

Agency Management of Arrangements to Meet Australia's Treaty Obligations

Across Agencies

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Canberra ACT
31 October 2013

Dear Mr President
Dear Madam Speaker

The Australian National Audit Office has undertaken an independent performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament. The report is titled *Agency Management of Arrangements to Meet Australia's Treaty Obligations*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name and title.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act* 1997 to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
AMSA	Australian Maritime Safety Authority
ANSTO	Australian Nuclear Science and Technology Organisation
ASNO	Australian Safeguards and Non-Proliferation Office
CRC	Convention on the Rights of the Child
CRC Committee	United Nations' Committee on the Rights of the Child
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DBCDE	Department of Broadband, Communications and the Digital Economy
DEEWR	Department of Education, Employment, Workplace Relations
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
DOHA	Department of Health and Ageing
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
IAEA	International Atomic Energy Agency
ICR	Inventory Change Report
JSCOT	Joint Standing Committee on Treaties

LOI	List of Issues
MBR	Material Balance Report
NGO	Non-governmental Organisation
NIA	National Interest Assessment
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NUMBAT	Nuclear Material Balance and Tracking database
PIL	Physical Inventory Listing
PSC	Port State Control
RIS	Regulation Impact Statement
SCOT	Standing Committee on Treaties
SIR	Ship Inspection Record
UN	United Nations

Glossary

Concluding observations	The final statement issued by a United Nations' human rights treaty body at the conclusion of its examination of a state party's report, in which the treaty body comments on the state party's record of implementation of the treaty.
JSCOT	The Joint Standing Committee on Treaties (JSCOT) is appointed by the Commonwealth Parliament to review and report on all treaty actions proposed by the Government before action which binds Australia to the terms of the treaty is taken.
Reservations	A reservation is a means by which a state purports to exclude or modify the legal effect of specified provisions of a treaty which a state finds unacceptable.
Port State Control	The inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.
Protocol	An agreement amending or supplementing an existing convention or agreement.
SCOT	A mechanism for consultation between the Australian Government and state and territory governments. The Commonwealth-State-Territory Standing Committee on Treaties (SCOT) consists of representatives from the Premier's or Chief Minister's Departments in every state and territory.
Treaty body	A committee of independent experts who are responsible for monitoring the implementation by states parties of their obligations under the treaty. Each of the human rights treaties has a treaty body associated with it.

Vienna Convention	The 1969 <i>Vienna Convention on the Law of Treaties</i> (Vienna Convention) codifies much of the customary international law on treaties.
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Summary and Recommendations

Summary

Introduction

1. Australia is a party to around 1990 international treaties of which around two-thirds address matters to do with business and trade, international organisations, health, transport, the environment, and crime. During 2012–13, Australia signed 16 treaties, ratified or acceded to two treaties, amended or accepted amendments to seven treaties and brought 28 treaties into force.

2. A treaty is an international agreement between countries that is governed by international law. The term ‘treaty’ includes a range of recognised international instruments, including charters, conventions, covenants, protocols, agreements, pacts and exchanges of notes or letters. The determining factor on whether an agreement is a treaty is whether the intention is for the countries signing the treaty to be bound by international law. Once in force, a treaty is akin to a domestic contract that is binding and enforceable.¹ Treaties must be published and registered with the United Nations (UN).

3. Treaties can be bilateral, between one country and another, or multilateral, between three or more countries or an international body and countries. An example of a bilateral treaty is the *Australia-US Free Trade Agreement 2005*, while an example of a multilateral treaty is the *International Convention for the Regulation of Whaling 1946*, to which Australia and 86 other countries are parties.

Australia’s treaty-making framework

4. Traditionally, the making of treaties was the exclusive role of the executive government in Australia. However, in 1996, reforms to the treaty-making framework were introduced, to provide greater parliamentary scrutiny and consideration of treaties prior to Australia becoming a party to a treaty. The current treaty-making framework includes two phases, the first being treaty negotiation and government approval/signature, followed by parliamentary scrutiny and enactment of legislation to give effect to a treaty (where legislation is required). The framework provides for

1 Because treaties are legally binding, they may be the subject of legal action adjudicated both by domestic judicial bodies, and, in some cases, international legal tribunals.

whole-of-government, parliamentary, and state and territory government consultation and consideration of the impact and benefits of a treaty for Australia prior to Australia becoming a party to a treaty. These processes include:

- National Interest Analysis (NIA), to determine the benefits to Australia if it were to become a party to a particular treaty;
- Regulation Impact Statement (RIS), when legislation and/or regulation is required to ratify and implement the treaty;
- legal consideration given to treaty text and proposed legislation, where required;
- consideration of all proposed treaties by the Parliamentary Joint Standing Committee on Treaties (JSCOT);
- briefing and engaging with the state and territory governments through the Standing Committee on Treaties (SCOT), for treaties being negotiated; and
- other mechanisms such as Inter-Departmental Committees, Parliamentary committees, Australian, state and territory government forums or meetings, including the Council of Australian Governments processes on specific issues that include a treaty(s).

5. Once a treaty enters into force for Australia the lead Australian Government agency is responsible for making sure Australia implements the treaty and complies with the relevant obligations. Ongoing visibility for the Parliament and public in relation to the actions taken to implement a treaty's obligations, and its impact, are influenced by the provisions of the treaty. For example, some treaties include ongoing monitoring and reporting obligations, whereas other treaties do not.

Audit objective, criteria and scope

6. The objective of the audit was to assess the effectiveness of Australia's arrangements to meet its treaty obligations under three selected treaties. In addressing this objective the audit:

- outlines the framework Australia has put in place to bring treaties into force; and
 - assesses whether Australia has arrangements in place to provide assurance that it is fulfilling its international obligations once a treaty enters into force.
7. The three treaties examined by the ANAO, and summarised below, are:
- *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*;
 - *Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 and Additional Protocol*; and
 - *Convention on the Rights of the Child 1990*.

Bunkers Convention

The multilateral *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (Bunkers Convention) complements a suite of multilateral International Maritime Organization (IMO) treaties to protect the marine environment from ship-related oil pollution. The Bunkers Convention establishes a compensation regime for pollution damage from a spill of a ship's fuel oil, known as bunker oil. The Convention requires all ships of more than 1000 gross tonnes entering an Australian port to hold liability insurance against bunker oil pollution damage and to carry onboard a 'Bunker Certificate' confirming their insurance.²

The Bunkers Convention entered into force internationally on 21 November 2008 and was implemented in Australia on 16 June 2009, through the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008*. The Australian Maritime Safety Authority (AMSA) has responsibility for administering the Convention, along with other IMO conventions in relation to maritime safety and protection of the marine environment.

2 The Bunkers Convention applies to ships other than oil tankers. Oil pollution damage from oil tankers is covered by three other IMO conventions, which Australia has implemented. These conventions allow for a greater level of compensation due to the greater impact on the marine environment of an oil spill from an oil tanker.

Nuclear Non-Proliferation Treaty

The multilateral *Treaty on the Non-Proliferation of Nuclear Weapons 1968* (NPT) is the centrepiece of the international nuclear non-proliferation regime designed to avert the proliferation of nuclear materials and technology that can be used in the development and production of nuclear weapons. The NPT entered into force for Australia in 1973.

The NPT is underpinned by a number of bilateral treaties, between individual countries and the International Atomic Energy Agency (IAEA). Australia's bilateral treaty with IAEA is the *Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons* (Comprehensive Safeguards Agreement), which entered into force in 1974, and the *Additional Protocol*, which entered into force in 1997. The *Nuclear Non-Proliferation Act 1987* implements the NPT and the Comprehensive Safeguards Agreement, along with other related nuclear protection and suppression of terrorism conventions. The NPT requires Australia to account for, and report on, all nuclear material and technology in Australia to IAEA.

The Australian Safeguards and Non-Proliferation Office (ASNO), which is located in the Department of Foreign Affairs and Trade (DFAT), is responsible for administering the NPT and Comprehensive Safeguards Agreement, by undertaking the required domestic regulatory activities to make sure that Australia is in compliance with safeguards commitments under the NPT. IAEA also undertakes independent verification and concludes on Australia's compliance with safeguards commitments under the NPT.

Convention on the Rights of the Child

The multilateral *Convention on the Rights of the Child 1990* (CRC) seeks to protect children, promote their well-being and to make sure that they have an appropriate place in society. The CRC recognises the civil, cultural, economic, political and social rights of children. The CRC also aims to protect children from economic exploitation and from performing hazardous work; sexual exploitation; abduction, and the sale of and trafficking of children. The CRC entered into force in Australia in 1991, and includes two optional protocols concerning the sale of children, child prostitution and pornography; and the involvement of children in armed conflict, that Australia ratified in 2007 and 2009 respectively.

The obligations of the CRC are implemented by both Australia's national, and state and territory governments, under a range of existing legislation and initiatives. Unlike the Bunkers Convention and NPT, there is no specific legislation in place that gives effect to the CRC.

The CRC requires Australia to periodically report to the UN CRC Committee on the Rights of the Child on progress in implementing the CRC. After receiving Australia's report, the CRC Committee conducts a hearing and then issues concluding observations against Australia's implementation of the CRC. The Attorney-General's Department (AGD) is responsible for coordinating and submitting Australia's report to the CRC Committee, which requires collation of information on the implementation of the CRC from the nine jurisdictions, and leading the Australian delegation at the committee hearings.

Overall conclusion

8. Treaties form an integral part of Australia's relationships with the global community. The around 1990 treaties to which Australia is a party cover a wide range of subjects and impose a correspondingly wide range of obligations that are enforceable under international law. Consequently, it is important that the Australian Government has appropriate measures in place to assure itself that its treaty obligations are being met.

9. Australia's treaty-making framework enables parliamentary scrutiny and consideration of proposed treaties in terms of national interests and regulatory impact prior to Australia becoming a party to a treaty. In respect of the three treaties examined by the ANAO, treaty obligations have been implemented effectively, although improvements could be made to strengthen the administrative arrangements supporting these treaties.

Bunkers Convention

10. The approach adopted by AMSA when implementing the Bunkers Convention in 2009 was sound. AMSA has in place a process for accepting applications, verifying ships' insurance and issuing the Bunker Certificates. The agency has adopted a risk-based approach for selecting ships for inspection, a component of which involves verifying that the ship holds a valid Bunker Certificate. AMSA did not however modify its inspection checklists or systems to support the consistent recording of Certificate inspection results. AMSA advised that since inspections began all ships inspected have held a valid Certificate. However, the lack of accurate records of ship inspection results limits AMSA's ability to assure itself that all ships inspected held the required Bunker Certificate. During the audit, AMSA advised that it has now put processes in place to record Bunker Certificate inspections.

Nuclear Non-Proliferation Treaty

11. The NPT has been in force for about 40 years, during which time ASNO has developed mature management arrangements and implemented a regulatory regime to account for Australia's nuclear materials. This regime includes industry self-reporting, supported by an ASNO inspection regime and the reporting of results to IAEA as well as verification activities undertaken by IAEA in Australia. Based on these activities, IAEA has concluded that Australia's accounting and use of nuclear materials is in accordance with the safeguards obligations of the NPT. There is however room for ASNO to achieve greater transparency and efficiency by implementing a

stronger risk-based approach to its inspection regime of nuclear permit holders.

Convention on the Rights of the Child

12. Implementation of the CRC, like other human rights treaties, poses particular challenges, as responsibility for implementation is shared between agencies and jurisdictions across the Australian, state and territory governments. These shared responsibilities place a premium on effective communication, coordination and consultation both when a treaty is being negotiated and when it is implemented. AGD has put in place broadly effective coordination arrangements to obtain the necessary information from Australian, state and territory government stakeholders for inclusion in Australia's most recent reports to the United Nations CRC Committee. The format and content of these reports also largely complied with the CRC Committee's reporting guidelines. AGD's administration of the reporting process could, however, be improved by developing fit for purpose guidance and capturing the experience gained to assist staff coordinating future CRC reports. Investigating options to improve data collection processes as well as consistency in information provided across jurisdictions would also assist in streamlining future CRC reporting obligations. In addition, AGD could make better use of its website to publicise the CRC and Australia's progress in meeting its obligations.

Australia's treaty-making framework

13. The treaty-making framework was reformed in Australia in 1996 to provide for an enhanced role for the Australian Parliament in the treaty-making process. These arrangements are well established, and provide an appropriate focus on treaty implementation issues prior to a treaty entering into force in Australia. However, this audit has highlighted that the current arrangements, which focus on the treaty-making stage, provide little visibility to the Australian Parliament, or the public, as to the effectiveness of the implementation of a treaty once it comes into force, particularly where a treaty does not include ongoing monitoring and reporting obligations. It is timely, therefore, that consideration be given to opportunities to achieve greater external transparency. In this regard, conducting an implementation review of new treaties, and publicising the outcomes of these reviews would be of benefit. It would also be appropriate for the Australian Government to consider options for the cost-effective ongoing reporting of the implementation of key treaties, including that Australia is meeting its treaty obligations.

14. The ANAO has made three recommendations aimed at improving the administration and ongoing monitoring of the three treaties, and other new and existing treaties by the lead agency. The recommendations relate to: strengthening ASNO's risk-based approach to its inspection of nuclear material permit holders; improving AGD's coordination of Australia's reporting obligations under the CRC; and strengthening monitoring and review arrangements to provide assurance that Australia is meeting its treaty obligations.

Key findings by chapter

Bunkers Convention (Chapter 2)

15. AMSA adopted a sound approach to implementing the Bunkers Convention that included: assessing the resources required to administer the Convention; identifying contingency arrangements to address risks; training staff and communicating with industry stakeholders on their obligations under the Convention. A key role for AMSA in implementing the Convention is to assess applications for ships' Bunker Certificates, including verifying that the ship holds the required insurance. Each Bunker Certificate is valid for 12 months and must be renewed in February each year. The ANAO's review of the 57 Bunker Certificates issued to ships in 2012, found that procedures were followed and the process appropriately documented, with each ship's insurance cover verified.

16. AMSA inspects ships in port for compliance with ship navigation, safety and environmental requirements, including verifying that the ship holds a valid Bunker Certificate. The authority adopts a risk-based methodology to identify and prioritise ships for inspection, based on a range of risk factors.³ In 2011–12, AMSA records show that 7802 inspections were undertaken of the 24 539 visits by ships at 79 Australian ports.⁴

17. In implementing the Bunkers Convention, AMSA integrated its verification obligations into existing inspection activities. However, it did not modify its inspection templates or systems to accommodate the new requirements. The ANAO reviewed a sample of 154 ship inspection records

3 The risk factors used include: the ship's age, size and type; number of previous deficiencies; country of registration; classification society; if first Australian inspection; and time since previous inspection.

4 AMSA uses four risk categories to assist in targeting ships for inspections, with Priority 1 being the highest risk, and Priority 4 the lowest risk, of non-compliance with requirements.

over 2011–12 and found that ship inspection forms did not allow the marine surveyor to consistently record Bunker Certificate inspection results. In the absence of a checkbox for the Bunker Certificate, 76 per cent of the records reviewed contained a mark against another checkbox which relates to a separate convention on requirements for oil tankers to have appropriate insurance in place for oil pollution. However, only 16 per cent of these records made it clear that this entry referred to the Bunker Certificate, limiting AMSA's ability to provide assurance that ships held a valid Certificate.

Nuclear Non-Proliferation Treaty (Chapter 3)

18. ASNO has developed the Nuclear Accounting and Permit System to enable it to meet IAEA requirements for reporting nuclear material information under the NPT. The system seeks to account for and maintain an inventory of nuclear materials, along with corresponding details and information on use and location. Users of nuclear materials are assessed and issued permits depending on the required use of, or need for the nuclear materials. Permit holders are then required to periodically report on their nuclear material inventory to ASNO in order to keep the Nuclear Accounting and Permit System up to date. As at 30 June 2012 there were 143 current permits, with three new permits issued over the previous 12 months. The ANAO's review of all permits found that ASNO had issued the permits in accordance with internal guidance and processes, and the required documentation was appropriately recorded.

19. A records management database supports the Nuclear Accounting and Permit System by generating monthly and annual reports. However, the database is unstable, with limited functionality, impacting on ASNO's ability to effectively meet Australia's obligations under the NPT.⁵ DFAT has allocated funds in 2012–13 to replace the database.⁶

20. During 2011–12, ASNO undertook 13 inspections of permit holders.⁷ Inspection of permit holders by ASNO involves: verifying the reported

5 The limitations increase the risk of delays to Australia's submission of reports to IAEA and reports being prone to manual data entry errors.

6 In 2010–11, funds were allocated to redevelop the two ASNO databases, including the Nuclear Accounting and Permit System, into a new system. However, due to competing resource requirements in DFAT, the upgrade of ASNO's databases was placed on hold until 2012–13 and is expected to be completed in 2013–14.

7 ASNO intended undertaking two inspections in 2012–13, but these had not commenced at the time of audit fieldwork.

physical location, type and quantity of the nuclear materials; checking that the required records are maintained and that security arrangements are appropriate; and confirming that the permit holder understands the requirements of the permit. The ANAO's review of the documentation for all inspections completed in 2011–12 confirmed that the inspections were appropriately recorded and documented. ASNO advised that the current approach to identifying permit holders for inspection is based on an assessment of the risks presented by individual permit holders, staffing resources and timing factors. However, there was no documentation to support these assessments. Currently, ASNO's inspection regime does not differentiate between high and low risk permit holders and, as a consequence, ASNO does not target greater inspection effort towards permit holders assessed as higher risk. There would be merit in ASNO strengthening its processes by developing inspection types of differing intensities that are aligned to the assessed risk of each permit holder.

21. The NPT also includes provisions for IAEA to independently verify Australia's nuclear material inventory by undertaking scheduled and unscheduled inspections of permit holders. During 2011–12, IAEA undertook 10 verification inspections. IAEA verification activities, in conjunction with Australia's nuclear material inventory reporting, provided the assurance IAEA required to conclude that Australia's accounting and use of nuclear material inventory is in accordance with the NPT.

Convention on the Rights of the Child (Chapter 4)

22. The CRC requires that signatories report to the CRC Committee on progress in implementing the Convention at five yearly intervals. The reporting cycle involves consideration by the CRC Committee of the written reports submitted by member countries and non-government organisations, on progress in implementing the CRC. The submission of reports is then followed by a hearing conducted by the CRC Committee, where concluding observations are made on the member country's progress in implementing the CRC. Australia has taken part in three reporting cycles, and has submitted all reports⁸ required under the CRC since ratification in 1991 and attended three hearings with the CRC Committee. Australia's most recent reporting

⁸ The six reports submitted by Australia include an initial CRC report, two periodic reports, and a 'list of issues' report, along with two initial reports related to the ratification of the two optional protocols.

cycle concluded in June 2012, following consideration of the fourth periodic report and list of issues report.

23. AGD has put in place arrangements to coordinate Australia's reports. However, there was only limited documented planning and guidance material available to assist staff. As a consequence, staff relied on corporate knowledge in preparing the CRC reports. Given the long timeframes between reporting cycles, documenting the process and past experience gained in CRC report preparation would be useful for future CRC reporting.

24. AGD engaged directly with Australian Government agencies in seeking input for the fourth periodic report and the list of issues report. In contrast, engagement with the states and territories was undertaken through the Standing Committee on Treaties (SCOT). The SCOT contact officers work with the relevant line agencies at the state and territory government level to obtain the information required. AGD put in place broadly effective arrangements to engage and obtain information from stakeholders to prepare the reports for the fourth periodic reporting cycle. However, the more active process of engaging stakeholders adopted for the list of issues report resulted in better targeted and timely information provision by government stakeholders.

25. Stakeholders advised the ANAO that there are opportunities to more effectively share, and use, information between different levels of government for CRC reporting purposes. The ANAO observed that AGD expended considerable effort to obtain information from government stakeholders that had previously been provided to other Australian Government agencies. There would be benefit in AGD investigating opportunities to streamline the information gathering process and build stronger networks between Australian, state and territory government agencies.

26. The ANAO's examination of the fourth periodic report and the list of issues report found Australia largely complied with UN reporting guidelines.⁹ Australia's reports provided information about child-focused policies and programs, and progress in meeting previous recommendations made by the CRC Committee, allowing progress to be reviewed. There were gaps however in providing the disaggregated statistical data specified in the CRC Committee

9 To supplement the CRC document, both the UN and the CRC Committee provide guidelines that include specific information and statistical data reporting requirements.

guidelines as Australia was also unable to report child specific data (on a per unit basis) according to budgetary allocations.¹⁰ AGD advised that this information was not available in the required form. There were also data compatibility and quality issues between jurisdictions, as stakeholders did not always conform to national data specification standards. In addition, Australia's performance in providing reports in a timely manner was mixed, with the fourth periodic report submitted 18 months late and the list of issues report submitted seven weeks late.

27. Australia broadly complies with its obligations in relation to disseminating CRC reports and communicating the CRC to the public. There are initiatives underway to raise awareness of human rights and the CRC. The AGD website could also better represent Australia's progress in implementing the CRC since ratification. Only the most recent list of issues report and the CRC Committee's concluding observations report are included on the AGD website. Including additional information, such as Australia's previous CRC reports and CRC Committee hearing information (Australia's Opening Statements and the committee's concluding observation reports), may assist in raising awareness and knowledge of the CRC. This is the approach taken by a number of other signatories to the CRC.

Improving assurance that Australia is meeting its treaty obligations (Chapter 5)

28. Treaties cover a diverse range of issues and impose obligations on Australia, which are enforceable under international law. These obligations can vary from being highly prescriptive, defined and frequently reported, such as for the NPT, to less prescriptive reporting at infrequent intervals as in the case of the CRC or no reporting requirements, like the Bunkers Convention. Ongoing reporting provides insights and assurance about Australia's performance in meeting its obligations under a particular treaty.

29. Once Australia becomes a party to a treaty, the lead Australian Government agency becomes responsible for making sure that Australia implements the treaty and meets the relevant obligations. Visibility by the Parliament and the public, as to the actions taken to implement a treaty's

10 The gaps in disaggregated data include information on ethnicity, refugees, migrant and internally displaced children, child abuse and neglect and children who are victims of sexual exploitation.

obligations, are dependent on the particular features of the treaty itself, including any monitoring and reporting requirements.

30. Greater visibility over the Australian Government meeting its treaty obligations could be achieved by a treaty implementation review, particularly where the treaty has required new or revised business activities. Such a review would provide a valuable assessment for the lead agency and Parliament of how the treaty was implemented and is being administered. It would not however provide ongoing monitoring and reporting of treaty obligations and there would be benefit in exploring further options for lead agencies to provide ongoing assurance to Parliament for key treaties already in force.

31. DFAT maintains a central online treaties database that records the particulars and associated documents for all Australian treaties in force and under negotiation. While the database is a useful resource, the ANAO identified deficiencies in its capacity and data quality.¹¹ In addition, the database does not identify the lead agency for each treaty, and the treaty text and associated documents, such as the National Interest Analysis and Regulation Impact Statement, are only available in a limited (webpage HTML) format that cannot be easily accessed.

Summary of agencies' responses

32. The proposed audit report was provided to AMSA, ASNO, AGD and DFAT. All agencies provided a formal response to the proposed report and to the recommendations. Agency responses to recommendations are contained in the body of the report following the relevant recommendation. Agencies' full formal responses are included in the report at Appendix 1.

33. The audited agencies' summary responses to the audit are provided below.

AMSA

34. AMSA was pleased to see that the audit resulted in no recommendations that required an AMSA response. Regardless, considering the importance of having adequate compensation available in case of an oil pollution event involving shipping and the improved assurance that a regional

¹¹ For example, the search function was poor—returning no results for the 'Bunkers Convention' when an alternative search returned more than 50 results.

approach to ship inspection provides, AMSA has commenced a process with the Asia Pacific Memorandum of Understanding on Port State Control seeking amendments to the Memorandum to explicitly include the Bunkers Convention as well as the Conventions related to pollution compensation for oil tankers as matters for inspection and reporting on.

35. While not directly relevant to Australia's treaties obligations, AMSA is taking this action after examining our processes during the audit and recognising that there were further opportunities for improvement not only for Australia but other countries in the region. Should these amendments be accepted then changes to procedures for inspection and reporting will be made over the next 12 to 18 months.

ASNO

36. ASNO welcomes the focus of the Australian National Audit Office (ANAO) on the important question of managing compliance with IAEA safeguards obligations under the NPT. IAEA safeguards comprise the various measures such as accounting, reporting, analysis and inspections, applied by states parties and the IAEA to ensure compliance with commitments to use nuclear material and technology solely for peaceful purposes. International confidence in the compliance of each state with these obligations derives from confidence in how IAEA safeguards are applied, so the effective, efficient and transparent management of these commitments by national safeguards authorities, such as ASNO, is paramount.

37. The ANAO report acknowledges that ASNO has in place mature management arrangements and a regulatory regime to account for Australia's nuclear material, and that the IAEA has concluded that Australia's accounting and use of nuclear material is in accordance with NPT obligations.

AGD

38. AGD accepts Recommendation No.2 in the ANAO report on the Agency Management of Arrangements to Meet Australia's Treaties Obligations concerning Australia's reporting under the *Convention on the Rights of the Child*.

DFAT

39. The Australian Government implements its treaty obligations in good faith as a matter of law and as a matter of course. Arrangements for monitoring and reporting on treaty implementation are in accordance with any

relevant provisions of the treaty in question and with the procedures determined by each implementing agency.

40. DFAT agrees in part with recommendation 3 but is not in a position to finalise its consideration until it has had the opportunity to obtain and consider the views of the many agencies that would be affected by its implementation, including states and territories. Given that responsibility for treaty implementation appropriately rests with the lead agency in each case, it is essential that lead agencies retain the discretion to determine what monitoring and reporting arrangements would work for their respective treaties and would be manageable within resource constraints. Lead agencies are also best placed to assess any potential risks associated with reporting. As lead agency on a number of treaties, DFAT has concerns about resource implications and avoiding duplication of existing reporting mechanisms. DFAT considers a one-size-fits-all approach would be impractical and undesirable.

Recommendations

Agencies responsible for implementing and administering Australia's obligations under treaties are encouraged to consider these recommendations in light of their own particular treaty responsibilities.

Recommendation No.1

Paragraph 3.59

To achieve greater transparency and efficiency under the Nuclear Non-Proliferation Treaty, the ANAO recommends that ASNO implements a stronger risk based approach to its program of inspections of nuclear permit holders by:

- documenting its risk assessment of permit holders; and
- developing an inspection program that includes inspection types of differing intensities.

ASNO response: *Agreed*

Recommendation No.2

Paragraph 4.66

To improve the coordination of Australia's reporting under the UN *Convention on the Rights of the Child*, the ANAO recommends that, Attorney-General's Department:

- develops fit for purpose guidance and captures experience gained to assist staff;
- investigates options for improving data collection and the standardisation of information across jurisdictions; and
- improves the information on the AGD website about the CRC and Australia's reports on its progress in meeting its obligations under the Convention.

AGD response: *Agreed in-principle*

**Recommendation
No.3**

Paragraph 5.32

To demonstrate how Australia is meeting its treaties obligations, the ANAO recommends that the Department of Foreign Affairs and Trade, in consultation with the Joint Standing Committee on Treaties, and taking into account existing treaty-mandated monitoring and reporting arrangements:

- include in its treaty guidance that, where appropriate, the lead agency conducts and publishes a treaty implementation review of a new treaty at an appropriate point after its entry into force; and
- considers options for the cost effective ongoing monitoring and reporting by lead agencies of the implementation of key treaties

DFAT response: *Agreed in-part*

Audit Findings

1. Introduction

This chapter provides an overview of Australia's arrangements to negotiate, sign and implement treaties, along with the three treaties examined. It also outlines the audit objective, criteria and scope.

Background

1.1 Australia is a party to around 1990 international treaties of which around two-thirds address matters to do with business and trade, international organisations, health, transport, the environment and crime. During 2012–13, Australia signed 16 treaties, ratified or acceded to two treaties, amended or accepted amendments to seven treaties and brought 28 treaties into force.

1.2 A treaty is an international agreement between countries that is governed by international law. The term 'treaty' includes a range of recognised international instruments, including charters, conventions, covenants, protocols, agreements, pacts and exchanges of notes or letters.¹² The determining factor on whether an agreement is a treaty is whether the intention is for the countries signing the treaty to be bound by international law. Once in force, a treaty is akin to a domestic contract that is binding and enforceable.¹³ Treaties must be published and registered with the United Nations (UN).

1.3 Treaties can be bilateral, between one country and another, or multilateral, between three or more countries or an international body and countries. An example of a bilateral treaty is the *Australia-US Free Trade Agreement 2005*, while an example of a multilateral treaty is the *International Convention for the Regulation of Whaling 1946*, to which Australia and 86 other countries are parties.

Australia's treaty-making framework

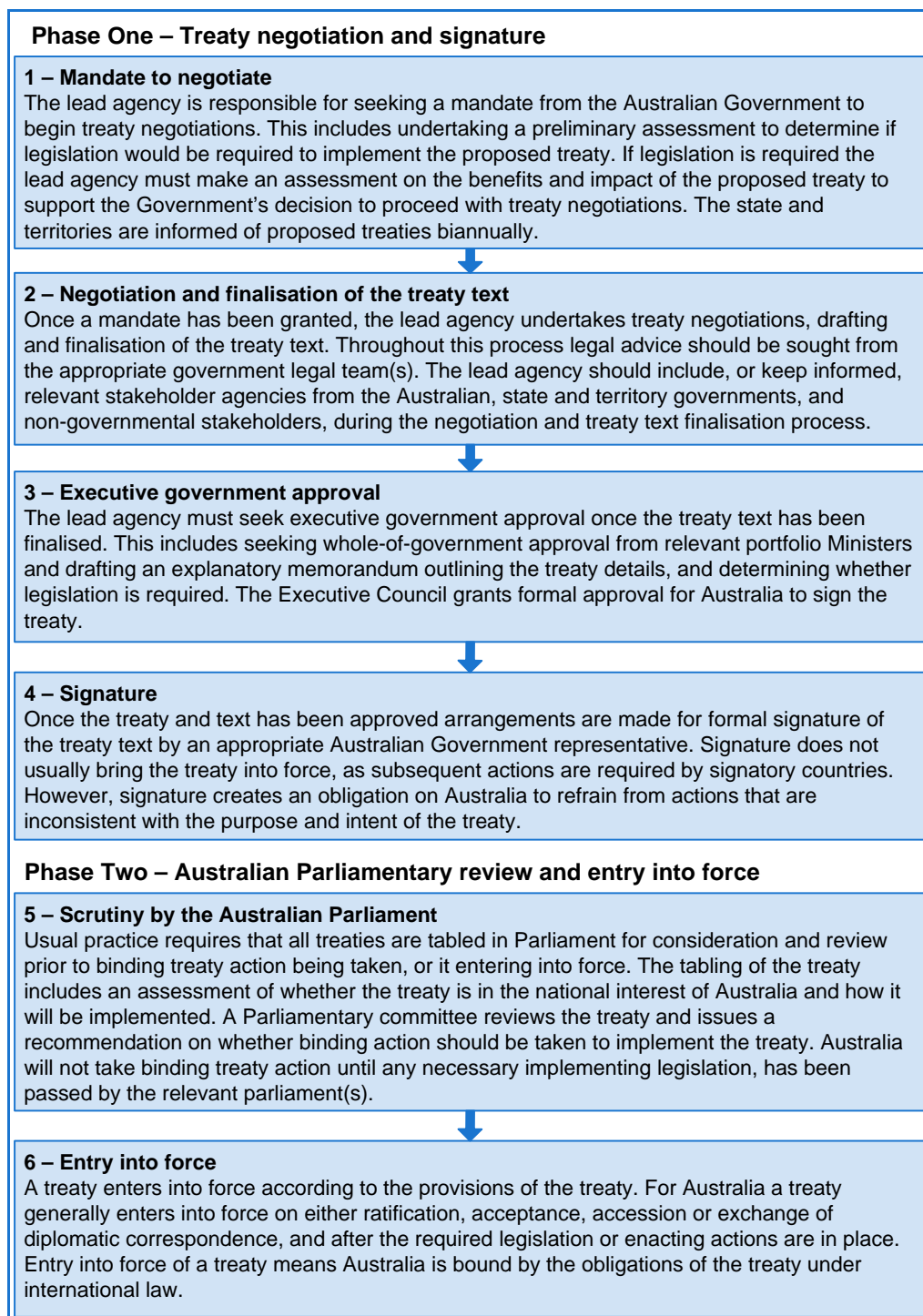
1.4 Traditionally, the making of treaties was the exclusive role of the executive government in Australia. However, in 1996, reforms to the

12 The *Vienna Convention on the Law of Treaties* defines a treaty 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'.

13 Because treaties are legally binding, they may be the subject of legal action adjudicated both by domestic judicial bodies, and, in some cases, international legal tribunals.

treaty-making framework were introduced, to provide greater parliamentary scrutiny and consideration of treaties prior to them entering into force. The framework provides for whole-of-government, parliamentary, and state and territory government consultation and consideration of the impact and benefits of a treaty for Australia prior to it entering into force.

1.5 The current treaty-making framework includes two phases: the first being treaty negotiation and government approval/signature; and the second parliamentary scrutiny and enactment of legislation to give effect to a treaty (where legislation is required). Figure 1.1 provides a high level summary of Australia's treaty-making framework.

Figure 1.1: Australia's treaty-making framework

Source: ANAO analysis of the DFAT *Signed, Sealed and Delivered Officials Handbook*.

1.6 The treaty-making framework requires consultation with stakeholders, including state and territory governments and non-government stakeholders, and consideration of the impact of a treaty, prior to it entering into force. These processes include:

- National Interest Analysis (NIA)¹⁴, to determine the benefits to Australia if it were to become a party to a particular treaty;
- Regulation Impact Statement (RIS)¹⁵, when legislation and/or regulation is required to ratify and implement the treaty;
- legal consideration given to treaty text and proposed legislation, where required;
- consideration of all proposed treaties by the Parliamentary Joint Standing Committee on Treaties (JSCOT);
- briefing and engaging with state and territory governments through the Standing Committee on Treaties (SCOT)¹⁶, for treaties being negotiated; and
- other mechanisms such as Inter-Departmental Committees, Parliamentary committees, Australian, state and territory government forums or meetings, including the Council of Australian Governments processes on specific issues that include a treaty(s).

1.7 The treaty-making framework is administered by the Treaties Secretariat in the Department of Foreign Affairs and Trade (DFAT), which also provides assistance to Australian Government agencies on treaties. A number of agencies are involved in the process of a proposed treaty entering into force, including, at a minimum: the Attorney-General's Department (AGD); DFAT; the Department of the Prime Minister and Cabinet, and the agency with lead

14 NIAs outline the treaty's foreseeable impact on Australia, direct financial costs, obligations, any legislation required to implement the treaty, and consultation undertaken through the treaty-making process.

15 A RIS is required if there are likely to be regulatory impacts on business or the not-for-profit sector, governments and the broader community, unless the impacts are of a minor or machinery nature and do not substantially alter existing arrangements.

16 The SCOT is a mechanism for consultation between the Australian and State and Territory Governments, and includes representatives from the Premier's or Chief Minister's Department in every state and territory.

responsibility for the treaty. The Federal Executive Council (ExCo)¹⁷ has a role at several stages of the treaty-making framework, depending on the type of treaty. The roles of these agencies and Parliamentary Committees supporting the treaty-making processes are outlined in the Table 1.1.

Table 1.1: Role of agencies in treaty-making process

Agency	Role in Treaty-Making Process
Lead Agency	Obtains mandate to negotiate; negotiates treaty terms; drafts treaty text; prepares NIA and RIS/explanatory memorandum, if required; reports as needed under treaty provisions.
Treaties Secretariat (within DFAT)	Provides advice on the treaty-making process; organises signing of treaty text; arranges tabling of treaties and NIAs in Parliament; deposits instruments of ratification, acceptance or accession, including reservations and declarations, with the treaty depository; maintains treaty records; and publishes treaty text on online database.
International Legal Branch (within DFAT)	Provides legal advice on draft treaty text, particularly technical aspects of text; reviews NIAs.
Office of International Law (within AGD)	Assists with treaty negotiation, provides legal advice on draft treaty text and on the domestic implementation of treaties; reviews NIAs.
Office of Best Practice Regulation (within the Department of Finance)	Advises lead agency if a RIS is required; assesses adequacy of RIS.
Department of the Prime Minister and Cabinet	Administers provision of information to state and territory governments via the SCOT.
JSCOT	Reviews proposed treaties; provides a report and recommendation(s) to Parliament.
Federal Executive Council	Considers and approves submissions of proposed treaties.

Source: ANAO analysis of the treaty-making framework.

1.8 While the Treaties Secretariat is responsible for the treaty-making framework, once a treaty enters into force, the lead Australian Government agency is responsible for making sure that Australia implements the treaty, and meets the relevant obligations. Ongoing visibility for the Parliament and public in relation to the actions taken to implement a treaty's obligations, and

¹⁷ The Federal Executive Council comprises all Australian Government ministers, with the Governor-General presiding. Its principal functions are to receive ministerial advice and approve the signing of formal documents such as proclamations, regulations, ordinances and statutory appointments. The decisions of Cabinet are given legal effect by their formal ratification by the Federal Executive Council.

its impact, are influenced by the provisions of the treaty. For example, some treaties include ongoing monitoring and reporting obligations, whereas other treaties do not.

Treaties examined by the ANAO

1.9 Three treaties were examined by the ANAO, namely the:

- *International Convention on Civil Liability for Bunker Oil Pollution Damage*, managed by the Australian Maritime Safety Authority (AMSA);
- *Agreement between Australia and the International Atomic Energy Agency on the Non-Proliferation of Nuclear Weapons and Additional Protocol*, managed by the Australian Safeguards and Non-Proliferation Office (ASNO); and
- *Convention on the Rights of the Child*, the reporting obligations of which are coordinated by the Attorney-General's Department (AGD).

An overview of these three treaties is provided below, including the purpose and role of each treaty as well as the treaty obligations.

Bunkers Convention

1.10 Bunker oil is primarily used as fuel oil for the operation and propulsion of all ship types. As fuel, the amount of bunker oil carried on ships is generally significantly less than oil transported for cargo purposes, such as crude oil. However, the risk from bunker oil spills is high, as most ships carry bunker oil, and the nature of bunker oil—generally highly viscous and relatively unrefined—means that it poses particular risks when spilled in the marine environment. The quantity of bunker oil carried by each ship depends on the size of the ship and how far the ship is travelling, for example a large container ship carrying up to 15 200 shipping containers can use 380 tonnes of bunker oil each day.

1.11 International data shows that oil spills originating from ships other than oil tankers accounted for 93 per cent of marine pollution incidents requiring some type of response. In Australia, 16 of the 26 major oil spills that have occurred since 1970 were from ships' bunker oil. By volume, the remaining 10 spills made up 93 per cent of the total volume of oil spilled. However, even though bunker oil spills have been smaller in volume, it is important to have environmental protection arrangements in place. Figure 1.2

outlines three recent incidents resulting from the spill of a ship's bunker oil in Australian waters.

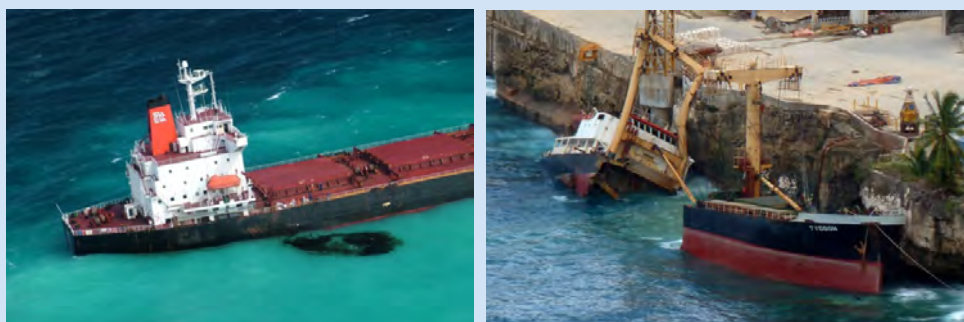
Figure 1.2: Bunker spill incidents from 2009–2012

Bunker oil spills in Australian waters since 2009

11 March 2009 - *Pacific Adventurer* (18 391 gross registered tonnes general cargo ship) en-route from Newcastle to Brisbane lost 31 cargo containers overboard and sustained damage to its side that resulted in the loss of 270 tonnes of bunker oil. The bunker oil impacted the south-east Queensland coast with the Queensland Government responsible for the oil spill response, supported by the Australian Maritime Safety Authority.

3 April 2010 – *Shen Neng 1* (36 575 gross registered tonnes bulk carrier) en-route from Gladstone to China with 68 000 tonnes of coal ran aground and ruptured its fuel tanks and spilled four tonnes of bunker oil into the surrounding sea. Oil booms, skimmers and oil dispersants were deployed to clean up the spill. Due to the limited size of the oil spill, response actions and prevailing weather conditions, most of the bunker oil was contained before impacting on shorelines or the adjacent Douglas Shoal.

8 January 2012 – *MV Tycoon* (2638 gross registered tonnes general cargo ship) berthed at Christmas Island, broke her mooring lines and broke up spilling cargo of phosphate and 102 tonnes of fuel oil, 10 tonnes of lubricating oil and 32 tonnes of diesel oil. The rough weather hampered cleanup activities but assisted in naturally dispersing much of the leaked oil into deeper waters offshore.



Shen Neng 1 (left) and *MV Tycoon* (right).

Photo: Maritime Safety Queensland (*Shen Neng 1*) and Australian Transport Safety Bureau (*MV Tycoon*).

Source: AMSA.

1.12 The *International Convention on Civil Liability for Bunker Oil Pollution Damage*, (Bunkers Convention) is a multilateral treaty between member countries to the International Maritime Organization (IMO). The Convention complements a suite of IMO multilateral treaties aimed at protecting the marine environment from ship-related pollution. With nearly 25 000 port visits by over 5000 ships annually, Australia has a particular interest in effective marine protection arrangements.

1.13 The Bunkers Convention entered into force on the 21 November 2008 and was implemented in Australia on 16 June 2009, through the *Protection of*

the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Bunker Oil Pollution Act).¹⁸ The Convention provides claimants with the right to direct action. That is, persons suffering pollution damage from a bunker oil spill may seek compensation directly from the shipowner's insurance company, rather than being required to submit a claim to the shipowner. The Convention provides for strict liability on the shipowner to meet clean up and compensation costs due to a bunker oil pollution incident.¹⁹

1.14 The Bunkers Convention requires that ships—with a gross tonnage of more than 1000—must carry a valid Bunker Certificate to confirm that the shipowner holds insurance against any liability from a discharge or spill of their bunker oil. The owner of a ship commits an offence of strict liability if a ship covered under the Convention enters or leaves an Australian port without having onboard the appropriate insurance certificate. The provisions of the treaty establish a liability and compensation regime to reimburse claimants for the costs to mitigate and clean up bunker oil pollution damage to the marine environment, along with costs associated with property damage, economic losses, and the cost of preventive measures.

1.15 Unlike many other treaties, there is no international reporting obligation under the Bunkers Convention. Signatories are required to verify the liability insurance that ships hold, and issue a Bunker Certificate to ships registered on their national shipping registries. Under the Convention, a ship can be detained in port by a member country if it does not hold a valid certificate.

Nuclear Non-Proliferation Treaty

1.16 The multilateral *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) is the centrepiece of international efforts to prevent the spread of nuclear weapons and technologies, advance cooperation in the peaceful use of nuclear energy and to further nuclear disarmament among nuclear-weapon countries. The safeguards commitments under the NPT are monitored by the United Nations International Atomic Energy Agency (IAEA). Only five countries—

18 Currently there are 66 countries with the Bunkers Convention in force.

19 A shipowner's liability is calculated according to the size of the ship, and is based on International Monetary Fund Special Drawing Rights, and is \$1.54 million for ships with gross tonnage up to 2000; and an additional \$618 for each tonne from 2001 to 30 000 tonnes; \$464 for each tonne from 30 001 to 70 000 tonnes; \$309 for each tonne over 70 000 tonnes.

India, Israel, Pakistan, South Sudan and North Korea—remaining outside the treaty.

1.17 The NPT applies to ‘nuclear materials’ that are used in, or are necessary to, the production of nuclear weapons and nuclear explosive devices. The nuclear materials covered by the NPT are outlined in Table 1.2. The definition of nuclear material is provided in Article XX of the IAEA Statute, and is essentially uranium, thorium and plutonium.²⁰ In addition, information and technology on nuclear related activities and on the export and import of equipment can be subject to the NPT.

Table 1.2: Nuclear materials covered by the NPT

Nuclear material details	
Natural uranium Uranium in its natural state.	Low enriched uranium Is considered a special fissionable material and an indirect use material.
Depleted uranium Uranium in spent fuel from natural uranium fuelled reactors and tails from uranium enrichment processes.	High enriched uranium Is considered a special fissionable material and a direct use material.
Enriched uranium Uranium having a higher abundance of fissile isotopes than natural uranium. Considered a special fissionable material.	Plutonium Considered a special fissionable material and a direct use material.
Uranium 233 Is considered a special fissionable material and a direct use material.	Thorium Naturally occurring but through transmutation becomes fissionable.

Source: ASNO.

1.18 The safeguards commitments under the NPT are implemented through a number of bilateral treaties—Safeguards Agreements—between member countries and IAEA. The Comprehensive Safeguards Agreement is a bilateral treaty between Australia and IAEA that implements the obligations of the NPT. The objective of the Comprehensive Safeguards Agreement with Australia is the:

... timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities to the manufacture of nuclear weapons or of

20 The full definition can be accessed at the IAEA website, *The Statute of the IAEA* <<http://www.iaea.org/About/statute.html#A1.20>> [accessed 16 August 2013].

other nuclear explosive devices or for purposes unknown, and deterrence of such diversion by the risk of early detection.

1.19 The NPT entered into force for Australia on 23 January 1973, while the Comprehensive Safeguards Agreement entered into force on 10 July 1974. The Comprehensive Safeguards Agreement has been enhanced by the Additional Protocol²¹, which entered into force in Australia on 12 December 1997. The Additional Protocol provides IAEA with greater access to information and locations to enhance its capabilities to verify the absence of undeclared nuclear material and activities.

1.20 Australia's ratification of the NPT commits Australia to not acquiring nuclear weapons, while the Comprehensive Safeguards Agreement defines the monitoring, control and reporting obligations in relation to the possession, use and transfer of nuclear material and nuclear technology. The provisions of the NPT require member countries to comply with reporting requirements, and to support verification activities undertaken by IAEA.

Convention on the Rights of the Child

1.21 The *Convention on the Rights of the Child* (CRC) is a multilateral treaty that provides an international framework on how children should be treated.²² The CRC is one of nine international core human right conventions²³, all of which have international monitoring and reporting obligations to the UN. Countries that ratify an international human rights treaty, 'assume obligations and duties under international law to respect, to protect and to fulfil human rights'.²⁴

1.22 This CRC encompasses the 'best interests of the child' as a primary consideration and seeks to protect children, promote their well being and make sure they have an appropriate place in society. The Convention recognises the civil, cultural, economic, political and social rights of children including health, education, an adequate standard of living, and the child's own culture, religion

21 *Protocol Additional to the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons.*

22 The CRC defines a child as being below the age of 18 years, and was developed around the view that children need special consideration that adults do not.

23 Australia is a party to seven of the nine core human right conventions.

24 Office of the High Commissioner of Human rights, International Human rights Law [Internet], available from <<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> [accessed 9 April 2013].

and language. It asserts young peoples' rights to form and express their own views, thoughts, conscience, religion, privacy, freedom of association and peaceful assembly.

1.23 The CRC entered into force for Australia on 16 January 1991. In addition, Australia has ratified two optional protocols in relation to: the sale of children, child prostitution and child pornography; and children in armed conflict.²⁵ Australia is currently considering a third optional protocol that would establish a communications (complaints) mechanism that would allow children to submit complaints regarding specific violations of their rights under the CRC.

1.24 The obligations and duties assumed following the ratification of the CRC include scheduled reporting by national governments to the UN CRC Committee about progress in implementing the CRC. In addition, signatories are required to raise awareness of the Convention through dissemination of reports and communication of CRC provisions to adults and children. Meeting these obligations is intended to improve the protection of children throughout the world. The implementation of the CRC, like other human rights treaties, poses particular challenges, as responsibility is shared between agencies and jurisdictions across the Australian, state and territory governments.

Audit objective, criteria and scope

1.25 The objective of the audit was to assess the effectiveness of Australia's arrangements to meet its treaty obligations under three selected treaties. In addressing this objective the audit:

- outlines the framework Australia has put in place to bring treaties into force; and
- assesses whether Australia has arrangements in place to provide assurance that it is fulfilling its international obligations once a treaty enters into force.

1.26 The audit scope included consideration of the Bunkers Convention, the NPT and the CRC. The assessment of the CRC focused on AGD's coordination

²⁵ The Optional Protocol relating to the Sale of Children, Child Prostitution and Child Pornography (OPSC), was ratified in 2007 and the Optional Protocol relating to the involvement of Children in Armed Conflict (OPAC), was ratified in 2009.

of Australia's periodic reporting under the CRC. Assessment of the implementation of other elements of the CRC, which are shared between the Australian, state and territory governments, was beyond the scope of the audit.

Audit methodology

1.27 The audit methodology involved undertaking fieldwork at AMSA, ASNO, AGD and DFAT and included:

- interviews with relevant staff and the review of documentation held by the agencies;
- interviews with relevant staff from the DFAT Treaties Secretariat; and
- consultation with the Standing Committee on Treaties, the Parliamentary Joint Standing Committee on Treaties, and government and non-government stakeholders.

1.28 The audit was conducted in accordance with ANAO auditing standards at a cost to the ANAO of \$512 060.

1.29 The structure of the report is outlined in Table 1.3.

Table 1.3: Structure of the report

Chapter title	Description
2. <i>Bunkers Convention</i>	This chapter examines the arrangements Australia has in place to meet its obligations under the <i>International Convention on Civil Liability for Bunker Oil Pollution Damage</i> .
3. <i>Nuclear Non-Proliferation Treaty</i>	This chapter examines the arrangements Australia has in place to meet its obligations under the <i>Agreement between Australia and the International Atomic Energy Agency for the Treaty on the Non-Proliferation of Nuclear Weapons and Additional Protocol</i> .
4. <i>Convention on the Rights of the Child</i>	This chapter examines the arrangements Australia has in place to meet its human rights reporting obligations under the <i>Convention on the Rights of the Child</i> .
5. <i>Improving assurance that Australia is meeting its treaty obligations</i>	This chapter examines the arrangements by which the Australian Parliament and the public gain ongoing assurance that Australia is meeting its obligations under treaties, and considers options for strengthening these arrangements.

2. Bunkers Convention

This chapter examines the arrangements Australia has in place to meet its obligations under the International Convention on Civil Liability for Bunker Oil Pollution Damage.

Introduction

2.1 The *International Convention on Civil Liability for Bunker Oil Pollution Damage* (Bunkers Convention) is administered by the Australian Maritime Safety Authority (AMSA). AMSA, a statutory authority in the Infrastructure and Regional Development portfolio, is Australia's regulating agency for the shipping and maritime industry, emergency response coordination and the marine environment.

2.2 To assess the arrangements Australia has in place to meet its obligations under the Bunkers Convention, the ANAO examined AMSA's:

- preparations for implementing the Bunkers Convention; and
- process for issuing Bunker Certificates and monitoring compliance with the Convention.

Implementation of the Bunkers Convention

2.3 Australia's preparations for implementing the Bunkers Convention began during the treaty negotiations and continued through the treaty approval process. Preparations included: appropriate planning and governance arrangements; processes, forms and systems for certification; resourcing arrangements; ship inspector training; and stakeholder engagement.

Planning and governance arrangements for implementation

2.4 In the case of the Bunkers Convention, and most new treaties, the process for defining the obligations and how they will be enforced was undertaken by the Federal Executive Council. As outlined in Chapter 1, this process commenced with the development of a NIA and RIS.²⁶

26 Department of Finance, *Best Practice Regulation Handbook*, Canberra, July 2013.

2.5 The NIA, tabled in the Parliament on 28 March 2006²⁷, and developed in conjunction with the RIS, outlined: how the Bunkers Convention was to be implemented; the rationale for Australia implementing the Convention; and the requirements and costs of implementation for both the Australian Government and the shipping industry.

2.6 The RIS, developed by the Department of Infrastructure and Transport (Infrastructure) and AMSA, also outlined the rationale for Australia entering into the Bunkers Convention and the obligations that Australia would need to enforce. A summary of the anticipated impact on the shipping industry is outlined below.

Summary of the Bunkers Convention Regulation Impact Statement

The RIS included analysis of the impact the implementation the Bunkers Convention would have on the Australian shipping industry, finding that:

Shipowners usually have a single policy in respect of each ship to cover most, if not all, their third party liabilities in relation to the ship. The insurance policies of the vast majority of shipowners will already cover the liabilities to which the Bunkers Convention relates.²⁸

The only additional requirement identified was the need for ships to carry a Certificate of Insurance for the Convention.

The RIS highlighted the consultation undertaken with shipping industry representative bodies, and with the State and Territory Governments.

The RIS identified similar existing Australian legislation, which was not as strict but applied to smaller ships, 400 gross tonnage or more, compared to the proposed Bunkers Convention of 1000 gross tonnage or more.²⁹

2.7 The RIS included a high level overview of the compliance regime for the Bunkers Convention, with arrangements for the inspection of ships to confirm that the required Bunker Certificate was held. These inspections were to be performed by AMSA marine surveyors as part of their existing Port State Control (PSC) ship inspections.

2.8 The RIS also outlined a role for officers from the Australian Customs and Border Protection Service (Customs and Border Protection) to inspect

27 Following consideration of the treaty, the JSCOT recommendation stated 'The Committee supports the *International Convention on Civil Liability for Bunker Oil Pollution Damage* and recommends that binding treaty action be taken'.

28 Regulation Impact Statement – International Convention on Civil Liability for Bunker Oil Pollution Damage, p. 5.

29 The Convention on the Limitation of Liability for Maritime Claims applies to ships with a gross tonnage of 400 or more to be insured to cover pollution damage caused in Australia, but only where they are found to be at fault. The Bunkers Convention applies to ships with a gross tonnage of 1000 or more but includes strict liability regardless of fault and precise definitions of pollution and documents to be carried by the ship.

ships' Bunker Certificates under an existing Memorandum of Understanding with AMSA. However, Customs and Border Protection advised that its officers do not currently inspect Bunker Certificates.³⁰ AMSA's PSC ship inspections are currently the sole compliance activity undertaken to confirm that ships hold the required Bunker Certificate.

2.9 Through the RIS process, it was determined by AMSA and Infrastructure that legislation would be required to give effect to the Bunkers Convention. AMSA and Infrastructure worked closely on the development and drafting of the legislation, for the *Protection of the Seas (Civil Liability for Bunker Oil Pollution Damage) Act 2008*.

2.10 In moving to implement the Bunkers Convention, AMSA advised that it relied on the NIA, RIS and the text of the Convention to develop a high-level work program and where possible used existing governance arrangements.³¹ These arrangements included business-as-usual reporting and approval processes in AMSA's Marine Environment Division and liaising with Infrastructure in developing the legislative requirements. The arrangements parallel the implementation and management of other IMO conventions, including the sister convention on oil pollution from oil tankers, the *International Convention on Civil Liability for Oil Pollution Damage 1992*.

Processes, forms and systems

2.11 AMSA expected that it would be able to implement the Bunkers Convention using its existing processes, forms and systems, for other conventions on certification, marine pollution and insurance, particularly the *International Convention on Civil Liability for Oil Pollution Damage 1992*.³² However, AMSA did not explicitly assess whether modifications were required to these prior to the implementation of the Bunkers Convention. The effectiveness of the processes, forms and systems used in conducting and recording inspection results for Bunker Certificates is discussed later in this chapter.

30 Customs and Border Protection advised the ANAO that it has been engaged in renegotiations with AMSA on the checking of ship certificates under the Memorandum of Understanding for approximately 18 months.

31 AMSA advised that in implementing a convention it systematically works through the text line by line, article by article identifying what actions are required to implement the convention.

32 This included the process for verifying ships' insurance, issuing the Bunker Certificate, and the inspection of ships' certificates in Australian ports.

2.12 AMSA also anticipated that it would be able to use its existing network of marine surveyors across Australia to undertake the inspection of the Bunker Certificates, and record inspection results using the Ship Inspection Record (Port State Control) (SIR) booklet. It was envisaged that checking the certificate would not impact significantly on the workload of the marine surveyors, as part of a ship's inspection is to check a range of certificates and qualifications.

Resource management and contingency arrangements

2.13 AMSA's preparations for implementing the Bunkers Convention included an assessment of the ongoing resources needed to administer the Convention, including verifying and issuing certificates and providing ongoing policy advice and guidance. The assessment found that the ongoing administration of the Convention could be undertaken by one officer, with provision for support from other sections during peak periods, if required. The administrative functions are carried out in AMSA's head office in Canberra.

2.14 During the implementation planning, AMSA identified that as one of the first countries to implement the Bunkers Convention, Australia may get overloaded with applications for Bunker Certificates, and planned for a range of scenarios.³³ However, AMSA advised that the number of applications for certificates during implementation were modest.³⁴

Training marine surveyors

2.15 Prior to implementing the Bunkers Convention, AMSA updated its information and training for its network of marine surveyors across Australia to include the obligations of the Convention. New AMSA marine surveyors must complete a four-module 10-week Marine Surveyor Training Program before being able to undertake ship inspections.³⁵ In addition, AMSA provides ongoing training to marine surveyors through a biannual workshop, with

33 Planning included identifying and developing a range of mitigation actions, such as estimating processing times and required staff numbers to process applications, along with identifying staff that were able to be reassigned if the need arose.

34 Eighty eight Australian registered ships and only a few foreign registered ships made applications. AMSA's assessment at the time was that the majority of foreign registered ships had applied for a certificate from countries that they frequented more often, such as countries in South East Asia, Europe, and North America.

35 The modules include: head office induction in Canberra; regional area port familiarisation; one-on-one Port State Control training; on-the-job training at home port and completion of assignments; completing surveyor school; and the appointment of a mentor. Assignments were updated to include questions on Bunker Certificates.

marine surveyors required to attend one of the workshops annually.³⁶ As well as the workshop, each regional office holds refresher training about every three months to cover changes to requirements and emphasise existing requirements.

Engaging with industry stakeholders

2.16 During the implementation period, AMSA engaged with the shipping industry, including shipowners and ships' agents, to outline the requirements ships would have to meet under the Bunkers Convention—principally to hold a valid Bunker Certificate. AMSA also issued three Marine Notices³⁷ about the introduction and ongoing operations of the Convention. The current notice³⁸, issued on 20 April 2011, supersedes the previous 09/2009 notice, and outlines the:

- background to the Bunkers Convention;
- requirements for ships and oil tankers;
- application process; and
- penalties applied in cases of non-compliance.

2.17 The Marine Notices are available on AMSA's website and accessible via a subscriber based automated email notification service, for stakeholders in the shipping industry, (such as shipowners and ships' agents). AMSA advised that shipowners were also able to seek additional information and clarification from its central office. AMSA further advised that no complaints or concerns have been raised by stakeholders in relation to the implementation and ongoing management of the Convention.

36 The workshop provides a forum for the surveyors to receive updates and discuss issues identified during ship inspections over the past 12 months, as well as recent and emerging developments at the International Maritime Organization.

37 A Marine Notice provides information to the shipping community of issues which may impact on them, including upcoming changes to legislation and/or changes in procedures as a result of amended or new legislation. A Marine Notice is not a legal instrument, however AMSA also issues Marine Orders which are a form of regulation used to keep laws up to date where there are a high number of technical amendments or improvements to the standards or requirements.

38 The Marine Notices issued by AMSA on the Bunkers Convention: No.16/2008 Entry into Force of Bunkers Convention; No.09/2009 Entry into Force of Bunkers Convention for Australia; and No.06/2011 Update on Application of the Bunkers Convention in Australia.

Issuing Bunker Certificates and monitoring compliance

2.18 Under the Bunkers Convention, ships entering Australian, and other member countries' ports, are required to hold a valid Bunker Certificate. This requirement places the onus on the shipowner to apply to the relevant authority in the country the ship is registered. In this context, AMSA has two primary roles, to:

- issue Bunker Certificates to Australian registered ships; and
- monitor compliance among all ships that use Australian ports.

Issuing Bunker Certificates

2.19 The obligation requiring Australia to issue Bunker Certificates to non-exempt ships with a gross tonnage greater than 1000, is set out in Article 7 of the Bunkers Convention. In Australia, this obligation is given effect through Section 18 of the *Protection of the Seas (Civil Liability for Bunker Oil Pollution Damage) Act 2008*. To meet this obligation, AMSA has put in place arrangements to accept applications from shipowners for a Bunker Certificate, verify that the insurance held in relation to the ship is compliant, and to issue the valid certificate.

Applications for a Bunker Certificate

2.20 To receive a Bunker Certificate from AMSA, shipowners are required to submit an application for assessment, and information on the ship particulars and insurance policy held. AMSA provides instructions and the application form on its website.³⁹

2.21 AMSA has procedures for processing applications for a Bunker Certificate and provides guidance to its officers. The guidance outlines the relevant legislation and regulations, templates and forms to be used and procedures to be followed. Where possible, an application should be processed and a certificate issued within five working days. The ANAO reviewed the applications and supporting documentation for the 57 Bunker Certificates issued in 2012 to foreign and Australian registered ships. The relevant documentation confirmed that AMSA followed its internal guidance when issuing each certificate.

39 Australian Maritime Safety Authority, Marine Environment Protection forms, available from <<http://amsa.gov.au/Forms/mep.asp>> [accessed on 17 April 2013].

2.22 Each certificate is valid for 12 months, and is required to be renewed in February each year. Consequently, the majority of processing and issuing of certificates occurs over January and February, with 64 per cent of certificates issued in these months in 2012. This predictable workload allows AMSA to plan and manage its resources.

Foreign ships applying for a Bunker Certificate

2.23 With respect to ships registered with countries not a party to the Bunkers Convention, shipowners are able to apply for a Bunker Certificate from the relevant authority of any country that is a member to the Convention. However, even though foreign registered ships are able to apply for a Bunker Certificate from AMSA, they rarely do so (with only eight out of the 57 certificates, being issued to foreign ships in 2012).⁴⁰ The process for issuing a certificate to a foreign registered ship is the same as for an Australian registered ship.

Verification of ships' insurance

2.24 When AMSA issues a Bunker Certificate it must verify that the ship holds insurance, and that the insurance provides the required cover under the Bunkers Convention. The documentation to be included with the application is the ship's 'Blue Card', which is the ship's certificate of insurance from the insurance company. The ANAO observed that AMSA received the relevant certificate of insurance for each of the 57 certificates issued in 2012. Typically, such insurance will provide cover against a range of liabilities, including liabilities under the Convention.

2.25 Given the maturity of the international shipping industry, insurers are known and understand the requirements of international maritime conventions and provide the appropriate insurance for their members or clients. AMSA has an arrangement whereby an insurance company is automatically accepted as a valid insurer if it is listed on the protection and indemnity clubs website.⁴¹ If the insurer is not listed, AMSA must undertake

40 AMSA advised that it was more common to issue certificates to foreign ships when the Bunkers Convention was first implemented in 2009, where a ship's country was not a party to the Bunkers Convention at the time and the ship was accessing Australian ports.

41 A protection and indemnity club is a cooperative of insurance associates coming together to provide insurance cover for its members. There are 13 principal protection and indemnity clubs that provide liability insurance cover for about 90 per cent of the world's shipping (ocean-going tonnage). The 13 protection and indemnity clubs can be accessed on the International Group of P&I Clubs website <<http://www.igpandi.org/>> [accessed: 20 August 2013].

further verification to determine the validity of the insurance provided, including seeking additional information and contacting the insurer. AMSA advised that only a few applicants each year are requested to provide additional documentation on the ship's insurance policy.

2.26 AMSA may withdraw a Bunker Certificate in cases where the ship no longer holds the required insurance and where a ship is registered in another country. However, since the implementation of the Convention in 2009, AMSA has not been required to do so.

Monitoring compliance with the Bunkers Convention

2.27 Establishing an effective monitoring and compliance regime is important to demonstrate that Australia is meeting its obligations under the Bunkers Convention. AMSA's and the shipowner's responsibilities are set out in the legislation, and are supported by a compliance regime that is intended to enable Australia to verify that ships are compliant with the treaty's obligations (see Figure 2.1).

Figure 2.1: Obligation to enforce Bunkers Convention

International Convention on Civil Liability for Bunker Oil Pollution Damage

Article 7 Compulsory insurance or financial security

- 12 ... each State Party shall ensure, under its national law, that insurance or other security, to the extent specified in paragraph 1, is in force in respect of any ship having a gross tonnage greater than 1000, whenever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008

Subdivision B—Production of certificates

- 20 (1) An enforcement officer may require the master or other person in charge of a ship to which this Part applies to produce to the officer an appropriate insurance certificate for the ship that is in force if:
- (a) for a ship that is registered in Australia—the ship is in Australia; or
 - (b) for any other ship—the ship is at a port in Australia or at an offshore facility in the coastal sea of Australia or an external Territory or in the waters of the sea within the limits of a State or Territory.

Subdivision C—Detention of ships

- 21 (1) An enforcement officer may detain a ship to which this Part applies in a port in Australia if the officer has reasonable grounds to believe that, at the time the ship attempts to leave the port, there is not an appropriate insurance certificate for the ship that is in force.

Ship inspections

2.28 As previously noted, the requirements of the Bunkers Convention are checked as part of AMSA's Flag and PSC inspections of ships that enter Australian ports.⁴² In 2011–12, AMSA records show that 24 539 port visits were undertaken by 5194 individual foreign registered ships. In the same year, AMSA completed 7802 ship inspections at 79 Australian ports—around 20 individual ship inspections per day. AMSA's inspections accounted for about 32 per cent of port visits by ships. AMSA has a team of 44 qualified marine surveyors located across AMSA's 16 regional offices who undertake these inspections.⁴³

2.29 AMSA advised that in the majority of cases ships will renew certificates, as the delays from operating without a certificate is cost prohibitive. The marine surveyors use a Ship Inspection Record (SIR) to record the ship and port visit details, along with the inspection results.⁴⁴ The SIR checklist includes a number of certificates that are required to be inspected and verified. The visit details and inspection results are recorded in AMSA's Shipsys system and marine surveyors are able to enter this information directly using a portable device, as well as completing a SIR. These records inform the identification of ships for future inspections.⁴⁵

2.30 AMSA advised that Shipsys is also used to forward data to regional computer systems in relation to safety aspects of shipping. The elements dealing with the liability and compensation conventions and their associated certificates, including the Bunker Certificate, are considered to be supplementary to the existing PSC system.

Risk-based targeting of ships for inspection

2.31 Targeting ships for inspection based on their risk profile allows AMSA to concentrate its inspection effort on those ships that pose the greatest

42 Flag State Control is the responsibility a country has to enforce maritime requirements over ships registered under its flag and includes inspecting ships to make sure they comply with the country's maritime requirements. PSC enables a country to inspect foreign ships in its ports for the purpose of verifying that the ship and crew comply with the requirements of international conventions and international law.

43 Data as at 30 June 2012.

44 The SIR covers a comprehensive range of requirements, including: crew qualifications; cargo record books; garbage management plan and record books; various log book entries; and safety management systems and maintenance.

45 The information recorded in Shipsys includes particulars of the ship, contact information for the ship owner or agents, expiry dates of certificates, inspection results, ship survey results, port visits details, and any incidents or detentions a ship may have.

non-compliance risk. In 2001, AMSA developed a risk-based methodology to complement their marine surveyor’s selection of ships for a PSC inspection, based on in-house statistical analysis. In 2002, AMSA engaged the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to develop a methodology based on a mathematical assessment of individual ship characteristics and their port visits to determine a ‘risk factor’. The CSIRO analysed over 18 000 PSC inspections since 1995, which identified the statistical probability of a ship being found to be non-compliant with shipping requirements.

2.32 The main risk factors identified through the statistical modelling by CSIRO are ranked and then applied to future ship visits. The ranking of these factors, is divided into two ship type categories, with six main factors being identified for bulk carrier ships, and nine main factors identified for all other ship types, as outlined in Table 2.1.⁴⁶ The risk factors are not specific to Bunker Certificate compliance, as the certificate is only one of many certificates and documents a ship is required to hold. Ships are ranked from high risk to low risk.

Table 2.1: Risk factors used to determine a ship’s risk profile

Bulk carriers		Other ship types	
1.	Age of ship	1.	Age of ship
2.	Number of deficiencies at the previous inspection	2.	Type of ship
3.	Country of registration	3.	If first Australian inspection for ship
4.	Ship's gross tonnage	4.	Number of deficiencies at the previous inspection
5.	Time since previous inspection	5.	Time since previous special survey
6.	If first Australian inspection for ship	6.	Ship's gross tonnage
		7.	Country of registration
		8.	Classification society*
		9.	Time since previous inspection

Note: * A classification society is an organisation that maintains technical standards for the construction and operation of ships and other offshore structures. The classification societies assess ships against a range of technical rules to determine if a ship meets a particular standard or requirement before certifying or providing the ship insurance.

Source: AMSA.

46 In 2004, AMSA undertook analysis of the statistical modeling against actual PSC inspection results and found that ships with a low—zero to six—risk factor had a five per cent probability of being detained due to non-compliance, while ships with a risk factor higher than six experienced detention rates of 10 to 28 per cent. The analysis showed a correlation between the statistical risk factor and actual ship detention rates.

2.33 AMSA advised that the risk factors are reviewed regularly, by comparing the actual PSC inspection results to verify the factors are still valid. AMSA also advised a broader review of its risk assessment approach will be undertaken in conjunction with a planned redevelopment of AMSA's Shipsys system. This review is expected to be completed by the end of 2013.

2.34 In 2011–12, AMSA reported that it had inspected 407 ships identified as Priority 1 (high risk) and 375 of Priority 2 ships, meeting its performance target of 80 and 60 per cent respectively for those two groups. AMSA advised that the statistical risk factor is used by the marine surveyor at each port to complement the identification of ships for PSC inspections, with operational, resource and other factors or information also being considered.⁴⁷ AMSA is limited in each port or region of ports by the number of PSC marine surveyors available to undertake PSC inspections. Table 2.2 sets out AMSA's reported ship inspection performance for each priority category.

Table 2.2: AMSA's reported ship inspection performance for 2011–12

Ship risk rating	Probability of detention-risk factor	2011–12 target inspection rate (%)	Reported 2011–12 inspection rate result (%)
Priority 1	More than 5%	80	92
Priority 2	4% to 5%	60	78
Priority 3	2% to 3%	40	61
Priority 4	1% or less	20	46

Source: AMSA Annual Report 2011–12, page 38.

Non-compliance with the Bunker Certificate

2.35 Where a PSC inspection by an AMSA surveyor identifies non-compliance with the Bunkers Convention it may detain the ship in port until a valid Bunker Certificate has been obtained. Both the Convention and the Act provide this authority to the marine surveyor.⁴⁸ AMSA advised the ANAO that, since the implementation of the Bunkers Convention, there has been no recorded case of a ship being detained because it did not hold a valid Bunker Certificate during a PSC inspection.

⁴⁷ This can include advice from officers of Customs and Border Protection, or the Department of Agriculture who can report issues in relation to a ship's structure, safety and pollution observed during their customs or quarantine inspections while a ship is in port.

⁴⁸ The authority to detain a ship from leaving port applies broadly to 'enforcement officer' not just AMSA surveyors.

Review of AMSA's compliance arrangements

2.36 To assess AMSA's enforcement and compliance regime for the Bunkers Convention, the ANAO reviewed a sample of 154 PSC ship inspections (non oil tanker) for the 2011–12 year.⁴⁹ This period included a total of 3213 PSC ship inspections. Inspection records from ports around Australia, were randomly selected based on the date of their port visit. The ANAO review included examining the:

- Ship Inspection Record 'Port State Control' (SIR) booklet, or the mini SIR booklet used by Shipsys mobile users; and
- the corresponding record for each PSC ship inspection within Shipsys.

2.37 The ANAO's analysis of completed ship inspection records, both the SIR (including the mini SIR) and in Shipsys, showed inconsistencies in how Bunker Certificate inspection results were recorded.

2.38 The SIR (and mini SIR) is a checklist used by the marine surveyors to record the outcome of ship inspections. While this checklist covers in the order of 66 certificates and documents that a ship is required to carry, it has not been revised to include a check box for the Bunker Certificate, nor does it provide a specific area to record the expiry date or other particulars of the certificate.

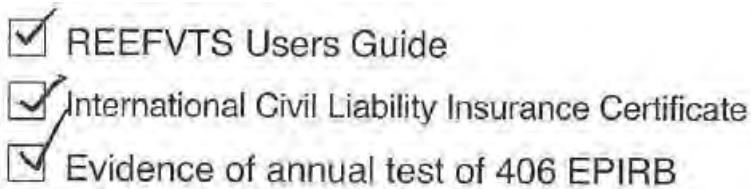
2.39 Analysis of the ANAO's sample of 154 SIRs (non oil tanker), showed that 76 per cent of the records reviewed contained a mark against a checkbox relating to the insurance certificates required for oil tankers under the separate *International Convention on Civil Liability for Oil Pollution Damage 1992*.⁵⁰ In some cases, the marine surveyor had made written reference to the Bunker Certificate next to the International Civil Liability Insurance Certificate checkbox (as shown in Figure 2.2).⁵¹ However, explicit written references to the Bunker Certificate in a SIR account for only 25 (16 per cent) of the 154 SIRs in the sample.

49 The ANAO reviewed 167 ship inspection records, with 13 records being for oil tankers. These 13 were excluded from the analysis as, depending on the product carried, they may or may not be required to hold a Bunker Certificate.

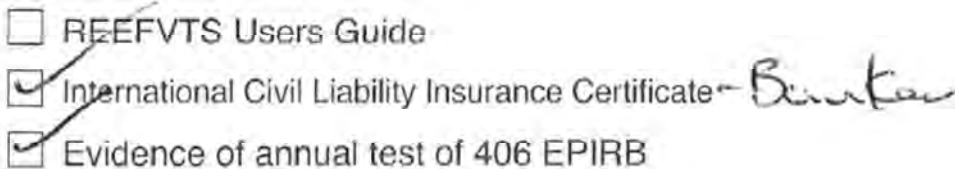
50 A small number of oil tankers are required to carry both certificates, due to the type of oils they are carrying.

51 For purposes of clarity within the ANAO sample, this was termed a reference to the Bunker Certificate.

Figure 2.2: Examples of SIR checkbox used for Bunker Certificate compliance



Note: SIR dated 12th September 2011 for a bulk carrier ship.



Note: SIR dated 14th August 2011 for a general cargo/multi-purpose ship.

Source: Extracts from two of the 154 SIRs in the ANAO sample.

2.40 Variations between the AMSA regional offices and the marine surveyors conducting an inspection were also observed for the 154 ship inspections. SIR records from nine of the 15 ports did not contain any explicit reference to the Bunkers Convention, while marine surveyors in the other six ports make written reference to the Convention.

2.41 The absence of an effective means to record the checking of the Bunker Certificate during inspections and varied practices between ports in employing a 'work around' is of concern. Further, the ANAO's review of the Shipsys record management system, identified corresponding deficiencies in AMSA's ability to record the results of ship inspections in relation to the certificate. Unlike other required certificates, Shipsys has no functionality to record a ship's certificate details including its expiry date.

2.42 As discussed at paragraph 2.12, AMSA did not assess whether modifications would be required to its forms and systems prior to implementation of the Bunkers Convention. Based on the ANAO's review it is evident that neither the checklist used to record a ship inspection, nor AMSA's Shipsys system, were subsequently amended or modified to include Bunker Certificate requirements. At the time of the audit, AMSA management consulted by the ANAO were unaware of this deficiency.

2.43 In response to the audit, AMSA advised that:

AMSA has now updated its SIR book and added a checkbox specifically for the Bunkers Certificate. Additionally, our Instructions to Surveyors on this matter will be further reviewed.

2.44 However, AMSA advised that modification of the Shipsys database to record Bunker Certificates information will be difficult:

The Shipsys system is used both to record the results of PSC inspection and to forward the data to the regional computer systems supporting both the Toyko and Indian Ocean MOUs.⁵² Thus changes to Shipsys and the exchange of ship bunker certificate information would require agreement at the governing bodies managing the Toyko and Indian Ocean MOUs. Previous AMSA experience to date indicates that such changes are difficult to achieve for those conventions and certificates deemed to be non-essential for ship safety purposes.⁵³

2.45 Nevertheless, the ANAO considers that the planned redevelopment of the Shipsys database provides an opportunity for AMSA to consider making the necessary amendments to the system to allow for the appropriate recording of Bunker Certificate information, as is done for other required certificates.

Conclusion

2.46 AMSA's implementation of the Convention, incorporated sound planning and included assessing the resources required to administer the Convention, identifying contingency arrangements to address risks, training of marine surveyors who conduct ship inspections, and communicating with industry stakeholders on their obligations.

2.47 Given the similar nature of the Bunkers Convention to existing shipping treaties already in force in Australia, AMSA was able to use existing arrangements for issuing and checking a ship's Bunker Certificate. AMSA has developed procedures for processing applications for certificates, verifying ships' insurance policies and issuing the relatively small number of certificates

52 The PSC Memorandum of Understandings (MOUs) facilitate the sharing of PSC compliance information on ships between member countries in their respective regions. There are nine MOUs across the globe, with Australia a member of the Tokyo (Asia-Pacific) and Indian Ocean MOUs.

53 The ship information requirements under both the Tokyo and Indian Ocean MOUs have generally been derived for the safety aspects of shipping. The PSC elements dealing with the liability and compensation conventions and their associated certificates has been an "add-on" to the existing PSC regime.

required annually. Guidance has been developed to aid staff and peak periods are planned and managed within AMSA's existing resources.

2.48 The agency has adopted a risk-based approach for selecting ships for inspection, a component of which involves verifying that the ship holds a valid Bunker Certificate. In implementing the Bunkers Convention AMSA did not modify its inspection checklists or systems to support the consistent recording of Certificate inspection results. AMSA advised that all ship's inspected have held a valid certificate since inspections began. However, the lack of accurate records of ship inspection results limits AMSA's ability to assure itself that all ships inspected held the required Bunker Certificate. During the audit, AMSA advised that it has now put processes in place to record the verification of a ship's Bunker Certificate during a ship inspection.

3. Nuclear Non-Proliferation Treaty

This chapter examines the arrangements Australia has put in place to meet its obligations under the Agreement between Australia and the International Atomic Energy Agency for the Treaty on the Non-Proliferation of Nuclear Weapons and Additional Protocol.

Introduction

3.1 The multilateral *Treaty on the Non-Proliferation of Nuclear Weapons and Additional Protocol* (NPT) came into force for Australia in 1973. The NPT was implemented through Australia's bilateral Comprehensive Safeguards Agreement and Additional Protocol with the International Atomic Energy Agency (IAEA) in 1974. The Australian Safeguards and Non-Proliferation Office (ASNO), a division within the Department of Foreign Affairs and Trade, administers these arrangements.⁵⁴

3.2 The ANAO reviewed the implementation and management of Australia's obligations under these treaty arrangements, including the processes in place to: account for nuclear materials in Australia; report to IAEA; and inspect nuclear material users.

Implementation of the NPT

3.3 The safeguards commitments under the NPT are implemented in Australia through the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Safeguards Act), which also implements obligations under other treaties in relation to nuclear safeguards and nuclear security.⁵⁵ The Safeguards Act and the *Nuclear Non-Proliferation (Safeguards) Regulations 1987* provide ASNO with the regulatory authority to make sure that Australia meets its safeguards obligations under the NPT. ASNO's responsibilities include the:

- maintenance of an national accounting system for recording, and control of, all nuclear material, facilities and equipment; and

54 ASNO was formerly known as the Australian Safeguards Office, from July 1974 to August 1998. The Director General of ASNO is an independent statutory officer and reports directly to the Minister for Foreign Affairs, and issues a separate Annual Report.

55 The Safeguards Act also gives effect to the *Convention on the Physical Protection of Nuclear Material*, the *International Convention for the Suppression of Acts of Nuclear Terrorism*, and 22 bilateral agreements that Australia has entered with other countries.

- reporting to IAEA information concerning Australia's nuclear material inventory, and the features of nuclear equipment and facilities.

3.4 ASNO reports the amounts, movements and location of nuclear material and the features of facilities relevant to safeguarding, as well as information required by the Additional Protocol, such as nuclear-related research and development activities. This enables IAEA to draw a conclusion on the non-diversion of declared nuclear material in Australia and the absence of undeclared nuclear material and activities.⁵⁶

Parliamentary review and legislation

3.5 As the NPT and related Comprehensive Safeguards Agreement came into force in 1973 and 1974, neither was subject to the current parliamentary treaty review framework through JSCOT, a NIA or RIS. The enabling legislation, however, is subject to Parliamentary scrutiny. The Safeguards Act has been amended three times since 1987, with minor changes made in 2003, 2007 and 2012. The 2003 and 2007 amendments included strengthening arrangements and offences for the protection of nuclear material, facilities and associated information, and to introduce permit categories for the establishment and decommissioning of nuclear facilities in Australia.⁵⁷ In 2012, the Safeguards Act was amended to align the offence provisions with the *International Convention for the Suppression of Acts of Nuclear Terrorism*.

3.6 The Australia Parliament—through JSCOT—also undertook a review of Nuclear Non-Proliferation and Disarmament in 2009.⁵⁸ The inquiry reviewed treaties related to nuclear non-proliferation and disarmament, how the treaties had progressed and advanced Australia's objectives, whether they could be improved, and what additional measures Australia could take to support the efforts of the nuclear non-proliferation and disarmament bodies.⁵⁹ The inquiry

56 The NPT and ASNO responsibilities do not include radioactive materials or radiation safety, as this is the responsibility of the Australian Radiation Protection and Nuclear Safety Agency.

57 The new permit categories were required to shut down two old reactors at the Australian Nuclear Science and Technology Organisation (ANSTO) Lucas Heights facility and to establish replacement reactors.

58 Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 106 Nuclear Non-Proliferation and Disarmament*, September 2009.

59 The Committee recommended that: the Australian Government encourage all other uranium exporting countries to require that the countries to whom they export uranium have an Additional Protocol in place; and that the Australian Government abandon its zero real growth policy in relation to IAEA's budget and work with other states to strengthen its funding base.

did not examine ASNO's administration of nuclear non-proliferation and disarmament treaties in Australia.

Accounting for Australia's nuclear material

3.7 Article 7 of the Comprehensive Safeguards Agreement requires that:

(a) Australia shall establish and maintain a national system ... of accounting for and control of all nuclear material subject to safeguards under this Agreement.

To meet this requirement, and account for the nuclear material covered under the NPT, Australia has put in place a Nuclear Accounting and Permit System as part of the *State System of Accounting for and Control of Nuclear Material*. An inventory of all materials, along with corresponding details and information on the nuclear materials held in Australia is maintained by ASNO. Under the Nuclear Accounting and Permit System, users of nuclear materials are assessed and issued permits depending on the required use of, or need for the nuclear material. The permits require the permit holders to report periodically on their inventory of nuclear materials and changes in inventory.

3.8 The types of nuclear materials covered by the NPT are outlined in Table 1.2, and can include quantities of less than one gram to hundreds of kilograms. All nuclear material in Australia is divided into accounting and reporting areas known as 'Material Balance Areas'. There are eight Material Balance Areas; five administered by the Australian Nuclear Science and Technology Organisation (ANSTO) located at Lucas Heights, one administered by Silex laboratories, and two covering all other locations outside of ANSTO.⁶⁰

3.9 The ANAO examined the Nuclear Accounting and Permit System's processes and databases to account for the nuclear materials covered by the NPT, including the issuing of permits to applicants.

Issuing and recording nuclear material permits

3.10 The Nuclear Accounting and Permit System includes seven types of nuclear material permits, depending on the use and function the permit holder requires the nuclear material for. The permits types are listed below in Table 3.1.

60 The ANSTO facilities at Lucas Heights include the: High Flux Australian Reactor (HIFAR), Australia's first nuclear reactor and now undergoing decommissioning; MOATA reactor which has been fully decommissioned; Open Pool Australian Lightwater reactor; research and development laboratories; and vault storages.

Table 3.1: Types of permits and authorities under the *Safeguards Act*

Nuclear material permit types	
•	<i>Possess nuclear material</i> —allows the permit holder to possess nuclear materials at their facility or site.
•	<i>Possess associated items</i> —allows the permit holder to possess specified associated equipment, material or technology used for or in nuclear activities or production at their facility or site.
•	<i>Transport nuclear materials</i> —allows the permit holder to transport nuclear materials between locations.
•	<i>Transport associated items</i> —allows the permit holder to transport specified associated equipment, material or technology used for or in nuclear activities or production between locations.
•	<i>Establish a facility</i> —allows the permit holder to develop a facility in which the nuclear material is used, including storage sites, where the nuclear material is greater than one kilogram. Once the facility has been established this permit is no longer required as one of the other permits is required.
•	<i>Decommission a facility</i> —allows the permit holder to decommission a facility where nuclear material was used. This permit expires once the decommissioning conditions have been met and verification completed.
•	<i>Communicate information contained in associated technology</i> —allows a permit holder to communicate information on associated nuclear material technology. This permit can be used by legal firms who hold nuclear material technology information on behalf of clients.

Source: ASNO.

3.11 ASNO has in place guidance to assist officers, and processes for accepting and assessing permit applications, creating, approving and issuing permits, and the gazettal of permits under the Nuclear Accounting and Permit System.⁶¹

3.12 Permit applications, and all other forms and reports required by permit holders, are accessible and available on the ASNO website. Permit holders are categorised into four groups, government related research and science (ANSTO and CSIRO); industry (commercial users of the nuclear materials, for example protective casing for radioactive materials); universities and hospitals; and miscellaneous users (for example nuclear materials in museum displays).

3.13 Permits are usually issued for a period of five years, except for the establishing and decommissioning of a facility, for which a customised time period will be set. Permit holders can apply to have permits renewed and varied—for cases where details about the permit holder or permit requirements may change, such as a business name. ASNO has the authority

61 Applicants are not required to pay a fee to obtain a permit from ASNO.

under the Safeguards Act to revoke permits, either at the request of the permit holder—where they no longer have a requirement for the permit—or at ASNO’s initiation if the permit holder does not satisfy the permit and compliance requirements.

3.14 ASNO assesses the applicant’s need or reason for holding nuclear material or information depending on the permit type. In the case of a permit to possess nuclear material ASNO requests information such as: the applicant’s details; reasons for and use of the nuclear material; arrangements to store the materials; who will have access; how the applicant will maintain the required records; and reporting of the nuclear materials.

3.15 The ANAO examined the physical and electronic records for the 454 permits issued since March 1988 (when the first permits were issued) to November 2012. The ANAO’s review included examining permit applications, supporting documentation, correspondence with applicants, assessment of applications and issued permits. The ANAO found that ASNO has adequately recorded and maintained these records, including those permits that are still current, along with those that were not renewed at expiry or revoked.⁶² The number of current permits by type, including the new, varied, revoked and expired permits during the 2011–12 year is shown in Table 3.2.

62 The permit holders have to renew their permits every five years.

Table 3.2: Type and number of permits as at 30 June 2012

Permit type	Total at 30 June 2012	New permits	Varied permits	Revoked permits	Expired permits
Possess nuclear material	95	3	9	1	-
Possess associated items	14	-	-	-	-
Transport nuclear materials	22	-	12	-	2
Transport associated items	0	-	-	-	-
Establish a facility	0	-	-	-	-
Decommission a facility	2	-	-	-	-
Communicate information contained in associated technology	10	-	-	-	-
Totals	143	3	21	1	2

Source: ASNO Annual Report 2011–12, Table 6.

3.16 The population of permit holders is steadily increasing. During the 2011–12, ASNO assessed and issued only three new permits, and renewed or varied 21 existing permits.⁶³ The ANAO observed that these permits were issued or amended in accordance with ASNO's guidance and processes, with the required permit documentation adequately recorded.

Electronic record management database

3.17 ASNO uses a purpose developed records management database to support the Nuclear Accounting and Permit System and Australia's reporting requirements to IAEA. The Nuclear Material Balance and Tracking (NUMBAT) database was developed in-house in the 1990's and upgraded to a Microsoft Access platform in the late 1990s. The database is used to produce the monthly and annual reports on Australia's nuclear materials required by IAEA. Reports from member countries must be in a specific text format and compatible with

⁶³ A permit to possess nuclear material is the most common permit type, making up 66 per cent of all permits, with a permit to transport nuclear materials the next highest with 16 per cent. The 'establishing a facility' and 'decommissioning a facility' permits are rarely used, with the two permits issued relating to the de-fuelling of one of the older reactors at Lucas Heights in 2007.

IAEA systems. The database is able to generate reports in the required format. It also includes additional modules for Yellowcake reporting.⁶⁴

3.18 The database is dated and ASNO has identified limitations that impact on its ability to effectively meet Australia's obligations under the NPT. These limitations include:

- the database has become unstable, unreliable and is vulnerable to single-point failure, where if one person in ASNO with expertise in the database is unavailable core functions of the database can fail;
- limited functionality as the database does not link permit holder information with corresponding nuclear material inventories;
- all data and information is required to be manually entered into the database. There is no functionality for automated data filling. ASNO staff are required to undertake the data entry and cross checking of data, which is prone to data entry error;
- no functionality to record exempted material, for example radiography cameras. The exempted material records are currently being recorded in a separate spreadsheet;
- additional spreadsheets are required to record changes to inventories for all permit holders—excluding ANSTO—with data entered into the spreadsheets then being used to inform the database; and
- several of the key inventory reports cannot be generated without manual calculation, input and checking, impacting on ASNO staff resources during IAEA reporting periods and increasing the risk of delays to Australia's submission of reports to IAEA.

3.19 The risk of not replacing the database was identified by ASNO as its highest risk in both its 2011–12 and 2012–13 risk assessments to the DFAT Executive. DFAT has subsequently approved a project to redevelop the database. The project is currently expected to span the 2012–13 and 2013–14 years, with a total of \$1.48 million allocated to complete the project.⁶⁵ Given the

64 Yellowcake is extracted and concentrated from uranium ore and used as the raw material for commercial nuclear materials, especially fuel elements in nuclear reactors.

65 The project includes replacing both the nuclear and chemical databases, with the nuclear database being completed first. In 2010–11, funds were allocated to redevelop two ASNO databases, including the Nuclear Accounting and Permit System, into a new system. However, due to competing resource requirements in DFAT, the upgrade of ASNO's databases was placed on hold until 2012–13.

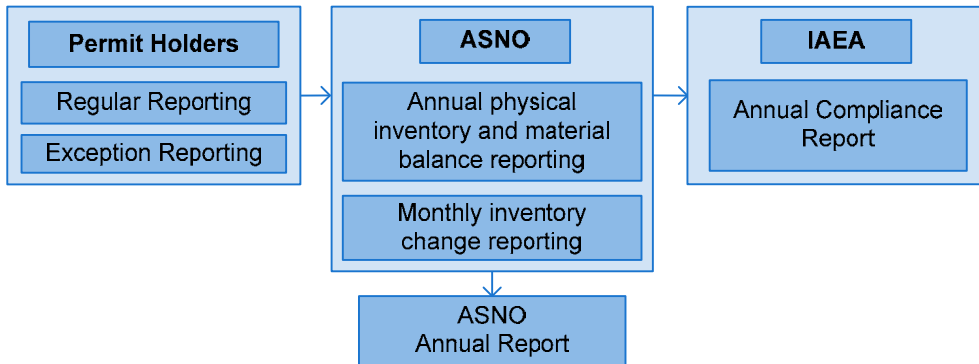
importance of accounting for, and controlling, all nuclear material inventory in Australia and for meeting Australia’s reporting obligations to IAEA, close management oversight of the development and implementation of the replacement database will be required to make sure it delivers the intended benefits and mitigates identified risks.

Reporting to IAEA

3.20 Australia’s requirement to report to IAEA is outlined in Article 8—Provision of Information to the Agency—of the Comprehensive Safeguards Agreement. The reports are to verify that there has been no diversion of nuclear material from peaceful uses to nuclear weapons or other nuclear explosive devices within Australia.

3.21 In order for Australia to report accurate information to IAEA, ASNO must collect details on permit holder inventories and changes to inventories along with design information on facilities. The requirement for permit holders to provide this information is part of the conditions of holding a permit, as set out in the Safeguards Act. The reporting process from the permit holder to ASNO, and ASNO’s reporting to IAEA is outlined in Figure 3.1 and was examined by the ANAO.

Figure 3.1: Nuclear material reporting



Source: ANAO analysis of ASNO processes.

Reporting by the permit holder

3.22 Permit holder reporting provides up-to-date information on the amounts, equipment and activities involving nuclear material within Australia. Permit holders are required to report regularly and on an exception basis in those cases where the permit holder needs to report a change that has an

impact on the particulars of the permit. To facilitate reporting, ASNO has implemented structured processes, including template reporting forms and submission timeframes. ASNO provides a comprehensive range of application, approval, notification and reporting templates to permit holders on its website. The templates are grouped into Applications for Approvals; Permit Applications; and relevant to reporting requirements, Reports and Notifications.

3.23 Reporting on inventory changes occurs regularly; on a monthly, biannual and annual basis, as specified in the guidance included on reporting forms. In addition, permit holders must submit reports for exceptional circumstances such as when an incident(s) occurs. ASNO compares current reported information against previous reports and any discrepancies or unidentified changes are followed-up. The information and data provided by the permit holder is then manually entered into the NUMBAT database and separate permit holder spreadsheets by ASNO staff.

3.24 In addition to the redevelopment of the NUMBAT database, DFAT has also allocated \$548 000 over 2012–13 to 2013–14 to develop an online web interface. The intended benefits from this interface include:

- minimising manual data entry and manipulation of spreadsheets external to the database system;
- improving data integrity and quality through system validation at the time of entry by permit holder;
- permit holders can enter updates, rather than complete submission each time;
- the availability of an audit history of submissions by permit holders;
- ASNO officers and permit holders would have visibility of the information and data entered; and
- alerts to permit holders can be setup to provide advanced notification of when reporting obligations are due.

Reporting to IAEA

3.25 To meet its reporting obligations to IAEA, Australia is required to submit three types of reports to IAEA:

- 1) Inventory Change Report (ICR): this monthly report includes the weight of nuclear material, movements of nuclear material between

zones—known as material balance areas (MBA)—and the location of nuclear material. The ICR provides a record of all changes in nuclear material inventory between Material Balance Areas relevant to safeguarding such material, and enables IAEA to assess the non-diversion of declared nuclear material.

- 2) Physical Inventory Listing (PIL): records the total inventory of safeguarded nuclear material held by each permit holder and is provided to IAEA annually.
- 3) Material Balance Report (MBR): a summary report that aggregates, for each category of nuclear material for each Material Balance Area, all changes within the reporting period and the opening and closing inventories.⁶⁶

3.26 Changes to Australia’s nuclear inventory are to be reported to IAEA on a monthly basis with more extensive reporting on permit holders’ inventories provided annually via the physical inventory listing and material balance report. The volume of reporting can be substantial, for example, ASNO submitted 32 ICR, PIL and MBR reports to IAEA in June 2012.⁶⁷ During 2011–12 the reports, which are required in a specified IAEA coded format, covered 2778 nuclear material items and 2014 separate notations related to the nuclear material items. Table 3.3 illustrates the number of individual items ASNO must verify prior to reporting to IAEA.

Table 3.3: ASNO reporting to IAEA 2011–12

Type of report	Number of reports (line entries) to IAEA
Inventory Change Report (ICR)	1084
Material Balance Report (MBR)	143
Physical Inventory Listing (PIL)	1551
Concise note associated with items reported	2014
Total	4792

Source: ASNO Annual Report 2011–12, page 54.

66 Once nuclear material leaves Australia, ASNO’s responsibility to report to IAEA cease, but for nuclear material exports for nuclear purposes ASNO continues to account for this nuclear material through Australia’s network of bilateral nuclear safeguards agreements. These agreements were outside the scope of this audit.

67 IAEA’s system is unable to upload reports with more than 99 separate line entries. Therefore, in the case of June 2012 reporting ASNO submitted 24 separate PIL reports for the 2290 separate entries to IAEA, with each report being less than 99 separate entries.

3.27 The required content and format of the reports to IAEA are specific, and data needs to be compatible with IAEA's system. Internal guidance material prepared by ASNO on meeting international reporting obligations, in conjunction with IAEA guidance on reporting, assists ASNO officers to meet reporting requirements. Opportunities to attend training courses related to reporting to IAEA are also available and attended by ASNO team members, with officers attending the International Safeguards Training in Japan in 2012 and in the USA in May 2013.

3.28 The ANAO reviewed the 32 ICR, PIL and MBR reports submitted to IAEA in June 2012. The review included examining the reports for submission timeliness and conformance with IAEA requirements. The ANAO found that, for the June 2012 reporting period, Australia met IAEA's requirements for reporting nuclear material information under the NPT. Only minor corrections and queries were made by IAEA on the data reported. IAEA's conclusions on Australia's nuclear activity and results of its inspections are discussed at paragraph 3.50 to 3.53.

Other Reporting to IAEA

3.29 ASNO is required to report to IAEA on a range of other items, which include: advance notice reporting for the import or export of nuclear material of a specific type and quantity⁶⁸; and reporting changes of the design information of relevant infrastructure and systems at ANSTO. ASNO also reports monthly to IAEA on the export of uranium ore concentrates, and advised this function is not burdensome. However, ASNO advised the ongoing tracking of uranium ore concentrates, and the nuclear material derived from its processing and use, is a significant workload, but outside the requirements of the Comprehensive Safeguards Agreement.

3.30 Under the Additional Protocol, ASNO is also required to provide annual reports to IAEA on a range of other nuclear related activities, and these include:

- reporting on nuclear material that is exempt from safeguards or is of a form that does not meet the starting point of full safeguards as defined under the Comprehensive Safeguards Agreement;

68 This usually applies to the import of fresh fuel for the OPAL reactor and the corresponding export of the spent fuel.

- outlining the nuclear fuel cycle related research and development activities;
- outlining all the relevant buildings in each location holding nuclear material or involved in nuclear activities;
- providing a description of uranium mining activities;
- providing a description of manufacturing activities related to nuclear equipment; and
- providing a forward 10 year plan in relation to nuclear fuel cycle developments.

Efficiency of collating and verifying reports to IAEA

3.31 Guidelines are provided by IAEA that allow for a consistent approach to reporting in terms of format, information and detail for Additional Protocol Reporting and reporting under the Comprehensive Safeguards Agreement. IAEA also provides Quality Control Software to make sure the nuclear material inventory and change reports match the formatting requirements. The ANAO observed that ASNO submits reports in the required format, information and detail, as specified by IAEA.⁶⁹

3.32 As discussed previously, a core function of the Nuclear Accounting and Permit System database is to produce reports for IAEA, in the required format. However, the current limitations of the database, principally that it cannot record all the information required to meet reporting obligations to IAEA, limits ASNOs ability to perform this function.⁷⁰ Consequently, reporting to IAEA on inventory levels is a challenging process for ASNO, particularly for non-ANSTO facilities. There are a large number of nuclear material line items to report and ASNO officers must manually verify the nuclear material quantities in the reports against the permit holder spreadsheet data with manual calculations undertaken to check for discrepancies and errors. The redevelopment of the database should reduce the manual verification and calculations performed by ASNO staff for its reporting to IAEA.

69 The format of the data contained in Australia's reports is specified by IAEA so that it can be automatically uploaded into IAEA's nuclear material database. IAEA conducts quality assurance over the data prior to uploading and will either make required corrections—seeking ASNO approval of those corrections—or request ASNO to amend the report so it meets requirements.

70 Supplementary information, such as exempted materials, is recorded in a separate excel spreadsheet. In addition, the NUMBAT database cannot produce the MBR report so the total amount of each category of nuclear material for each change type must be manually calculated and recorded.

Inspection of nuclear material permit holders

3.33 The Comprehensive Safeguards Agreement is prescriptive in terms of member countries’ safeguards obligations under the treaty and a compliance regime has been instituted to assess how well each country is meeting its obligations. In Australia’s case, this includes the inspections ASNO undertakes to make sure permit holders comply with treaty requirements, and the activities undertaken by IAEA to verify Australia’s compliance with the safeguards obligations of the treaty.

ASNO inspection of permit holders

3.34 The inspections ASNO undertakes of permit holders are aimed at verifying that the permit holders are complying with the requirements of the permit according to the Safeguards Act.

3.35 Undertaking domestic inspections of permit holders is not an explicit requirement of the NPT. How Australia accounts for the nuclear material covered as part of the Nuclear Accounting and Permit System, is determined by the Australian Government and through the Safeguards Act, Part IV (Administration, Division 4—Inspections, searches and seizures) which provides the authority for ASNO to undertake inspections of Australian permit holders. These inspections seek to verify that permit holders are complying with the requirements of the permit, reported inventories match the physical inventory and security arrangements are adequate. Inspections also provide an opportunity to educate permit holders about their obligations and address any queries they may have. The ASNO permit holder inspection process includes the following steps.

ASNO Inspection Process	
Verification	Physically verifying the amount and exact location of material. Comparison is made against previous reports of type, quantity, disposal and movement from the permit holder. Permit holders are required to prove where the nuclear material is, if it is not available for inspection. For example, if the material is being used in the field, then the permit holder is required to demonstrate that their records account for its location. A copy of the permit is also requested.
Security	Verify the security measures are adequate to the types and quantities of nuclear material held. Check the permit holder’s access procedures and records are adequate.
Inspection report	An inspection report is drafted based on the inspection findings, along with a copy of the inventory of material and permit. The report may include recommendations.

ASNO Inspection Process	
Sign off	The report is provided to the Director General or Assistant Secretary of ASNO for sign-off and sent to the permit holder after sign-off.
Follow-up	Recommendations in the report (where made) are actioned by ASNO, which can include requests for additional information from the permit holder or a follow-up inspection.
Communication	The report is circulated within the ASNO inspection team and senior management.

Undertaking inspections

3.36 The ASNO safeguards inspection team comprises four positions, with all the team members designated under the Safeguards Act as an ‘inspector’. ASNO’s practice is to allocate a minimum of two inspectors to undertake an inspection, and as outlined earlier, inspections are seen as providing ‘on the job training’ for inspection officers.

3.37 ASNO is not required to provide permit holders prior notice of an inspection, but advised that notice is usually given one to two weeks prior to establish availability of the permit holder. Inspections generally involve ASNO officers: discussing the permit requirements with the permit holder to make sure the permit holder understands the requirements, and clarifying any queries. Inspectors will also verify the:

- physical location of the nuclear materials;
- security arrangements to secure the materials;
- required nuclear material records are being maintained; and
- type and quantity of nuclear material corresponds with the materials and quantity on the permit.

3.38 During 2011–12, ASNO conducted 13 domestic safeguards related inspections.⁷¹ The reported number of inspections undertaken since 2006–07 and inspection effort in days, is outlined in Table 3.4.

⁷¹ ASNO intended undertaking two inspections in 2012–13, but these had not commenced at the time of audit fieldwork.

Table 3.4: Reported number of inspections undertaken by ASNO and recorded effort in days

	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13
ASNO permit holder inspections	20	6	25	2	6	13 ¹	2
Inspection effort (days)	20	3	20	0.5	4	8.5	1.5

Note: Inspection effort includes preparation, inspection and follow-up activities, but it does not include travel time.

¹ ASNO met with two permit holders during the 2011–12 year to discuss permit matters, but these did not constitute inspections and are not recorded in the figures for this year.

Source: ANAO analysis of ASNO documentation.

3.39 Table 3.4 shows that the reported number of inspections undertaken by ASNO varies each year. The ANAO's review of the 74 inspections from 2006–07 to 2012–13 shows that this variation is due to a number of factors, including the availability of ASNO inspectors and the focus and effort of inspections. ASNO advised that the amount of effort required for each inspection varies depending on the permit holder and the types and quantities of materials held. ASNO also undertakes physical protection and security related domestic inspections of permit holders, in relation to the *Convention on the Physical Protection of Nuclear Material* and associated international recommendations for implementation of nuclear security.

3.40 From 2006–07 to 2012–13, ASNO reported that the results from inspections of permit holders identified no indication of unauthorised access to, or use of, nuclear materials or nuclear items.⁷² ANAO review of the documentation for the inspections completed in 2011–12 confirmed that the inspections were appropriately recorded and documented.

Risk-based approach to inspections

3.41 ASNO advised that it takes a number of factors into consideration when selecting a permit holder for inspection including the time since last inspection or visit; likelihood of issues; whether they are a new permit holder; and inspector availability and budget. ASNO also advised that other meetings,

72 ASNO reported in 2006–07 one incident of a permit holder reporting the discovery of uranium samples outside the approved location. The permit holder undertook an investigation and an audit of their materials and procedures. Based on the investigation and audit, ASNO decided not to take action under the Safeguards Act. In addition, ASNO noted that the material discovered was considered before the start of IAEA safeguards and was not subject to nuclear material accountability to IAEA.

seminars and training are used as opportunities to inspect permit holders in the same locations, to minimise time loss from travel and impact on its budget. However, this approach is undocumented and no record is made of the rationale or risk rating of permit holders selected for an inspection.

3.42 The ANAO considers that ASNO's approach to selecting permit holders for inspections would be strengthened by developing a risk matrix and risk ranking permit holders, to identify those presenting the highest risks. The risk matrix could include details on: type of permit; type and quantity of material(s) held; time since last inspection; results of previous inspection(s) or queries from the permit holder; and whether a new permit holder. Documenting the approach ASNO takes in identifying permit holders for inspection would provide assurance that higher risk permit holders are being inspected.

3.43 In this context, there would also be merit in ASNO developing inspection types of differing intensities that are aligned to assessed permit holder risk. For example, lower risk permit holders could undergo a desktop review involving ASNO officers obtaining information via telephone or email, supported by the submission of photographs by the permit holder of storage and security arrangements for nuclear materials. Such an approach would allow resources to be directed towards the physical inspection of higher risk permit holders.

IAEA inspections of Australian materials

3.44 The NPT includes provisions for IAEA to independently verify the nuclear material information member countries are required to report. Inspection provisions are outlined in Articles 71 to 83 of the Comprehensive Safeguards Agreement, which covers the purpose, scope, access, frequency and timing of inspections by IAEA designated inspectors. When undertaking inspections in member countries, IAEA conducts visual observations; collects environmental samples; uses radiation detection and measurement devices to check the quantity and type of nuclear material and the facilities they are located in; the application of seals and other identifying and tamper indicating devices.⁷³

⁷³ The Safeguards Act authorises IAEA inspection under Part IV—Administration, Division 4—Inspections, searches and seizures.

3.45 ASNO facilitates and supports IAEA inspections, which can be both scheduled and unscheduled. IAEA advises and coordinates with ASNO in advance for scheduled inspections, with ASNO informing the permit holders of when the inspections will occur. In the case of the unscheduled inspections under the Comprehensive Safeguards Agreement, IAEA only provides three hours notice.

3.46 The types of the inspections IAEA undertake to verify the information Australia has provided in reports, includes:

- Design Information Verification Inspection (DIVI);
- Routine Inventory Verification Inspection (RIVI);
- Short Notice Inspection (SNI); and
- Complementary access inspection in accordance with the Additional Protocol (CAAP).

3.47 Table 3.5 below illustrates the type and number of IAEA inspections undertaken for the period from 2006–07 to 2011–12.

Table 3.5: IAEA inspections undertaken by type

IAEA Inspections	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12
DIVI	4	3	4	5	2	4
RIVI	4	3	3	5	3	3
SNI	1	1	1	1	1	1
CAAP	3	3	4	3	3	2
Obligations discharged satisfactorily	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*

Note: * Small inventory discrepancies were identified (and are discussed in paragraph 3.49).

Source: ANAO analysis of data from ASNO Annual Reports.

3.48 IAEA inspections findings since 2006–07 have indicated that Australia has met the obligations under the NPT. The only findings of note for inspections during the period 2006–07 to 2011–12 were minor discrepancies in inventories of materials held by permit holders. The discrepancies were attributed to measurement uncertainties and re-measurement, processing losses, sample losses, rounding of calculations, minor shipper/receiver differences, and double counting of materials.

3.49 Over the period 2006–07 to 2011–12, only in 2006–07 was a minor difference between book and physical inventories identified at the ANSTO facilities (at Lucas Heights). This was attributed to 18 grams of enriched uranium during the shutdown and defueling of a facility. No further differences between book and physical inventories were identified at the ANSTO facilities at Lucas Heights in the subsequent five years.⁷⁴

IAEA conclusion of Australian compliance

3.50 IAEA's conclusions against Australia's compliance with safeguards commitments under the NPT are provided at two levels: the higher level overarching findings (known as boarder conclusions); and conclusions against IAEA inspections and verification activities under the Additional Protocol. When drawing its conclusions IAEA uses a combination of information available, including reports provided by Australia, its inspections activities undertaken in Australia, and the review of open source and other information.

3.51 The conclusion of IAEA's inspection activities in Australia for 2011 covered six areas.⁷⁵ Against these six areas, IAEA made one negative conclusion, which related the timeliness of Australian reports to IAEA. ASNO reported that these reports were submitted approximately 40 days overdue, due to the need to balance competing priorities at that time.

3.52 IAEA's Additional Protocol concluding statements for 2011 were positive and IAEA reported that verification activities did not indicate the presence of undeclared nuclear material or activities at the sites inspected. The one negative finding with respect to the timeliness of some reports did not impact on IAEA's 2011 broader conclusions for Australian. The broader conclusions apply to all compliant member countries, including Australia and stated that:

the Secretariat found no indication of the diversion of declared nuclear material from peaceful nuclear activities and no indication of undeclared nuclear material or activities. On this basis, the Secretariat concluded that, for these States, all nuclear material remained in peaceful activities.

74 ASNO also advised that minor discrepancies are commonly due to limitations in accurately measuring small amounts of the nuclear materials. ASNO uses the inspections it undertakes of permit holders to minimise discrepancies where possible and notifies IAEA where discrepancies in nuclear material inventories are identified.

75 The six areas include: examination of records; examination of report to the agency; application of containment and surveillance measures; verification of physical inventory; confirmation of the absence of unrecorded production of direct-use material from material subject to safeguards; and verification activities for timely detection.

3.53 ASNO advised that Australia was the first country to receive the higher level conclusion from IAEA in 2000 and has received it every year since.

Conclusion

3.54 The NPT has been in force for nearly 40 years, and ASNO has in place mature management arrangements and a regulatory regime to account for Australia's nuclear materials. ASNO has developed the Nuclear Accounting and Permit System to enable it to meet IAEA requirements for reporting nuclear material information under the NPT.

3.55 ASNO assesses users of nuclear materials and issues permits depending on the required use of, or need for the nuclear materials. Permit holders periodically report on their nuclear material inventory to ASNO in order to keep the Nuclear Accounting and Permit System up to date. The ANAO's review of all permits found that permits had been issued in accordance with internal guidance and procedures.

3.56 A records management database supports the Nuclear Accounting and Permit System by recording nuclear materials, along with generating monthly and annual reports. However, limitations with the database present risks to ASNO's ability to effectively meet Australia's reporting obligations under the NPT. In recognition of these risks, ASNO has received funding and will redevelop the database over 2013–14 and 2014–15.

3.57 Inspections of permit holders are undertaken to verify permit requirements are met, and reported nuclear materials match permit holders' actual inventories and ASNO records. ASNO's current approach to identifying permit holders for inspection is based on an assessment of risk of permit holders, staffing resources and timing factors. However, there is no documentation supporting these assessments. Currently, ASNO's inspection regime does not differentiate between permit holders with different levels of compliance risk. As a consequence ASNO is not able to target greater inspection effort towards permit holders assessed as high risk. There would also be merit in ASNO developing inspection types of differing intensities that are aligned to the assessed risk of each permit holder.

3.58 ASNO has supported the independent verification of Australia's nuclear material inventory by facilitating IAEA's scheduled and unscheduled inspection activities of permit holders' nuclear material inventories and facilities. IAEA verification activities, in conjunction with Australia's nuclear material inventory reporting, provides the assurance required for IAEA to

conclude that Australia's accounting and use of nuclear material inventory is in accordance with the NPT.

Recommendation No.1

3.59 To achieve greater transparency and efficiency under the Nuclear Non-Proliferation Treaty, the ANAO recommends that ASNO implements a stronger risk based approach to its program of inspections of nuclear permit holders by:

- documenting its risk assessment of permit holders; and
- developing an inspection program that includes inspection types of differing intensities.

ASNO response: *Agreed.*

3.60 ASNO agrees with the recommendation that ASNO implement a stronger risk-based approach to its program of inspections of permit holders by documenting the risk assessment of permit holders and developing an inspection program with differing intensity of inspections.

3.61 ASNO manages its regime of inspections of permit holders on the basis of the relative safeguards compliance risks involved and within available resources. ASNO acknowledges the report's finding that there is considerable variability in the number of inspections ASNO conducts from year to year, and accept ANAO's recommendation on how this could be strengthened.

4. Convention on the Rights of the Child

This chapter examines the arrangements Australia has in place to meet its human rights reporting obligations under the Convention on the Rights of the Child.

Introduction

4.1 The Attorney-General's Department (AGD) has been responsible for coordinating Australia's international reporting obligations since the *Convention on the Rights of the Child* (CRC) came into force in 1991. AGD is not, however, solely responsible for developing the policies or implementing the programs that contribute to Australia meeting its CRC obligations. These responsibilities are shared between other Australian Government agencies and the states and territories.⁷⁶

4.2 The ANAO examined AGD's coordination arrangements to meet Australia's reporting obligations under the CRC. Particular attention was given to the following key areas:

- internal planning processes and guidance to staff;
- engaging stakeholders;
- meeting CRC reporting requirements; and
- raising awareness of the CRC.

4.3 The ANAO examined the most recent CRC reporting 'cycle', which commenced in 2006 and concluded in 2012 and sought feedback from Australian, state and territory government agencies and non-governmental organisations (NGOs) on AGD's role in coordinating the reporting

76 Due to Machinery of Government changes announced 18 September 2013 several new Australian government departments (discussed in the audit report) have been created. The audit report will refer to the former departments, which include: the former Department of Education, Employment and Workplace Relations (DEEWR) that is now two departments—Department of Education, and the Department of Employment; the former Department of Immigration and Citizenship (DIAC) that is now the Department of Immigration and Border Protection; the former Department of Health and Ageing (DoHA) that is now the Department of Health; the former Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) that is now the Department of Social Services; and the former Department of Broadband Communications, and the Digital Economy (DBCDE) that is now the Department of Communications.

requirements.⁷⁷ The audit did not examine the adequacy of Australia's compliance with the provisions of the CRC.

Implementation of the Convention on the Rights of the Child

4.4 Unlike the NPT and the Bunkers Convention, Australia does not have specific child rights legislation in place at the Australian Government level.⁷⁸ Prior to ratifying the CRC in 1991, the Australian Government reviewed existing mechanisms that protect child rights and assessed existing legislation and common law as being adequate to implement the CRC.⁷⁹

4.5 Responsibility for the implementation of the CRC is shared in Australia, with the nine federal, state and territory jurisdictions, holding significant responsibility for implementation of child focused policies and programs. Funding for programs dedicated to children at the Australian Government level is primarily administered by the departments: Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); Education, Employment and Workplace Relations (DEEWR); and Health and Ageing (DoHA). Corresponding human services and health agencies administer funding at the state and territory government level.⁸⁰ Therefore, a considerable number of government stakeholders contribute to the CRC reporting process through the provision of information and data relative to their area of responsibility.

77 Submissions were received from four Australian Government departments: Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), Australian Federal Police (AFP), Department of Health and Ageing (DoHA) and Department of Education, Employment, Work Place Relations (DEEWR); and the Tasmanian Government's Standing Committee on Treaties (SCOT) contact officer. Feedback was also received from the Australian Human Rights Commission (AHRC) and the Child Rights Taskforce.

78 Australia does have extensive anti-discrimination legislation in place and since ratification of the CRC two jurisdictions, Victoria and the Australian Capital Territory, have enacted specific human rights legislation that accords with the principles and provisions of the CRC. In addition, legislative reform, aimed at protecting human rights within Australia, the *Human Rights (Parliamentary Scrutiny) Act 2011*, was enacted. This legislation supports the Parliamentary Joint Committee on Human Rights, established in March 2012, to assess the compatibility of new bills and disallowable legislative instruments with the seven core international human rights treaties.

79 The review included an assessment of the Australian Constitution; common law; and existing legislation together with anti-discrimination legislation at the Australian, state and territory levels.

80 Other Australian Government agencies are also responsible for policies related to children including Department of Immigration and Citizenship (DIAC), AFP and Department of Broadband Communication and the Digital Economy (DBCDE).

4.6 AGD's responsibilities in relation to the CRC include:

- implementation of policies related to the protection of children's rights, such as family law;
- dissemination of CRC reports and raising awareness of the principles of the CRC to the general public; and
- coordination of reporting responsibilities.

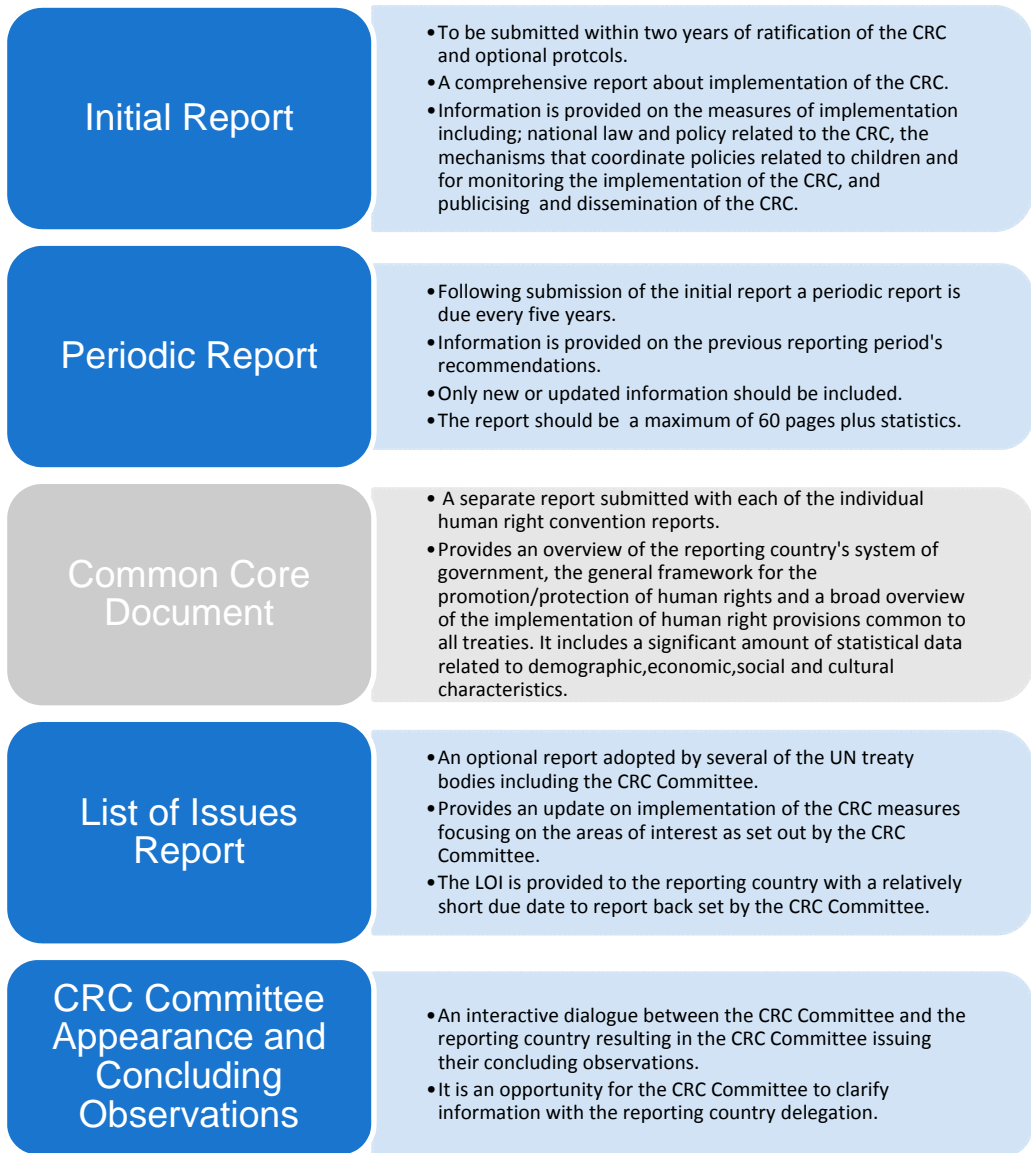
Overview of Australia's reporting obligations under the CRC

4.7 The CRC requires that signatories report (initially and every five years) to the United Nations' Committee on the Rights of the Child (CRC Committee)⁸¹ on progress in implementing the Convention. The CRC Committee can also seek optional reports known as 'List of Issues' reports (LOI) to supplement this periodic reporting cycle. The Committee provides guidelines that include specific information on the preferred content and format of these reports. Following receipt of the reports, the Committee conducts hearings with the relevant signatories and issues a concluding observations report. Significantly, any recommendations made by human rights treaty committees are of an advisory nature only.⁸² Consequently, the CRC Committee's concluding observations report acts as 'an early warning and implementation guidance tool for signatories'⁸³, rather than as a guarantee of a signatories' compliance with the CRC. Figure 4.1 outlines the types of reports required to meet the CRC's reporting obligations.

81 The CRC Committee meets in Geneva and holds three sessions each year, each consisting of a three-week plenary and a one-week pre-session working group. The CRC Committee is made up of a group of 10 individuals, elected by member countries, that are independent child rights experts. The Committee also includes a Special UN Rapporteur that is responsible for visits to member countries to assist with monitoring and promotion of the CRC.

82 Office of the High Commission of Human Rights, International Human Rights Law [Internet], available from <<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> [accessed 9 April 2013].

83 N Pillay, Strengthening the United Nations Human Rights Treaty Body System, A report by the United Nations High Commissioner for Human Rights, June 2012, p. 8.

Figure 4.1: CRC reporting obligations

Source: ANAO analysis from the UN treaty-specific guidelines and the harmonised guidelines.

4.8 Australia has taken part in three reporting cycles and has submitted all reports required under the CRC since ratification. Despite periodic reporting being scheduled every five years, the process of planning and submitting written reports through to review by the CRC Committee has become extended. Australia's reports have included:

- initial CRC report submitted in December 1995, considered by the CRC Committee in September 1997;

- combined second and third periodic report submitted in September 2003 (covering the period September 1997 to January 2003)⁸⁴, considered by the CRC Committee in September 2005; and
- the fourth periodic report submitted in June 2009 and the LOI report submitted in May 2012, considered by the CRC Committee in June 2012.⁸⁵

4.9 Australia's next reporting cycle, the fifth periodic report, is currently listed to be submitted on 15 January 2018.⁸⁶ At the request of the CRC Committee, this update on progress will combine both the fifth and sixth reporting cycles, to assist in reducing the current delays in reviewing signatories CRC reports by UN Committees.⁸⁷

The fourth periodic report, LOI report and concluding observations

4.10 To meet the reporting obligations of the fourth reporting cycle, (the focus of this audit), Australia submitted two written reports and provided a delegation for the CRC Committee hearing in June 2012. This reporting cycle spanned nearly six years, from initial planning to issue and dissemination of the concluding observations. The fourth reporting cycle timeframes are outlined in Figure 4.2.⁸⁸

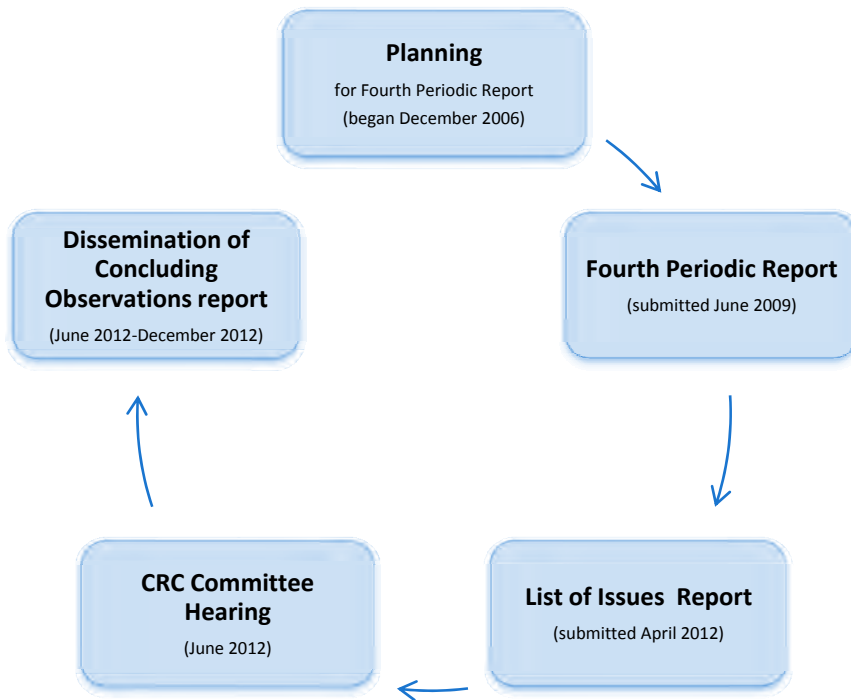
84 A combined report was submitted by Australia at the request of the CRC Committee due to the second periodic report being due in January 1998, but the review of the initial report was only completed in September 1997. The combined second and third periodic report highlighted significant changes to law and practice for the period September 1997 and January 2003 and addressed previous CRC Committee recommendations from Australia's initial report.

85 The fourth periodic report for the CRC was submitted with Australia's common core document. UN guidelines require each of the core human right convention reports to be submitted with the common core document. Australia last completed this document in June 2006, and the next common core document update is expected to be completed in 2014. Review of the common core document was outside the scope of the audit.

86 The next periodic report submission date of 15 January 2018 was specified in the CRC Committee concluding observations report (June 2012). In addition to combining periodic reports the CRC Committee also has the option of requesting a LOI report prior to the submission of this periodic report.

87 Four out of nine treaty bodies with a reporting procedure are facing significant and increasing backlogs of reports awaiting consideration.

88 The reporting process for the CRC Optional Protocols (OPs) are separate from the CRC's fourth periodic report, with the initial reports for each of the OPs submitted in October 2008 and June 2009. Separate LOI reports were also submitted by Australia for both of the OPs, with separate concluding observations issued by the CRC Committee. Review of the OPs was outside the scope of the audit.

Figure 4.2: The fourth periodic reporting cycle

Source: ANAO analysis of AGD data.

Focus of the fourth periodic report

4.11 The fourth periodic report provided an update of the progress Australia had made in implementing the CRC for the three year period to September 2008. Appendix 2 lists the nine themes around which Australia's report was structured. Australia's report provided information on the issues about which the CRC Committee had made recommendations in the previous reporting cycle. Information was also provided on two longstanding issues; the lack of human rights legislation specific to children, and Australia's reservation to Article 37(c) of the CRC (which relates to children being detained separately to adults, unless it is not in their best interests). There had been no change to Australia's stance on these two issues.

4.12 The periodic report also included information about the remaining issues raised in the CRC Committee's previous report. New and existing programs and policies were reported for the key issues of violence, abuse, neglect and maltreatment, and basic health and welfare issues such as obesity. An explanation of the prominent issues, including indigenous issues,

alternative care arrangements, corporal punishment and the administration of juvenile justice were also provided.⁸⁹ Information about programs such as the National Emergency Response to protect indigenous children in the Northern Territory, policy changes related to immigration and detention centres and changes to the state and territory laws relating to corporal punishment was also included.

Focus of the List of Issues report

4.13 Following the review of the fourth periodic report and NGO input⁹⁰, the CRC Committee identified 14 issues about which it requested further information. Australia's response to the LOI was reported for the three year period to September 2011. Of the 14 issues (listed at Appendix 3), five were addressed through child specific programs or action plans including the National Framework for Protecting Australia's Children 2009–2020, specific national partnership agreements under the National Early Years Strategy (2009)⁹¹ and implementation of the National Action Plan to Build on Social Cohesion, Harmony and Security. In addition, Australia's LOI report includes an update on measures related to prominent themes including child abuse and neglect, indigenous issues, juvenile justice administration, and children in community detention arrangements.

Summary of the CRC Committee's concluding observations

4.14 The concluding observations report issued by the CRC Committee in June 2012 included positive comments about Australia's reporting and the commitment to the hearing process, stating that the committee 'welcomed Australia's efforts to implement the concluding observations on its previous report'.⁹² Furthermore, the CRC Committee report 'welcomes as positive' the measures Australia had taken to progress implementation of the CRC including three legislative changes⁹³, five ratifications related to core human

89 The information included developments with the criminal age of responsibility for children, indigenous juveniles in detention and mandatory sentencing in the criminal law system of states and territories.

90 NGOs can provide independent 'shadow reports' to the CRC Committee on aspects of a signatory's implementation of the CRC.

91 An example is the National Partnership Agreement on Early Childhood Education.

92 UN Committee for the Convention on the Rights of the Child, *Consideration of reports by states parties under article 44 of the Convention, concluding observations: Australia*. 28 August 2012 (CRC/C/AUS/CO/4), p. 2.

93 The *Human Rights (Parliamentary Scrutiny) Act 2011*, *Family Law legislation Amendment (Family Violence and other Measures) Act 2011* (Cth) and *Education and Care Services National Law Act 2010* establishes a national quality framework for early childhood education and care.

right conventions affecting children⁹⁴ and developments to institutional and policy measures.⁹⁵

4.15 Notwithstanding this acknowledgement of progress, the CRC Committee's concluding observations report raised concerns, and recommendations relating to 40 issues. Of these recommendations, 10 were 'reiterated recommendations' from the previous CRC Committee's concluding observation report.⁹⁶ For five of the 10 previous recommendations the committee did not comment on Australia's reported progress in addressing these issues. These recommendations covered: the reservation of article 37(c) of the CRC Convention; the gathering of young people in certain places; corporal punishment; targeted programs providing family support to vulnerable families; and juvenile justice.

4.16 The CRC Committee expressed specific concern on six issues related to: racial discrimination; the principle of the 'best interests of the child' not being widely known; the level of violence against women and children; children deprived of their family environment and the significant increase in the number of children placed in out-of-home care; and the lack of awareness among young people about sexual and reproductive health. The CRC Committee acknowledged Australia's progress around the issue of asylum-seeking and refugee children; however, 'deep concern' was raised about mandatory detention of children and the 'best interests of the child' not being the primary consideration in asylum and refugee determinations.⁹⁷ AGD advised that as of the date of the audit report, Australia has not responded to

94 The ratifications related to the Elimination of Discrimination against Women, the CRC's two Optional Protocols, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol.

95 Six measures were noted: the National Plan to reduce Violence against Women and Children 2010–2022, released in 2010; the National Early Childhood Development Strategy in 2009 and the National Apology to the Stolen Generations. Other examples include: The National Framework for Protecting Australian Children 2009–2020, in 2009; the creation of the National Youth Forum in 2008; the National Integrated Strategy for Closing the Gap in Indigenous Disadvantage in 2008.

96 The CRC Committee stated that it is concerned that some of the recommendations contained therein have not been fully addressed...and urges Australia to take all necessary measures to effectively address the recommendations contained in the concluding observations on the combined second and third periodic reports that have yet to be implemented. The issues include: the reservation to article 37(c) of the Convention, legislation, coordination, respect for the views of the child, freedom of association, corporal punishment, and the administration of juvenile justice.

97 The Committee also reported concern about: the 'high risk of conflict of interest where the legal guardianship of unaccompanied minors is vested with the Minister for Immigration and Citizenship who is also responsible for immigration detention and determinations of refugee and visa applications'; and Australia continuing to 'pursue its policy of so-called "offshore processing" of asylum and refugee claims'.

the CRC Committee's concluding observations, noting that there is no obligation for governments to respond as this will form the basis for Australia's next report to the CRC Committee in 2018.

4.17 A number of new issues were also identified for follow up as part of the next reporting cycle, scheduled in January 2018. These issues included:

- reviewing the birth registration process to make sure all children born in Australia are registered at birth;
- enacting comprehensive national legislation enshrining the right to privacy and child specific and child friendly mechanisms for children complaining against breaches of their privacy; and
- improving the access to friendly mental health support and services for children and youth.

Coordination of Australia's reporting obligations

4.18 Coordinating the preparation and delivery of reports in an environment where responsibilities for implementation are shared between agencies and layers of government poses particular challenges for the coordinating agency. In addition, the extended timeframes for CRC reporting place a premium on effective stakeholder engagement and management processes. As there is no defined process for preparing Australia's CRC reports, the ANAO examined the arrangements put in place by AGD to coordinate the reports, in respect of planning and guidance for staff, engaging stakeholders and meeting reporting requirements.

Planning and guidance

4.19 Within AGD, responsibility for coordinating Australia's reporting in relation to the CRC has changed over time, as AGD's organisational structure has changed, but the function has remained in the International Law and Human Rights Division. The responsibility for human rights treaty reporting, including preparing and submitting the LOI report and undertaking subsequent activities for the CRC, is currently undertaken by AGD's Human Rights Policy Branch.⁹⁸

98 The Human Rights Policy Branch is now responsible for all human right convention reporting within AGD.

4.20 There was only limited documented planning or guidance developed for staff prior to the preparation of the fourth CRC periodic report⁹⁹ and the LOI report. AGD advised that this truncated approach to planning reflects the routine nature of human rights convention reporting and the department's long-standing experience in treaty report preparation. In this context, report preparation experience is learned on the job and, largely, is passed on by word of mouth. Considerable value therefore rests on AGD's ability to retain corporate memory within the organisation. AGD further advised that internal guidance for CRC reporting had not been prepared because of the long timeframes between CRC reporting cycles and that a unique approach is adopted for each human right convention reporting cycle.

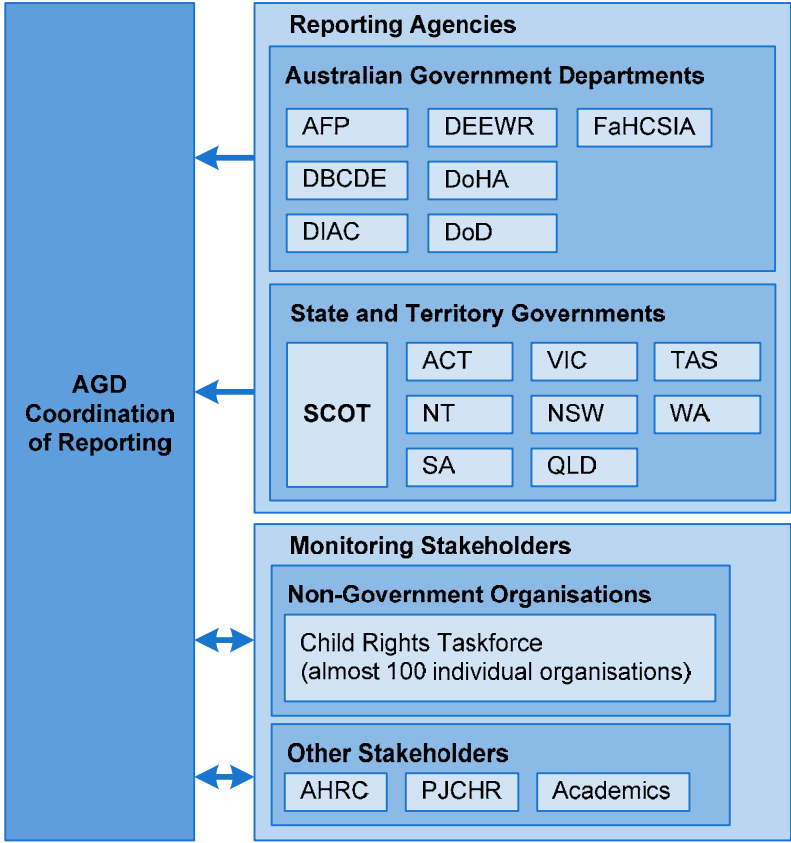
4.21 In response to the audit, AGD prepared a background document on the CRC and the processes undertaken for the LOI report. The ANAO considers that this document would be a useful reference for staff undertaking the planning of human right convention reporting. It would also serve as a suitable baseline document for the capturing of experience gained as future reporting cycles are completed.

Engaging stakeholders

4.22 Meeting the CRC reporting obligations requires AGD to work cooperatively with government and non-government stakeholders. The role of government and non-government stakeholders in the CRC reporting process is outlined in Figure 4.3.

99 AGD had prepared a short timetable (two pages) for the fourth periodic report in October 2006, which set out key tasks, milestones and planned timeframes.

Figure 4.3: Stakeholder roles for CRC reporting



Source: ANAO analysis of AGD data.

Government stakeholders

4.23 As discussed in paragraph 4.5, responsibility for the implementation of the CRC is shared in Australia, with the nine federal, state and territory jurisdictions, holding significant responsibility for implementing child focused policies and programs. Therefore, a considerable number of government stakeholders contribute to the CRC reporting process through the provision of information and data relative to their area of responsibility.

4.24 AGD engaged directly with the responsible Australian Government agencies in seeking input for the fourth periodic report and the LOI report. In contrast, engagement with the states and territories was undertaken through the Standing Committee on Treaties (SCOT). The SCOT is a mechanism for consultation between the Australian Government and State and Territory governments, consisting of representatives from the Premier's or Chief Minister's department in every state and territory. The SCOT contact officers

work with the relevant line agencies at the state and territory government level to obtain the information required by the AGD.

4.25 The arrangements to obtain information from government stakeholders were broadly effective in terms of stakeholders providing AGD with sufficient information to prepare the fourth periodic report and the LOI report. However, feedback from some stakeholders indicate that there are opportunities to streamline the process. For example, in respect of the LOI report, it was noted that AGD spent considerable effort obtaining data from states and territories that was also held by other Australian Government agencies. Furthermore, stakeholder agencies advised that they are routinely required to provide similar human rights information to various Australian Government agencies for reporting purposes, with each request requiring a slightly customised response. Similarly, the reporting burden at the Australian Government level can be considerable.¹⁰⁰

4.26 The ANAO observed that AGD's engagement with SCOT contact officers during the LOI report process was particularly effective, and was characterised by responsive, active communication. These strong working relationships with the state and territory governments through the SCOT contact officers, depended on the relationship management and communication skills of officers coordinating and supplying information for the reporting process.

4.27 The ANAO sees merit in AGD investigating options to build on the successful working relationships developed during the LOI report process to better coordinate and streamline the reporting process. Other jurisdictions, for example, Canada, have put in place a central coordination committee for human rights reporting (the Continuing Committee of Officials on Human Rights). This committee includes stakeholders involved in providing information and data from all levels of government to meet international human rights reporting obligations. In Australia, such a group could include a forum, potentially using the SCOT framework, to look at opportunities to streamline the treaty reporting process; share information between stakeholders in a timely manner; and build stronger networks between Australian Government departments and the state and territory government agencies.

100 Appendix 4 summarises the requests for human rights information at the domestic and international level, made to FaHCSIA.

Non-government stakeholders

4.28 As described in Figure 4.3, NGOs play an important role in the CRC reporting process. In practice, the CRC Committee seeks input from NGOs to complement the information provided by the signatory governments. In Australia, there are many child focused NGO groups that are engaged and actively participate in the CRC reporting process. In the case of the LOI report, nine 'shadow reports'¹⁰¹ were provided to the CRC Committee by NGO groups, and an opportunity was given for them to brief the CRC Committee in private. In addition, the Australian Human Rights Commission (AHRC) also submitted a shadow report in 2011 to the CRC Committee.

4.29 The UN encourages a reporting process that includes broad-based participation of stakeholders at the national level in the preparation of reports, and ongoing stakeholder collaboration that facilitates the follow-up of recommendations.¹⁰² There are also clear potential benefits for signatory governments to engage with the NGO sector prior to submitting a country's report. While governments and NGOs may disagree on matters of human rights policy and some programs, effective engagement may serve to help focus feedback to the CRC Committee on key priority areas.¹⁰³

4.30 AGD's arrangements to engage NGOs during the fourth periodic report and the LOI report differed. For the fourth report, AGD's arrangements involved seeking views from NGOs, on the report. This was primarily undertaken by alerting NGOs and the then Human Rights and Equal Opportunity Commission (HREOC), via email, that the draft report had been placed on the AGD website for public comment. Comments received from seven NGOs, two state Children's Commissioners and HREOC on the draft report were incorporated into the final report.

4.31 In comparison, for the LOI reporting process engagement between AGD and NGOs was more targeted. All NGO shadow reports were publically

101 The nine NGOs that provided shadow reports include: Monash University-Castan Centre for Human Rights Law, Child Rights Taskforce Report, Concerned Australians, Child Helpline International, Edmund Rice International, Global initiative, International Baby Food Action Network, International Disability Alliance, National Aboriginal and Torres Strait Islander Legal Services. NGOs shadow reports can be accessed on the UN CRC website <http://www2.ohchr.org/english/bodies/crc/crcs60.htm> [accessed 1 May 2013].

102 N Pillay, Strengthening the United Nations Human Rights Treaty Body System, A report by the United Nations High Commissioner for Human Rights, June 2012.

103 *ibid.*

available on the UN website and were considered by AGD in finalising the LOI report. In addition, funding was offered by AGD to NGOs, including the Child Rights Taskforce¹⁰⁴, to assist with their shadow report and attendance at the CRC Committee hearing.¹⁰⁵

4.32 In addition, consistent with UN guidance, after the completion of the reporting cycle and the issuing of the CRC Committee's concluding observations, AGD coordinated an NGO stakeholder roundtable meeting in December 2012. The meeting provided an opportunity for NGOs to advise AGD as to the relative priorities of the recommendations within the concluding observations. While a follow-up meeting was planned for June 2013, (12 months after Australia's CRC Committee appearance) AGD advised the ANAO that:

AGD has not made plans for a second roundtable session after the December 2012 roundtable. As part of Australia's Human Rights Framework, the Attorney-General and the Minister for Foreign Affairs co-hosted the 2013 Australian Government and Non-Government Organisations Forum on Human Rights in Canberra on 19 – 20 June 2013. This included a session on Children's Rights, which involved presentations by Ms Megan Mitchell, National Children's Commissioner and the National Children's and Youth Law Centre.

4.33 The ANAO sees merit in AGD continuing to build on the relationships and activities undertaken at the conclusion of the fourth reporting cycle. This collaborative approach to reporting will assist Australia's next CRC reporting cycle, currently scheduled for 2018.

¹⁰⁴ The Child Rights Taskforce, a coalition of nearly 100 organisations advocating for the protection of child rights in Australia, was one of nine NGOs that submitted a shadow report to the CRC Committee in 2011. NGOs shadow reports can be accessed on the UN CRC website <<http://www2.ohchr.org/english/bodies/crc/crcs60.htm>> [accessed 1 May 2013].

¹⁰⁵ Two funding rounds, totaling \$60 000, were provided to the Child Rights Taskforce between September 2010 and September 2011, for the fourth periodic reporting cycle. This funding was administered by AGD under the Grants to Australian Organisations Program (GAOP) to assist organisations with projects or activities that contribute to the pursuit of an equitable and accessible system of federal civil justice. AGD advised this funding is no longer available as the annual appropriation for GAOP has been reduced.

Meeting CRC reporting requirements: form, content and timing

4.34 Both the UN and CRC Committee provide guidance on the form and content requirements for signatories' periodic reports.¹⁰⁶ The guidance for the fourth report requested that the report include information and data to address:

- the previous recommendations;
- details about programs and monitoring mechanisms;
- budgetary allocations to children;
- statistical data; and
- factors and difficulties challenging implementation.¹⁰⁷

4.35 A limit of 60 pages was specified, as was additional information to add to the readability of the report, such as table of contents, list of acronyms and information to include in the appendices. The guidelines also stated that the CRC report should be submitted with, and refer to, the common core document. Australia's fourth report met the page limit, and was submitted with the common core document. While the CRC Committee noted that Australia's report was 'submitted in accordance with the guidelines of the Committee¹⁰⁸', the ANAO observed that, requirements for some statistical data were not met and information on one required section, 'factors and difficulties', was not provided.¹⁰⁹

4.36 As previously noted, for the LOI report the CRC Committee's requirements focused on 14 issues. The Committee also specified a limit of 33 pages and requested that additional statistical data on child abuse victims,

106 These include two guideline documents: Office of the High Commissioner for Human Rights, Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents, 10 May 2006 (HRI/MC/2006/3); Committee for the Convention on the rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under Article 44, paragraph 1 (b), of the Convention on the Rights of the Child. 1 October 2010 (CRC/C/58/Rev2).

107 The UN reporting guidelines aim to make procedures transparent and readily accessible and are 'strongly recommended' by the UN, to assist signatories (with report preparation), and the CRC Committee (to review CRC implementation), however AGD advised that the requirements are more in the nature of the committee's preferences, and not in themselves treaty requirements.

108 The Committee welcomes the State party's fourth periodic report (CRC/C/AUS/4), submitted in accordance with the reporting guidelines of the Committee, as well as the written replies to its list of issues (CRC/C/AUS/Q/4/Add.1).

109 The factors and difficulties paragraph is expected to 'describe any factors and difficulties, if any, affecting the fulfillment of the obligations of States parties' obligations for the cluster concerned, as well as information on the targets set for the future.'

children in alternative care arrangements and juvenile justice be provided. Australia's report was 34 pages plus the statistical data.¹¹⁰ Each of the 14 issues were addressed in Australia's LOI report, with an update provided of progress made with implementation, along with information on new legislation, instruments, policies and programs.

4.37 The ANAO observed that the nature of issues raised by the CRC Committee can be broad, which makes preparing a concise, yet complete, response challenging. For example, the request for updated and detailed information on the issue of children with disabilities required information on the provision of inclusive education; sterilization of girl children with disabilities for non-therapeutic reasons; and immigration restrictions, including with regard to their impact on the right to family reunification, for children with disabilities.

4.38 The CRC's guidance continues to be updated as the Committee's requirements evolve. For example, the current guidance, issued in 2010, contains more specific requirements for statistical data to assist in measuring progress in implementation than the guidance that was in place for the fourth report.¹¹¹

4.39 AGD invested significant effort in identifying the information needed for the fourth periodic report and LOI report, to align with the CRC Committee requirements. For the fourth periodic report, AGD compiled a draft report populated using information sourced from Australia's combined second and third periodic report, the CRC Committee's preceding concluding observations report, issued in 2005 and follow-up information sourced from agencies in 2006, to respond to the CRC Committee's concluding observations. This draft report was then sent out to stakeholder agencies for comment and amendment.

4.40 In comparison, for the LOI report, AGD requested information using a prepared spreadsheet which included the specific information requirements of the CRC Committee. This approach was supported by active communication with stakeholders. As a result, more defined, targeted information and data

110 Committee on the Rights of the Child, List of issues concerning additional and updated information related to the consideration of the fourth periodic report of Australia CRC/C/AUS/Q/4, 9 November 2011.

111 Examples of the additional data requirements included in the 2010 guidelines include: information on the allocation of resources for social services in relation to total expenditure; the number of children who have been heard under judicial and administrative proceedings, including information on their age; and the number of incidences of corporal punishment in all settings.

was received by AGD from agencies. However, notwithstanding the more concentrated approach to collecting data from stakeholders, there were still variations in the useability of information provided by some stakeholders for the LOI, with some information provided in greater detail than required by AGD.

4.41 In preparing CRC reports, AGD relies on the information provided by government stakeholders and compiles this into the reports provided to the CRC Committee. AGD advised that it conducts only limited quality assurance on the information provided. Consequently, a comprehensive and accurate report reflecting the status of Australia's implementation of the CRC (within guideline requirements) is dependent on both the availability of information, and the quality of information received from stakeholders. As discussed below, Australia has struggled to meet requirements for certain statistical and budgetary data.

Meeting statistical data requirements

4.42 For the fourth report, the CRC Committee's statistical requirements were specified as follows:

States parties should provide, where appropriate, annual statistical data disaggregated by age/age group, gender, urban/rural area, membership of a minority and/or indigenous group, ethnicity, disability, religion, or other category as appropriate.¹¹²

4.43 However, Australia's fourth report included only limited data, integrated into commentary on key issues.¹¹³ The statistical data was not presented in the disaggregated form requested by the Committee.

4.44 For the LOI report, the CRC Committee also set detailed requirements for specific data, 'where available'. Australia provided six pages of detailed statistics addressing the Committee's data requirements. The improved data reflected significant developments in the collection of statistical data by Australia since the fourth periodic report, including the *Longitudinal Study of*

112 Nine pages of data requirements are included in the UN guideline appendix.

113 References are made in the fourth periodic report to information contained in the common core document. Statistical data is included in the common core document however it is not child specific and is not disaggregated to meet UN guidelines.

*Australian Children*¹¹⁴ and data related to child protection, collected by the Australian National Institute of Health and Welfare.¹¹⁵ However, gaps persisted in the statistics provided by Australia's LOI response, including:

- data for child abuse victims was not disaggregated by region or ethnic origin, except for indigenous origin;
- the data related to out-of-home care was not disaggregated by ethnic origin;
- states and territories were unable to provide certain specific data; and
- comprehensive data on the frequency of children under the age of 14 years old found criminally responsible was not provided.

4.45 In most cases, the gaps in the data provided by Australia reflected the fact that this information was not available in the required disaggregated form. In some cases, for example, data on child abuse victims, was not disaggregated, in order to protect the identity of victims. In addition, there were data compatibility and quality issues between the jurisdictions, as stakeholders did not always have the capacity to conform to national data specification standards due to different policies, practices and information systems.

4.46 Australia was also unable to provide the required data on budgetary allocations for children, as national, state and territory governments do not adopt a child-specific approach to budgetary planning and allocation. As a consequence, the CRC Committee commented in its concluding observations, that this gap makes 'it practically impossible to identify, monitor, report and evaluate the impact of investments in children and the overall application of the Convention in budgetary terms'.¹¹⁶ The ANAO noted similar comments have been made by the CRC Committee about the need for a national comprehensive data collection system for other countries.

114 The Australian Bureau of Statistics collects and processes the data for the Longitudinal Study of Australian Children. This study is funded and managed by FaHCSIA on behalf of the Australian Government. The Australian National Institute of Health and Welfare collaborates with the states and territories to manage the national child protection data collection.

115 The Australian Institute of Health and Welfare collaborates with the states and territories to manage the national child protection data collection.

116 UN Committee for the Convention on the Rights of the Child, Consideration of reports by states parties under article 44 of the Convention, concluding observations: Australia. 28 August 2012 (CRC/C/AUS/CO/4) p.4.

4.47 Given the CRC Committee's continuing request for disaggregated statistical data, as well as budgetary data, the ANAO sees merit in AGD investigating opportunities, with partner stakeholders, that will allow Australia to more comprehensively meet the statistical data requirements. Planning prior to the next reporting cycle, that builds on the work already undertaken by the Australian Bureau of Statistics and Australian National Institute of Health and Welfare, would assist AGD to better meet Australia's reporting obligations.

Timing of CRC reports

4.48 Signatories are required to report to the CRC Committee every five years. Submission of reports on time enhances a country's international reputation and support for the UN process. In this regard, Australia's fourth periodic report was due in January 2008 and was submitted 18 months late, in June 2009. A draft periodic report had been approved by the then Attorney-General for public comment in August 2007. However, with the calling of the 2007 Federal election, a decision was made by the AGD Senior Executive, to pause the reporting process. AGD advised:

The Attorney-General approved the release the draft report for public comment on 16 October 2007, two days after the date of the 2007 general election was announced, but a day before the writs were issued (17 October 2007). Accordingly, AGD took the decision that caretaker conventions should apply.

4.49 Following the change of government at the 2007 election, additional consultation was undertaken with Australian Government agencies to reflect updates to Australian Government policy. This consultation, in combination with obtaining signoff from relevant departments, including approval by DFAT to submit the report, contributed to the delay in submitting the report to the CRC Committee.¹¹⁷

4.50 The CRC Committee issued the request for Australia's LOI report on 9 November 2011, with a response due by 1 March 2012. The compressed response timeframe of five months, challenged AGD's ability to access the

¹¹⁷ Following the additional consultation with the Australian Government agencies, amendments were made to reflect the incumbent Government's policy changes. The draft report was released for public consultation on May 2008, seven months after the original approval.

relevant information in a timely manner.¹¹⁸ The LOI report was submitted six weeks late, on 17 April 2012.

4.51 AGD advised that, while it is important to meet the reporting deadlines, the challenges and delays associated with obtaining information and data within the federal system and obtaining clearance of the report through Australian Government departments, can have a significant time impact. State and territory government stakeholders also noted that their capacity to give priority to AGD's information requests can be affected by factors such as the impact of elections and resourcing constraints. Globally, it has been noted that:

... only 16 per cent of all signatory countries' reporting on human rights conventions due in 2010 and 2011 submitted on time, and with only one third of the reports submitted within one year of their deadline very few countries are called upon to strictly adhere to the periodicity established under each treaty.¹¹⁹

4.52 The ANAO acknowledges that a number of factors can influence whether Australia's reports to UN committees are submitted on time. Nevertheless, the mixed performance in respect of the fourth periodic CRC report and the LOI report highlights the importance of AGD's active management of the reporting process, including prioritising the sign-off process by each of the stakeholder agencies, (including final sign-off by DFAT) and greater use of existing relationships between Australian Government and state and territory government agencies to streamline the data collection process.

Raising awareness of the CRC

4.53 The CRC places obligations on signatories to raise awareness of the CRC by making their reports widely available to the public in their own countries¹²⁰ and to communicate the principles and provisions of the

118 When it became apparent that the timeframe would not be met, AGD kept the CRC Committee up-to-date on the pending submission date.

119 N Pillay, Strengthening the United Nations human rights treaty body system, A report by the United Nations High Commissioner for Human Rights, June 2012, pp 21-2.

120 *Convention on the Rights of the Child*, Article 44(6) states: States Parties shall make their reports widely available to the public in their own countries.

Convention to adults and children alike.¹²¹ Greater awareness of the CRC at the domestic level develops a country's general knowledge and understanding about child rights and the expectations of how a child should be treated. AGD is responsible for meeting these CRC obligations.

4.54 Australia's fourth periodic report was disseminated widely, through the distribution of hard copies, tabling of the report in the Australian Parliament, and by its inclusion on the AGD website.¹²² The AGD website was also the primary means of disseminating information about the LOI report. The website presently includes information about the CRC and copies of Australia's most recent report on CRC implementation (the LOI report and two recent reports on optional protocols under the Convention). The most recent CRC Committee concluding observations report is also available. However, the fourth periodic report was removed when the LOI report was included.¹²³ As a consequence, the AGD website is only of limited use as a means of directly disseminating information about Australia's ongoing progress in implementing the CRC.

4.55 The ANAO observed that other countries, including Canada and the United States of America, include all CRC reports and concluding observations, under their respective government's treaty reporting webpage. Information included on these websites, (but not directly available on AGD's treaty reporting website) includes all CRC reports submitted since ratification and the subsequent concluding observations. Canada also included their delegation's opening statement to the CRC Committee for the hearing. Overall, the ANAO considers that greater use could be made of the AGD website to publish a more complete record of Australia's reports under the CRC and to promote greater public awareness and understanding of the reporting process.

121 *Convention on the Rights of the Child*, Article 42 states: Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

122 The Attorney-General's Department: Human Rights Treaty Body Reporting: <<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/>> [accessed 21 March 2013].

123 Australia's reports and CRC Committee concluding observations reports from previous reporting cycles are only accessible through the UN CRC Committee website which can be accessed through a link on the AGD website. The United Nations High Commissioner for Human Rights CRC website includes extensive information and guidance about the CRC, the reporting process and all reports. However, the website is complex, and users without pre-existing knowledge of the website would find it difficult to easily access country specific information.

4.56 Distribution of the CRC Committee's concluding observations also occurs through tabling of the report in Parliament, with the CRC concluding observations report being tabled on 30 May 2013.¹²⁴ In addition, the concluding observations were distributed to Australian Government and state and territory agencies with requests to investigate opportunities to follow-up.¹²⁵

4.57 AGD also plays a role in raising awareness of human rights, through Australia's Human Rights Framework. The framework, launched by AGD in April 2010, acts on the key recommendations of the National Human Rights Consultation Committee, and complements a number of actions, including the Human Rights Action Plan (launched on 10 December 2012), to encourage greater inclusion and participation in the Australian community.¹²⁶

4.58 AGD also undertakes limited work to raise the general awareness of the principles and provisions of the CRC among adults and children. Communication of the principles and provisions of the CRC is undertaken by AGD through its website and promotion of Australia's Human Rights Framework Education Grants to relevant child focused organisations and human rights groups.¹²⁷ However, AGD has not assessed whether these activities have had the desired effect of raising awareness of the CRC. AGD advised the ANAO that it has identified potential opportunities to further promote the provisions and principles of the CRC, particularly to children, including through online youth forums and setting up children's advisory groups. However, to date, AGD has not progressed these proposed initiatives.

4.59 Australia meets the UN obligations to disseminate Australia's reports and communication of the Convention. However, the CRC Committee's view, as reflected in the most recent reporting cycle's concluding observations report was that, notwithstanding these actions:

124 The Australian Government committed in January 2011 to tabling the concluding observations of all the UN human rights committees in Parliament.

125 Recommendations from the concluding observations report are also included on the UN human rights recommendations database, accessed through the AGD website. It is a publically accessible online Australian Government database that draws together UN Human Rights recommendations from treaties and reviews to which Australia is a party.

126 One of the principles of the Framework is enhancing Australia's domestic and international engagement on human rights issues. The role of the AHRC is to promote and protect human rights in Australia, including children. The appointment of a National Children's Commissioner (announced in March 2013) followed a recommendation made in the previous CRC cycle.

127 This program provides funding to a wide range of community organisations. These small grants are intended to help deliver practical, grassroots human rights education projects for the community and vulnerable groups. The ANAO did not assess the administration of these grants.

... awareness and knowledge of the convention within Australia continues to be limited amongst children, professionals working with or for children, and the general public.¹²⁸

4.60 While a number of initiatives are underway to raise awareness of human rights and the CRC, investment in further initiatives would need to be carefully considered, given available resources. However, at a minimum, enhancements to the AGD website would provide a more complete understanding of the reporting cycle process and outcomes, and assist in raising awareness of the Convention.

Conclusion

4.61 Periodic reporting is the principal mechanism the UN uses to monitor compliance by countries with their obligations under the human rights treaties. The CRC requires that signatories report at five yearly intervals and Australia has reported to the CRC Committee on the progress made in implementing the CRC three times since ratification in 1991 and attended three hearings with the CRC Committee. The most recent reporting cycle for Australia concluded in June 2012 and resulted in the CRC Committee making 40 concluding observations. Concerns were raised about limited progress in 10 areas highlighted in the CRC Committee's previous review.

4.62 AGD has in place arrangements to coordinate Australia's reports under the CRC. However, there was only limited documented planning and guidance material available to assist staff. As a consequence, staff relied on corporate knowledge in preparing the fourth periodic report and list of issues report. Given the long timeframes between CRC reporting cycles, there would be benefit in documenting fit for purpose guidance and past experience gained to assist staff preparing future reports.

4.63 AGD is reliant on stakeholders to provide the relevant information and data to meet Australia's reporting obligations. It put in place broadly effective arrangements to engage and obtain information from stakeholders to prepare the reports for the fourth periodic reporting cycle. The more active process of engaging stakeholders adopted for the list of issues report resulted in better targeted and timely information provision by government stakeholders.

128 UN Committee for the Convention on the Rights of the Child, Consideration of Reports submitted by states parties under article 44 of the Convention Concluding Observations: Australia, 28 August 2012, p. 5. (CRC/C/AUS/CO/4).

4.64 Review of the fourth periodic report and the list of issues report found Australia largely complied with UN reporting guidelines. However, Australia's performance in providing reports in a timely manner to the CRC Committee was mixed, with the fourth periodic report and list of issues report being submitted after the due dates. In addition, there were deficiencies in providing disaggregated data that met UN reporting guidelines. There would be merit in AGD investigating opportunities with relevant stakeholders to further develop and more effectively share information between different levels of government to assist in better meeting future UN reporting requirements.

4.65 Australia complies with its obligations in relation to disseminating CRC reports and communicating the CRC to the public. However, AGD could make better use of its website to communicate the principles and provisions of the CRC and to provide more comprehensive information about Australia's reports and the CRC Committee's concluding observations.

Recommendation No.2

4.66 To improve the coordination of Australia's reporting under the *UN Convention on the Rights of the Child*, the ANAO recommends that, Attorney-General's Department:

- develops fit for purpose guidance, and captures experience gained to assist staff;
- investigates options for improving data collection and the standardisation of information across jurisdictions; and
- improves the information on the AGD website about the CRC and Australia's reports on its progress in meeting its obligations under the Convention.

AGD response: *Agreed in-principle.*

4.67 As concerns the recommendation to developing guidance materials to assist staff in coordinating Australia's reporting under the *Convention on the Rights of the Child*, the Department [AGD] notes that whilst guidance material is usually generated to deal with policy processes, that specific guidance materials for coordinating reporting under the Convention was not currently in place due to the long timeframes between reporting cycles. These timeframes can vary between five to seven years and during this time, both Government and United Nations' policies on reporting can change. Hence a

tailored approach had been adopted for each reporting cycle. The Department notes that, within these constraints, it will give effect to the recommendation.

4.68 As concerns options for improving data collection, the Department [AGD] notes the views of the ANAO and commits to drawing these views to the attention of the relevant Government organisations. However, the Department notes that additional resources would be required to generate disaggregated data and reiterates the view that the Committee's request for disaggregated data is a preference of the Committee and not an obligation under the Convention. The Department notes that, within these constraints, it will endeavour to give effect to the recommendations, where possible.

4.69 In relation to improving information on the Department's [AGD's] website, the Department will shortly update its page on Human rights treaty body reporting, not only for the Convention, but for all human rights treaties for which the Department is the lead agency.

5. Improving assurance that Australia is meeting its treaty obligations

This chapter examines the arrangements by which the Australian Parliament and the public gain ongoing assurance that Australia is meeting its obligations under treaties, and considers options for strengthening these arrangements.

Introduction

5.1 Treaties form an integral part of Australia's relationships with the global community. After a treaty enters into force, Australia is then bound by the international obligations specified in the treaty. As previously noted, the around 1990 treaties to which Australia is a party cover a wide range of subjects and impose a correspondingly wide range of obligations that are enforceable under international law. Consequently, it is important that the Australian Government has appropriate measures in place to be assured that its treaty obligations are being met.

5.2 Since 1996, Australia has had a framework in place which provides for whole-of-government, Parliamentary, and state and territory government consultation and consideration of the impact and benefits of a treaty prior to its ratification. These arrangements are well-established, and provide an appropriate focus on treaty implementation issues prior to a treaty entering into force in Australia.

5.3 The ANAO examined the arrangements that are in place to provide ongoing assurance that Australia is meeting its treaty obligations, once ratified, and considers options for strengthening those arrangements.

Assurance arrangements

5.4 While the 1996 reforms introduced a consistent approach to the consideration of proposed new treaties, there is no similar framework that governs the monitoring of treaties, once implemented. Instead, when a treaty enters into force in Australia, the responsibility for making sure Australian legislation or activities are in compliance with the obligations of the treaty rests with the lead agency. Generally speaking, new treaty obligations will be integrated into an agency's 'business as usual' activities. Visibility for the Parliament and the public as to any actions taken specifically to implement a treaty's obligations, and their impact, will be substantially influenced by the

requirements of the treaty itself through, for example, ongoing reporting obligations.

5.5 As discussed earlier, treaties can include, as part of their requirements, reporting to international bodies, such as the UN International Labour Organisation. These arrangements vary significantly, depending on whether the treaty is bilateral or multilateral, the topic and complexity, with some treaties requiring extensive and detailed reporting at regular intervals, while other treaty requirements range from less frequent and subjective reporting, through to no required reporting.

5.6 The ANAO reviewed the reporting arrangements for three multilateral treaties, the *International Convention on Civil Liability for Bunker Oil Pollution Damage* (Bunkers Convention); the Treaty on the Non-Proliferation of Nuclear Weapons (NPT); and the *Convention on the Rights of the Child* (CRC), to highlight the similarities and differences in monitoring and reporting against each treaty, and the implications these have for Parliamentary assurance.

Bunkers Convention reporting

5.7 The Bunkers Convention, a multilateral treaty, does not require Australia to report to the international treaty body, the International Maritime Organization, on Australia's compliance with the Convention once it entered into force. Domestically, AMSA does not separately report on Australia's compliance with the Bunkers Convention or on the results of its Bunker Oil compliance activity. However, AMSA advised that results from its compliance activities for the Convention would be aggregated into the PSC reporting, which is reported annually in both AMSA's annual Port State Control report and Annual Report.¹²⁹ Given the lack of separate reporting for the Bunkers Convention, only limited ongoing assurance is provided in AMSA's existing reporting to the Australian Parliament and the public, that Australia is meeting its obligations under this treaty.

Nuclear Non-Proliferation Treaty reporting

5.8 Unlike the Bunkers Convention, the Nuclear Non-Proliferation Treaty requires regular reporting to the international body, the International Atomic

¹²⁹ AMSA shares information that may include Bunkers Convention compliance results, with other countries and international organisations through existing reciprocal ship detention and deficiency information exchanges. This information is of an operational nature only to assist and inform other member countries when undertaking their compliance inspections on ships entering their ports.

Energy Agency (IAEA). As discussed in Chapter 3, the reporting Australia is required to provide to IAEA under the treaty is defined, systematic and regular and is supported by ASNO's inspection activities. In addition, the reporting by Australia is verified by IAEA through its regular verification activities on member countries, including scheduled and unscheduled facility inspections, data collection and analysis.

5.9 Based on member countries reporting and its own verification activities, IAEA independently concludes on member countries compliance with the treaty each year. This includes high level findings and conclusions across groups of member countries and specific country conclusions of IAEA results from verification inspections. IAEA's high level findings and conclusions on Australia are reported in IAEA's annual report, with ASNO providing a summary in its annual report. The specific reports of IAEA's verification inspections are provided to Australia by IAEA, with ASNO providing a summary of IAEA inspection conclusions in its annual reports.

Convention on the Rights of the Child reporting

5.10 As discussed in Chapter 1, there are extensive reporting obligations associated with the seven core human rights treaties to which Australia is a party, including the CRC.

5.11 For Australia to meet its reporting obligations under the seven human rights treaties, it is required to report on each convention every two to five years.¹³⁰ This reporting obligation includes submitting a common core document with each human rights treaty report. Australia submits detailed written reports to the CRC Committee, largely based on self-reporting from Australia's various national and state and territory governments, with limited quality assurance of this information by the coordinating agency, AGD. Australia also appears before the Committee to respond to queries by members. The CRC Committee draws upon 'shadow reports' provided by non-government organisations, and publically issues its concluding observations on Australia's progress in meeting the obligations under the CRC based on the report and appearance before the CRC Committee.

¹³⁰ Each treaty's reporting period is outlined in the provisions of the treaty, however reporting in practice is usually every four to five years.

5.12 The CRC reporting arrangements provide a measure of independent conclusion about Australia's implementation of, and compliance with, the CRC. However, as outlined in Chapter 4, the period between reporting is significant, which coupled with delays in submitting Australia's reports and scheduling of appearances by the CRC Committee, means that this assurance is irregular and extended. There were seven years between the recent reporting cycles concluding observations (2012), and the previous concluding observations in 2005.

Improving assurance on treaty obligations

5.13 The diversity of monitoring and reporting arrangements for treaties is illustrated by the three treaties reviewed by the ANAO and provides an insight into the challenges in providing assurance that Australia is meeting its obligations under the around 1990 treaties which are in force.

5.14 The differences amongst treaties highlights that, for example, a centralised 'one-size-fits-all' approach for monitoring and reporting against Australia's treaty obligations would be difficult to implement, and potentially very costly. The ANAO noted that neither the United Kingdom, United States of America, New Zealand nor Canada have a centralised monitoring and reporting system. However, improvements to the current treaties framework (after a treaty has been ratified and implemented) could be explored, particularly in relation to improving the assurance provided to Parliament and the public.

Parliamentary and judicial review

5.15 While the parliamentary JSCOT reviews and reports on treaties, this currently occurs after a treaty has been tabled in Parliament. JSCOT noted that this arrangement limits the Committee's ability to be involved in influencing treaty negotiations and drafting treaty texts, restricting it to commenting on treaties already signed. As discussed in Chapter 3, the Committee has conducted an inquiry into Nuclear Non-Proliferation and Disarmament, however at present, such inquiries may only be conducted at the request of a Minister or either House of Parliament. In this context, the ANAO notes that

the parameters of a Committee's responsibilities are one for Parliament to determine and are beyond the scope of this audit.¹³¹

5.16 The judiciary can also play a role in providing assurance on Australia's compliance with domestic laws that implement its treaty obligations. For example, the 2011 decision of the High Court of Australia on the 'Malaysia solution' case¹³², referred to domestic legislation (*Migration Act 1958*) that implements Australia's obligations under the *1951 Refugee Convention*. Internationally, allegations that a country is not complying with its treaty obligations can—where both parties agree to this—be brought before the International Court of Justice or other international legal tribunals. For example, Australia is currently pursuing a case against Japan under the *International Whaling Convention* in the International Court of Justice.

5.17 The judiciary's capacity to review aspects of certain treaties is only activated when cases are taken to court, and is limited to the legal dimensions of these cases. In relation to the three treaties reviewed as part of this audit, DFAT advised that there has been no occasion when there has been any domestic or international judicial review of Australia's performance.

Review of treaty implementation

5.18 Presently, there is no explicit requirement for lead agencies to conduct an implementation review of new treaties, once they come into force. Conducting a review following the implementation of a new treaty would provide assurance that a treaty was implemented as intended, that Australia's obligations are being met, and that management approaches are consistent with sound practice. Areas for improvement in the systems and processes being adopted to implement treaty obligations could be identified for consideration by the lead agency, as well as any impediments of a legislative or policy nature.

5.19 While the ANAO considers that conducting an implementation review of new treaties would generally be desirable, the scope and timing of such a review would need to take into account the particular features of each treaty

131 The ANAO notes that the issue of greater Parliamentary oversight of treaties, prior to negotiation was canvassed in JSCOT Report No.128 Inquiry into the Treaties Ratification Bill 2012, August 2012. In the report, the Committee recommended that prior to commencing new treaty negotiations, the Government table in Parliament a document outlining the priorities and objectives, including anticipated costs and benefits of the treaty, and that the Treaties Ratification Bill 2012 not be passed by either House of Parliament. The Government is yet to respond to these recommendations.

132 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011).

and existing treaty-mandated monitoring and reporting arrangements. In some cases, for example, treaties on the exchange of information between countries, a review would be unnecessary as the post implementation actions are self explanatory. However, where a treaty has required new or revised business activities, an implementation review would provide a valuable assessment for the lead agency and Parliament of how the treaty was being implemented and is being administered at an appropriate point after its entry into force.

5.20 An implementation review would also assist in shaping future review or monitoring arrangements to assure an agency that the treaty obligations are being met, and that the processes and systems are functioning optimally. For example, in the case of the Bunkers Convention, the ANAO considers that it would have been beneficial for AMSA to have incorporated an implementation review into the planning for the implementation of the Bunkers Convention. The review may have identified the issues, highlighted by the ANAO's audit, in relation to the need to improve the forms and templates that are used for inspections, as well as the management system used to record compliance with the Bunkers Convention obligations.

5.21 While conducting an implementation review would benefit agencies as they implement new treaties, the reviews would also provide information for Parliament and the public, as to early progress in implementing a particular treaty. However, an implementation review will only serve to provide a 'snapshot' that treaty obligations are being met and will not provide ongoing monitoring and reporting of treaty obligations. During the course of the audit, it became apparent that, at the Parliamentary level, such information would also be useful.¹³³

Exploring further options for ongoing assurance

5.22 The changes to the treaty-making framework introduced in 1996 introduced improvements in the consultation with Parliament, and transparency of the treaty-making process in Australia. However, this framework does not provide ongoing assurance to Parliament that treaties are operating as intended and that Australia's obligations are being met.

133 Within this context, the ANAO notes that JSCOT has in previous treaty enquiry reports, requested the lead agency undertake a review of the treaty in future. For example, the JSCOT's Report 130, Malaysia – Australia Free Trade Agreement, tabled on 14 August 2012, recommended an independent review of the treaty be undertaken 24 months after the treaty comes into force, to assess the actual outcomes of the treaty against the claimed benefits and potential negative consequences identified in JSCOT's enquiry. The Government is yet to respond to this recommendation.

5.23 Given the passage of time since the previous reforms were introduced, it would be timely for DFAT to consider options to update the treaty-making framework that would improve the ongoing monitoring and reporting by lead agencies of key treaties that are in force in Australia and that do not require ongoing public reporting as part of the specific treaty obligations.

5.24 Consultations with Parliament, including JSCOT, would be important to determine what information would be of greatest value, how often it should be provided and what form it would take. Any potential approaches to improve assurance to Parliament, would need to be balanced against the effort in preparing such information, and take into consideration the many types of treaties.

Treaty records

5.25 DFAT maintains high-level treaty details on its website, and funds a comprehensive record of all Australian treaties concluded and/or in force on a searchable online database, the Australian Treaties Library, which is hosted by AustLII, and includes: when a treaty entered into force; the treaty text; associated documents (NIAs, RISs, Explanatory Memoranda); and Parliamentary Reports.¹³⁴ In addition, DFAT provides an alternative user interface and preset searches on the DFAT website that is linked to the information on the Australian Treaties Library. While the information recorded on the treaties database is useful, the ANAO's review of the Australian Treaties Library identified some constraints, including:

- the lead agency or ministerial portfolio for a treaty (either at the time the treaty entered into force or subsequently) is not recorded. This gap makes it difficult to determine the current agency responsible for each treaty;
- treaty text and associated documents are available in only a limited form (converted HTML), and cannot be downloaded easily, (such as with PDF); and
- ANAO testing showed discrepancies between the treaty details on the DFAT website and the AustLII database, with some details on

¹³⁴ DFAT has outsourced the maintenance and administration of the Australian Treaties Library to AustLII, an online legal database provider, since 1997. Some high level treaties details can be accessed on the DFAT website at <www.dfat.gov.au/treaties/> with the full documents available from the AustLII website at <<http://austlii.edu.au>>.

one database and not the other and searches generating different results.¹³⁵

5.26 There would be merit in DFAT reviewing the databases to improve the functionality and accessibility of the Australia Treaties Library. There would also be benefit in the databases including more treaty information, in particular, the lead agency or portfolio. These improvements would assist Parliament and the public to access relevant treaty details and documentation.

Conclusion

5.27 The changes to the treaty-making framework introduced in 1996 signified improvements in the consultation with Parliament, and transparency of the treaty-making process in Australia. However, this framework does not provide ongoing assurance to Parliament that treaties are operating as intended and the Australia's obligations are being met.

5.28 The provisions of some treaties provide for ongoing reporting, which offers insight and assurance about Australia's performance in meeting its obligations under a particular treaty. However, these obligations can vary from highly prescriptive, defined and frequent reporting, such as for the NPT, to less prescriptive reporting at infrequent intervals as in the case of the CRC. Other treaties, like the Bunkers Convention, do not require any ongoing reporting.

5.29 Presently, there is no requirement for agencies to conduct a implementation review of new treaties, once they come into force. Currently, the lead Australian Government agency is responsible for making sure that Australia implements the treaty and meets the relevant obligations. However, visibility by the Parliament and the public, as to any actions taken to implement a treaty's obligations, are dependent on the particular features of the treaty itself, including any monitoring and reporting requirements.

5.30 There would be merit in the lead agency undertaking an implementation review at an appropriate point after its entry into force, particularly where the treaty has required new or revised business activities, and in DFAT amending its treaty guidance accordingly. The implementation

135 For example, the search term 'Bunkers Convention' did not return any search results within DFAT's treaties search function, however 58 results were found when using the same search term within the AustLii Treaties database.

review would provide an early assessment for the lead agency and advise Parliament of how the treaty was implemented and is being administered. As an implementation review would only provide a snapshot that treaty obligations are being met and not provide ongoing monitoring and reporting of treaty obligations, there would also be benefit in exploring further options for lead agencies to provide ongoing assurance to Parliament for key treaties already in force.

5.31 DFAT maintains a central online treaties database that records the particulars and associated documents for all Australian treaties in force and under negotiation. While the database is a useful resource, the ANAO identified deficiencies in its capacity and data quality. In addition, the database does not identify the lead agency for each treaty, and the treaty text and associated documents, such as the National Interest Analysis and Regulation Impact Statement, are only available in a limited (webpage HTML) format that cannot be accessed easily. There would be merit in reviewing the database to improve the quality and accessibility of the information available on treaties.

Recommendation No.3

5.32 To demonstrate how Australia is meeting its treaties obligations, the ANAO recommends that the Department of Foreign Affairs and Trade, in consultation with the Joint Standing Committee on Treaties, and taking into account existing treaty-mandated monitoring and reporting arrangements:

- include in its treaty guidance that, where appropriate, the lead agency conducts and publishes a treaty implementation review of a new treaty at an appropriate point after its entry into force; and
- considers options for the cost effective ongoing monitoring and reporting by lead agencies of the implementation of key treaties.

DFAT response: *Agreed in-part.*

5.33 DFAT agrees in part with the recommendation but is not in a position to finalise its consideration until it has had the opportunity to obtain and consider the views of the many agencies which would be affected by the implementation of the recommendation. Detailed interagency consultation has not been possible, given the legislative framework and the time available for comment. Consultation would also be required with states and territories, which have an important role in the implementation of many treaties (for example, human rights and trade treaties).

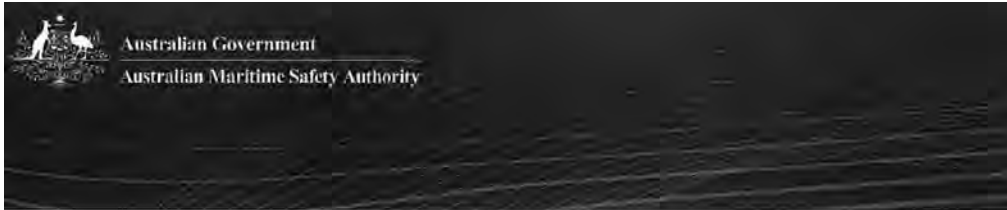


Ian McPhee
Auditor-General

Canberra ACT
31 October 2013

Appendices

Appendix 1: Agency Responses to Proposed Report



CHIEF EXECUTIVE OFFICER

Barbara Cass
Group Executive Director *Bar* 23/9/2013
Performance Audit Services Group
Australian National Audit Office
GPO Box 707

CANBERRA ACT 2601

Dear Ms Cass

Proposed audit report on the Agency Management of Arrangements to Meet Australia's Treaties Obligations

I refer to your letter of 5 September requesting AMSA's response and comments on your draft audit report.

It was pleasing to see that the audit resulted in no recommendations that required an AMSA response.

Regardless, considering the importance of having adequate compensation available in case of an oil pollution event involving shipping and the improved assurance that a regional approach to ship inspection provides, AMSA has commenced a process with the Asia Pacific Memorandum of Understanding on Port State Control seeking amendments to the Memorandum to explicitly include the Bunkers Convention as well as the Conventions related to pollution compensation for oil tankers as matters for inspection and reporting on. A submission has been made to the Committee of the Memorandum for consideration at their meeting in October 2013.

This action is relevant to the commentary in paragraphs 2.44 and 2.45 of the draft report and while not directly relevant to Australia's treaties obligations AMSA is taking this action after

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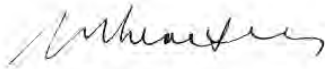


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examining our processes during the audit process and recognising that there were further opportunities for improvement not only for Australia but other countries in the region. Should these amendments be accepted then changes to procedures for inspection and reporting will be made over the next 12 to 18 months.

I would also like to take this opportunity to thank the ANAO for their efforts during this audit.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Graham Peachey', written in a cursive style.

GRAHAM PEACHEY

20 September 2013



Australian Government
Department of Foreign Affairs and Trade
 Australian Safeguards and Non-Proliferation Office

File Number: 12/9827

2 October 2013

Ms Barbara Cass
 Group Executive Director
 Performance Audit Services Group
 Australian National Audit Office
 GPO Box 707
 CANBERRA ACT 2601

Dear Ms Cass,

Thank you for your letter dated 5 September 2013 in which you provided the proposed audit report on *Agency Management of Arrangements to Meet Australia's Treaty Obligations*, which covered the arrangements that the Australian Safeguards and Non-Proliferation Office (ASNO) manages for meeting the International Atomic Energy Agency (IAEA) nuclear safeguards obligations that arise from Australia being a party to the Nuclear Non-Proliferation Treaty (NPT). This letter conveys my comments on Chapter 3 and Recommendation 1 of the proposed audit report. I note your advice that ASNO's comments will be included in the final audit report.

I welcome the focus of the Australian National Audit Office (ANAO) on the important question of managing compliance with IAEA safeguards obligations under the NPT. IAEA safeguards comprise the various measures such as accounting, reporting, analysis and inspections, applied by states parties and the IAEA to ensure compliance with commitments to use nuclear material and technology solely for peaceful purposes. International confidence in the compliance of each state with these obligations derives from confidence in how IAEA safeguards are applied, so the effective, efficient and transparent management of these commitments by national safeguards authorities, such as ASNO, is paramount.

The ANAO report acknowledges that ASNO has in place mature management arrangements and a regulatory regime to account for Australia's nuclear material, and that the IAEA has concluded that Australia's accounting and use of nuclear material is in accordance with NPT obligations.

I welcome ANAO's recognition of the importance of an electronic database for managing the some 100 permits for possession of nuclear material and for accounting for and reporting on the disposition and use of the around 2,000 individual batches of nuclear material in Australia. The database upgrade project to address the limitations in ASNO's current database is well advanced and should be completed by early 2014.

ASNO, R G Casey Building, John McEwen Crescent, Barton ACT 0221 Telephone: 02 6261 1920 Facsimile: 02 6261 1908

Comments on Recommendation 1

I agree with the recommendation that ASNO implement a stronger risk-based approach to its program of inspections of permit holders by documenting the risk assessment of permit holders and developing an inspection program with differing intensity of inspections.

ASNO manages its regime of inspections of permit holders on the basis of the relative safeguards compliance risks involved and within available resources. I acknowledge the report's finding that there is considerable variability in the number of inspections ASNO conducts from year to year, and accept ANAO's recommendation on how this could be strengthened.

I would like to express my appreciation for the constructive and consultative approach taken by ANAO throughout the performance of this audit.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Floyd', with a stylized, flowing script.

Dr Rob Floyd
Director General

4 OCT 2013
 6 C 20



Australian Government
 Attorney-General's Department
 International Law & Human
 Rights Division

12/12068

3 October 2013

Barbara Cass
 Group Executive Director
 Performance Audit Services Group
 Australian National Audit Office
 GPO Box 707
 CANBERRA ACT 2601

Dear Ms Cass

Proposed audit report on the Agency Management of Arrangements to Meet Australia's Treaties Obligations

The Attorney-General's Department has prepared a formal agency response to Recommendation No. 2 in the proposed audit report on the *Agency Management of Arrangements to Meet Australia's Treaties Obligations* provided to Mr Roger Wilkins AO on 5 September 2013.

Formal agency response

The Department welcomes the ANAO report on the Agency Management of Arrangements to Meet Australia's Treaties Obligations and thanks the ANAO for its constructive engagement.

Recommendation No. 2

Develop fit for purpose guidance and capture experience gained to assist staff

As concerns the recommendation to developing guidance materials to assist staff in coordinating Australia's reporting under the *Convention on the Rights of the Child*, the Department notes that whilst guidance material is usually generated to deal with policy processes, that specific guidance materials for coordinating reporting under the Convention was not currently in place due to the long timeframes between reporting cycles. These timeframes can vary between five to seven years and during this time, both Government and United Nations' policies on reporting can change. Hence a tailored approach had been adopted for each reporting cycle. The Department notes that, within these constraints, it will give effect to the recommendation.

Investigate options for improving data collection and the standardisation of information across jurisdictions

As concerns options for improving data collection, the Department notes the views of the ANAO and commits to drawing these views to the attention of the relevant Government organisations. However, the Department notes that additional resources would be required to generate

disaggregated data and reiterates the view that the Committee's request for disaggregated data is a preference of the Committee and not an obligation under the Convention. The Department notes that, within these constraints, it will endeavour to give effect to the recommendation, where possible.

Improve information on the AGD website about the Convention and Australia's reports on its progress in meeting its obligations under the Convention

In relation to improving information on the Department's website, the Department will shortly update its page on Human rights treaty body reporting, not only for the Convention, but for all human rights treaties for which the Department is the lead agency.

Recommendation No. 3

The Department further notes the recommendations regarding post-implementation reviews and ongoing monitoring of treaties and is supportive of the concerns regarding the additional work that this would impose as against the estimated costs and benefits of undertaking such a process. The Department understands that these issues concerning resources and costs and benefits will be referred to in the response by the Department of Foreign Affairs and Trade.

Summary of agency response

The Department accepts recommendation 2 in the ANAO report on the Agency Management of Arrangements to Meet Australia's Treaty Obligations concerning Australia's reporting under the *Convention on the Rights of the Child*.

The action officer for this matter is Tracey Pearce who can be contacted on 02 6141 4808.

Yours sincerely



Bill Campbell QC
General Counsel (International Law)
International Law and Human Rights Division



Australian Government
Department of Foreign Affairs and Trade

Acting Secretary

Telephone: 02 62613048

Facsimile: 02 62732081

8 October 2013

Ms Barbara Cass
 Group Executive Director
 Performance Audit Services Group
 Australian National Audit Office
 GPO Box 707
 CANBERRA ACT 2601

Dear Ms Cass

Thank you for your letter of 5 September 2013 inviting comment on the ANAO's proposed audit report on the Agency Management of Arrangements to Meet Australia's Treaty Obligations. This letter conveys the comments of the Department of Foreign Affairs and Trade (DFAT) on Recommendation 3 of the proposed report:

To demonstrate how Australia is meeting its treaties obligations, the ANAO recommends that the Department of Foreign Affairs and Trade, in consultation with the Joint Standing Committee on Treaties, and taking into account existing treaty-mandated monitoring and reporting arrangements:

- **include in its treaty guidance that, where appropriate, the lead agency conducts and publishes a treaty implementation review of a new treaty at an appropriate point after its entry into force; and**
- **considers options for the cost-effective ongoing monitoring and reporting by lead agencies of the implementation of key treaties.**

DFAT agrees in part with the recommendation but is not in a position to finalise its consideration until it has had the opportunity to obtain and consider the views of the many agencies which would be affected by the implementation of the recommendation. Detailed interagency consultation has not been possible, given

the legislative framework and the time available for comment. Consultation would also be required with states and territories, which have an important role in the implementation of many treaties (for example, human rights and trade treaties).

Accordingly, the comments below represent DFAT's preliminary views.

The Australian Government implements its treaty obligations in good faith as a matter of law and as a matter of course. DFAT considers that current arrangements regarding treaty implementation are adequate. However, DFAT acknowledges that Parliament and the general public may not currently have a detailed understanding of precisely how the Government fulfills Australia's treaty commitments.

As the proposed report notes (paragraph 5.24), any potential approaches to further monitoring of Australia's treaty implementation would need to be considered in the context of the effort and resource cost of preparing such information. In the current budgetary environment where significant savings are required of agencies, any new proposals with resource implications will be subject to particularly rigorous scrutiny.

The proposed report highlights the diversity of monitoring and reporting arrangements established under treaties, with most treaties having no provision for reporting. Any implementation monitoring and reporting mechanisms provided for within a treaty would need to be taken into account in any domestic implementation monitoring and reporting practice. Treaties also vary widely in their subject matter and the action required to implement them, and a given treaty may allow parties wide discretion as to how to implement it. Some treaties require little or no specific action to implement (for example, where Australian domestic law and practice already complies with the terms of the treaty). Treaties in some subject areas (for example, tax treaties and air services agreements) have well-established implementation arrangements. Still other treaties require entirely new arrangements. Consequently, as the proposed report acknowledges (paragraph 5.14), a "one-size-fits-all" approach would be difficult to implement, and potentially very costly. In DFAT's view, it would also be inappropriate to attempt any "one-size-fits-all" approach.

The responsibility for treaty implementation appropriately rests with the lead agency in each case, although for certain treaties more than one agency (or indeed, more than one level of government) will have a significant implementation role. Given the diversity of treaties and the decentralised nature of treaty implementation, it is essential that lead agencies retain the discretion to determine what monitoring and reporting arrangements would work for their respective treaties and would be manageable within their available and anticipated resources. Lead agencies would also be best placed to assess any potential risks associated with reporting.

In relation to those treaties for which DFAT is itself the lead agency, preliminary internal consultation indicates that DFAT would need considerable discretion as to which treaties it selected to be the subject of any form of implementation reporting – for reasons of both resource constraints and risk management.

As noted in the proposed report (paragraph 5.14), no centralised treaty monitoring and reporting system is applied by the United Kingdom, the United States, New Zealand or Canada. Indeed, DFAT is not aware of any such national system anywhere in the world.

DFAT notes that agencies are already required to explain how they intend to implement treaty obligations as part of the National Interest Analysis (NIA) tabled in Parliament before binding treaty action is taken. Lead agencies might choose to expand this section of the NIA as appropriate to provide additional detail on proposed implementation arrangements, including whether they intend to conduct an implementation review and the proposed timeframe. It would be open to the Joint Standing Committee on Treaties to comment in its reports on specific treaties on proposed implementation arrangements.

DFAT takes note of the comments on the Australian Treaties Library set out in paragraphs 5.25 and 5.30 of the proposed report. The Australian Treaties Library is managed under contract by the Australian Legal Information Institute (AustLII). DFAT will explore possible improvements with AustLII, noting that any changes would be subject to technical feasibility and cost.

As requested in your letter, please find attached a summary of the above preliminary response for inclusion in the report summary (Attachment A) and some additional commentary and editorial comments on the proposed report (Attachment B), for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Grigson', with a stylized flourish at the end.

Paul Grigson

Appendix 2: Themes for the fourth periodic report and CRC Committee’s previous concluding observations

Nine Themes	
1.	General measures of implementation
2.	General principles
3.	Civil Rights and Freedoms
4.	Family Environment and Alternative Care
5.	Basic health and welfare
6.	Education, leisure and cultural activities
7.	Special protection measures
8.	Optional protocols to the CRC
9.	Follow-up and dissemination

Source: Australia’s fourth periodic report (submitted June 2009).

Appendix 3: List of Issues themes related to consideration of the fourth periodic report

Issue	Broad Themes
1	Reservation to article 37(c) ¹³⁶
2	Provide information on measures, to implement a comprehensive child rights law framework
3	The agreement by the Council of Australian Governments to establish the National Framework for protecting Australia's Children
4	The National Agenda on Early Childhood
5	National Children's Commissioner
6	Financial resources invested in children
7	National Action plan to Build on Social Cohesion, Harmony and Security
8	Measures addressing child abuse and neglect ¹³⁷
9	Implementation of the National Council (Responsible for reducing the incidence and impact of domestic and family violence and sexual assault on women and children).
10	Corporal punishment
11	Policies and legislation related to children with disabilities
12	Indigenous children (Australian remote indigenous Accommodation, discrimination, impact of the closing the plan)
13	Immigration policies (August 2011 High Court ruling, new risk based detention policy, children in community detention arrangements, unaccompanied minors)
14	Juvenile justice system and policies (minimum age of criminal responsibility, criminal responsibility for children under the age of 14, children separate from adult detainees, facilitate the re-integration of juvenile offenders)

Source: CRC Committee, List of issues concerning additional and updated information related to the consideration of the fourth periodic report of Australia, (CRC/C/AUS/4) November 2011.

136 Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances (initial report p.226).

137 Including the follow-up of the intergovernmental summit on Violence and Child Abuse in Indigenous Communities and the Government's Emergency Response to child sexual abuse in remote Indigenous communities in Northern Territory.

Appendix 4: Human rights reporting obligations from FaHCSIA

Three Australian Government agencies share responsibility for reporting on the seven core international human rights treaties Australia has ratified: AGD, Department of Foreign Affairs (DFAT) and the Office for Women in the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). The variety of human rights reporting obligations are listed below.

Type of reporting	Reporting to	Regularity
UN Core Human Right Conventions	Core Human Rights Treaty Committees	Every 4–5 years
UN Bodies	Office of the High Commissioner for Human Rights Un General Assembly – The Third Committee (The Social, Humanitarian Cultural Affairs) Human Rights Council (HRC) HRC Special Procedures including the Special Rapporteurs; and the UN Open Ended Working Group on Ageing (OEWGA) Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Commission on the Status of Women (CSW) UN Security Council – UNSCR 1325 UN Economic and Social Commission for Asia and the Pacific (ESCAP) Permanent Forum on Indigenous Issues (PFII) International Conference on Population and Development (ICPD)	Unscheduled
Non-UN Reporting	National Human Rights Framework – Action Plan The Annual AGD/DFAT NGO Forum on Human Rights Australia-Laos Human Rights Dialogue (Vientiane 2012) Australia-Vietnam Human Rights Dialogue (Hanoi 2012) Australia-China Human Rights Dialogue (Canberra 2012) Social Justice and Native Title Reports for 2013 Commonwealth Plan of Action for Gender Equality 2005-2015 Asia Pacific Economic Cooperation (APEC) – Women in the Economy Forum	Annually

Source: Submission to ANAO audit from FaHCSIA.

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