

Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan

Public hearing: Wednesday, 12 October 2022

Response to questions on notice

Professor Donald Rothwell

Question

The National Interest Analysis has stated a different view about the legal status of the Agreed Minutes, suggesting that they are legally binding.

- What are the implications of this not being settled?
- Will this cause significant issues if there is a dispute?

Response

The NIA at [10] states as follows:

10. The Agreement comprises a package of legally binding instruments including the treaty text, annex and agreed minutes. These instruments will be equally authentic in both English and Japanese. There are also less-than-treaty-status instruments associated with the Agreement, namely the Record of Discussion and further subsidiary instruments implementing certain treaty articles.

My disagreement with this position is that while Article XXIX (4) of the RAA makes clear that the ‘Annex to this Agreement’ is ‘an integral part’ of the RAA, no equivalent reference is made to the Agreed Minutes.

In my written submission at [23], and evidence before the Committee, I attempted to develop a legal argument based on the Vienna Convention on the Law of Treaties in which I asserted that the Agreed Minutes could be taken into account when interpreting Articles I, V, X, XVII, and XXIII. I refer Senator Cox to my submission and evidence on those points.

As to Senator Cox’s question ‘Will this cause significant issues if there is a dispute?’ that is difficult to assess as it all depends on the context of the disagreement that may arise. The Agreed Minutes relate to Articles I, V, X, XVII, and XXIII. It could be argued that these Articles are not central to the overall object and purpose of the RAA, but they could over the life of the RAA become the subject of attention if differing interpretations arise between Australia and Japan, and the particular factual scenarios associated with the need to consider those Articles. So the potential for disagreement between Australia and Japan over interpretation of these Articles cannot be ruled out over the life of the RAA. This could be simply resolved by Article XXIX (4) stating:

“The Annex to this Agreement, and the Agreed Minutes, shall form an integral part of this Agreement”.