

**QUESTION TAKEN ON NOTICE – LEGAL AND CONSTITUTIONAL AFFAIRS
REFERENCES COMMITTEE**

**INQUIRY INTO AUSTRALIA'S AGREEMENT WITH MALAYSIA IN RELATION TO
ASYLUM SEEKERS: 23 SEPTEMBER 2011**

IMMIGRATION AND CITIZENSHIP PORTFOLIO

(QON 32)

Senator Cash asked (in writing):

[Regarding the Agreement being not legally binding] I refer to Clause 16 of the Agreement which states that "This Arrangement represents a record of the Participant's intentions and political commitments but is not legally binding on the Participants". Why is the Agreement with Malaysia not legally binding? What is the effect of this on the enforcement of Malaysia's "intentions and political commitments" under the Arrangement?

Answer:

The Arrangement is not legally binding because it is expressly stated in Clause 16 to be not legally binding upon the Participants. Moreover, as with all less-than-treaty status instruments entered into with other countries, the Arrangement is not subject to the processes (including tabling in Parliament of a text and National Interest Analysis, and consideration by the Joint Standing Committee on Treaties) associated with treaties.

The contents of less than treaty status instruments represent solemn political commitments which the participants are expected to implement in good faith and in full. In this context, we note that clause 13 of the Arrangement provides for a monitoring mechanism, through the establishment of a Joint Committee to oversight day-to-day transfer arrangements and the welfare of transferees and the establishment of an Advisory Committee to deal with broader issues arising out of the implementation of the Arrangement.

Both Governments entered into the Arrangement in good faith and with the intention of meeting their respective commitments. It is not in the interest of either government that the Arrangement not be successfully implemented.