply to many of these instruments.

46. The time has come to give greater recognition to the complexity and importance of international law making and international cooperation between States that takes place outside the framework of formal treaty relations. At least three steps should be considered:

- A government-wide audit and preparation of a comprehensive list of current instruments of less than treaty status (starting with bilateral instruments) and the publication of that list on the web in one place.
- The adoption of an approach to the negotiation of such instruments that makes it clear to the other party that MOUs will in the ordinary course of events be made public unless a compelling case is made to the contrary.
- The adoption of a coherent government publications policy based on a presumption of publication of the full text, perhaps in the form of a new library in the Australian Treaties Library – the equivalent of a Federal Register for (bilateral) instruments of less than treaty status.
- The regular reporting to Parliament of instruments of less than treaty status that have been concluded, are being negotiated or are being proposed.
- The expansion of JSCOT's mandate to ensure that all MOUs are brought to its attention, for such examination as it considers appropriate.

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[23 March 2016]



Joint Standing Committee on Treaties 20th anniversary seminar Canberra, 18 March 2016

Never Stand Still

Law

Time to put on the 3-D glasses: is there a need to expand JSCOT's mandate to cover instruments of 'less than treaty status'?

**Andrew Byrnes
Professor of Law
Australian Human Rights Centre
Faculty of Law
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Instruments of less than treaty status

1. How many are there?
2. What areas do they cover?
3. Are they publically available?
4. Do they raise significant policy issues, or affect the rights of citizens or others or the interpretation of legislation?
5. Are they laid before Parliament or a Parliamentary Committee?
6. Does Parliament otherwise get the opportunity to review them?



Patterns of publication of ILTS (1)

1. 17 MOUs on cooperation in relation to counter-terrorism

2. MOUs re treatment of asylum seekers on Nauru and Manus Island

3. MOU re resettlement of refugees in Cambodia (2014)

4. MOU with Sri Lanka on migrant smuggling (2009)

5. MOU with Indonesia on cooperation in education and training (2003)

6. Australian NZ arrangement re Trans-Tasman Retirement Savings Portability (2009)

1. None published, though many mentioned on DFAT Country pages

2. Appear on DFAT Country pages and 'People smuggling and trafficking page'

3. Appears only on 'People smuggling page' not on Cambodia Country page

4. Not published initially – disclosed in response to FOI request 3 years later

5. Referred to on DFAT Indonesia country page, but text available only on ROI treaty database

6. Available only on NZ government website

All published



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Patterns of publication of ILTS (2)

7. MOUs with NZ on exchange of criminal history information for vetting (2012) and (2015)

8. US-Australia MOU on combatting crime 2011

9. ASIC MOUs with over 50 counterpart agencies

7. MOU for trial published in evaluation report; 2015 MOU not published

8. Published by both governments on PM and POTUS websites when signed

9. All published on ASIC websites



References in legislation to ILTS where text unavailable

International Development Law Organization (Privileges and Immunities Regulations 2007)

Explanatory statement

The Regulations give effect to a Memorandum of Understanding between the Australian Government and IDLO, signed on 28 June 2005, on the establishment and operation of IDLO's Asia Pacific Regional Center (APRC) in Australia...

Subregulation 3(2)

(2) An expression used in these Regulations and in the Memorandum of Understanding has the same meaning in these Regulations as it has in the Memorandum of Understanding.



The difference it can make: US agreements with Australia and New Zealand on preventing and combatting crime (visa waiver program)

AUSTRALIA

- **MOU – non-binding instrument of less than treaty status**
- **Same content as NZ agreement**
- **Not laid before Parliament**
- **No Parliamentary review**
- **No statutory implementation required**

NEW ZEALAND

- **Arrangement of treaty status**
- **Same content as Australian MOU**
- **Laid before Parliament with full National Interest Analysis**
- **Detailed Review by Parliamentary Committee with recommendations**
- **Some legislative changes required**



Instruments of less than treaty status

1. How many are there?
 1. We don't know
2. What areas do they cover?
 2. Fields such as law enforcement, counter-terrorism , securities regulation , development education ... but possibly many other areas as well
3. Are they publically available?
 3. Some are – seems little rhyme or reason as to publication or not
4. Do they raise significant policy issues, or affect the rights of citizens or others or the interpretation of legislation?
 4. Some do, others don't – but we don't know the full extent
5. Are they regularly laid before Parliament/Parliamentary Committee?
 5. No
6. Does Parliament otherwise get the opportunity to review them?
 6. Possibly if attached to bills or delegated instruments, or considered by portfolio committee or in Estimates



What should be done?

1. Audit and listing of current (bilateral) instruments of less than treaty status
2. Adoption of an approach to the negotiation of such instruments that makes it clear that publication is the norm
3. Development of a coherent publications policy – presumption of openness – perhaps a new library in the Australian Treaties Library
4. The regular reporting to Parliament of instruments of less than treaty status that have been concluded, are being negotiated or are being proposed
5. Expansion of JSCOT's mandate to ensure that all MOUs are brought to its attention, for such examination as it considers appropriate

