12 June 2008

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600

jsct@aph.gov.au

Dear Secretary,


Thank you for the opportunity to make a submission to the Committee’s inquiry in relation to the Defence Trade Cooperation Treaty (‘the Treaty’).

I regret I am unavailable to attend the hearing; if the Committee conducts a further hearing in Canberra or Sydney on the treaty, then I hope I would be able to attend.

My submission addresses an issue relating to the Treaty and the trade regulations to which the Treaty relates, the US International Traffic in Arms Regulations (‘the ITAR’). The issue, which is not addressed at all in the relevant National Interest Analysis ([2008] ATNIA 15), is that the ITAR oblige Australian employers to engage in race discrimination, in breach of local laws and of Australia’s international human rights treaty obligations. The Treaty does not remedy that situation.

I have attached to this submission an edited extract from a draft book chapter I have written (for publication 2008/9), based on extensive research I have done into the operation of the ITAR. I set out below a submission that is supported by the detail in the attached extract.

Effect of the ITAR

It is notorious in the Australian defence industry that the ITAR impose on Australian defence manufacturers an obligation to treat their employees differently on the ground of their race, specifically their nationality. Nationality is a difficult concept, but the ITAR deal with it simply by inferring nationality from the country of a person’s birth.

The thinking behind the ITAR is that the country you are born is the country you are allied to, and that if that country is not Australia or the USA then you pose a security threat to the USA. Clearly there are ways of addressing security concerns other than this crude approach.

The ITAR affect not only defence manufacturers, but also industries that use defence-related material for civilian purposes, eg development of radar, or space research. The ITAR require an employer to not allow employees who are not USA or Australian nationals to work with relevant imported US technology. The only way that an employer can comply with this requirement is to
select job applicants according to their nationality, and to allocate duties to existing employees according to their nationality. There is no argument to do so breaches the anti-discrimination laws of every Australian State and Territory.

To avoid breaching the law in this way, defence manufacturers have approached the relevant agencies in the Northern Territory, Queensland, New South Wales, the Australian Capital Territory, Victoria and South Australia, seeking an exemption from the relevant anti-discrimination law. An application in the NT was withdrawn; elsewhere the exemptions have been granted, except in the ACT where a decision to refuse an exemption is currently under appeal.

**Effect of the Treaty**

The Treaty narrows, to some degree, the pool of employees of non-UAS and non-Australian nationality who will have to be subject to individual clearance under the ITAR: see Article 4(1)(b) and (c) of the Treaty, and Section 6(11) of the related Implementation Agreement. Existing agreements concerning the status of dual-nationals also narrow the pool.

But the Treaty and agreements result only in less burdensome processes for some employers to obtain security clearances for employees, and only in some circumstances. The Treaty is premised on an employer’s having to identify an employee’s nationality, and to treat the employee differently for at least a period. The Treaty deals only with employers in the defence industry, not in civil industries that use the same imported technology. The Treaty addresses only arrangements that are made for existing employees, and not arrangements made for hiring new employees.

The persistent discriminatory nature of the importing regime is clear in Section 6(14) of the Implementation Agreement, where people who are not nationals of either Australia or the USA will continue to be treated less favourably.

Until and unless the USA abandons its belief that a person’s security risk is necessarily a function of their nationality, Australia employers will have to continue to take their time, and that of courts and tribunals, to argue for an exemption from Australia’s longstanding, nationwide regime of anti-discrimination laws.

I am concerned that despite the issue of mandatory discrimination having been widely publicised within the defence industry, and having been litigated extensively across Australia, it is not referred to at all in the NIA. While the Treaty states that its purpose is “to provide a framework for Exports and Transfers” (Article 2), the NIA narrows the prospective width of that framework to say that the Treaty’s purpose is to “enable greater access and sharing … between Australia and the USA”, and to “reduce barriers” (paras 3 and 4). Removing a requirement to discriminate on the ground of race could fall within a “framework for Exports and Transfers”, but is not mentioned by the NIA.

I note from the Attachment to the NIS that affected industry was not consulted. I note too that a Regulation Impact Statement (RIS) was not prepared in accordance with best practice requirements. Because the Treaty leaves in place the regulatory impost on employers of having to seek exemptions from anti-discrimination laws, it affects business regulation, and both an RIS and industry consultation would have been appropriate for at least this reason.

It is not my submission that the Committee recommends against taking binding treaty action. Rather, I submit that in its report the Committee

1. refers to the continuing unsatisfactory state of affairs, in which the USA requires Australian employers to engage in race discrimination or to avoid Australia’s race discrimination laws

2. notes that the terms of the Treaty and the Implementation Agreement assume that that employees in Australia will continue to be identified and treated differently on the ground of their nationality
3. notes the limited extent to which the Treaty and the Implementation Agreement reduce the burden on employers in obtaining security clearance for employees
4. regrets the missed opportunity to the Treaty offered to address this issue
5. notes that the NIS fails to address the issue
6. notes the desirability of an RIS in the circumstances
7. notes the desirability of consulting further with industry in the circumstances
8. states the desirability of addressing and resolving this issue at a diplomatic level at the earliest opportunity
9. proposes that there are available methods of ensuring security without discriminating on the ground of race.

The extract that follows provides detail in support of the points made above.

Please let me know if I can assist the Committee further.

Yours sincerely,

By email

Associate Professor Simon Rice OAM
Director of Law Reform and Social Justice
ANU College of Law
World peace and US security

The ITAR are export regulations, promulgated under the US Arms Export Control Act. The US President is authorised to control the export from, and import into, the US of defence articles and defence services “[i]n furtherance of world peace and the security and foreign policy of the United States”\(^1\). The President’s authority to control the export and import of defence articles and services has been delegated to the Secretary of State,\(^2\) and it is the Code of Federal Regulations (CFR) Title 22 – Foreign Relations, Chapter I, Subchapter M that implements that delegated authority and sets out the ITAR.\(^3\) Consistently with the President’s authority the ITAR are applied “in furtherance of world peace, or the national security or the foreign policy of the United States”.\(^4\)

The overall effect of Subchapter M of the ITAR is to prohibit the transfer of defence items and technology to people other than US nationals.

The ITAR achieve extra-territorial operation by the simple device of incorporating themselves into export contracts. The ITAR require the export of defence-related material to be pursuant to a prescribed manufacturing license agreement\(^5\) or technical assistance agreement.\(^6\) Both the US exporter of defence-related material and the corresponding non-US importer are parties to these agreements, and are bound by its ITAR-prescribed terms even after termination.\(^7\) For the non-US importer, contractual compliance is, effectively, ITAR compliance.

The ITAR require these agreements to include a clause that prohibits defence-related material from being “transferred to a person in a third country or to a national of a third country except as specifically authorized in this agreement unless the prior written approval of the Department of State has been obtained”\(^8\). This clause is a mandatory discrimination clause, and is in direct conflict with Australia’s human rights obligations and extensive anti-discrimination laws.

If, in breach of the mandatory discrimination clause, defence-related material that is imported into Australia is transferred to a “national of a third country” without prior written approval of the State Department, the importer is in breach of the contract, and faces blacklisting by the State Department for purposes of future trade.\(^9\) As well, its conduct will expose its US export partner to massive sanctions under the ITAR. The US exporter will be in direct breach of ITAR, and penalties for non-compliance are considerable.

The reasoning that underpins the ITAR is that the threat that a person poses to US security can be inferred from their nationality. In the ITAR, ‘national’ of another country is equated with ‘foreign person’,\(^10\) and ‘foreign person’ is, effectively, not a US person.\(^11\) The ITAR are suspicious of a person who is not a US person, and use the idea of ‘nationality’ as a means of assessing a person’s security status.

\(^{1}\) US Code Title 22 §2778(a)(1); 22 CFR §120.1.
\(^{2}\) Executive Order 11958, as amended: per 22 CFR §120.1.
\(^{3}\) The export of items and technology for commercial – but not defence – purposes is regulated under the US Export Administration Regulations (EAR).
\(^{4}\) see eg 22 CFR §127.8(a), 126.7(a)(1), 120.5.
\(^{5}\) 22 CFR §120.21.
\(^{6}\) 22 CFR §120.22.
\(^{7}\) 22 CFR §127.8(6).
\(^{8}\) 22 CFR §124.8(5).
\(^{10}\) 22 CFR §124.2(6).
\(^{11}\) 22 CFR §120.15 and 22 CFR §120.16; 8 U.S.C. 1101(a)(20) and 8 U.S.C. 1324b(a)(3).
The presumptive security risk arising from nationality or, strictly speaking, non-US/Australian nationality, conflates ‘nationality’ with ‘national allegiance’, and assumes that the former is necessarily an indicator of the latter. The drafting of the ITAR predate, but precisely anticipate, the sentiment expressed by President George W Bush: “You’re either with us or against us in the fight against terror”.  

The ITAR’s assumption that nationality is a reliable indicator of national allegiance is readily rebuttable, and objections to the reasoning behind the ITAR have been strongly worded; the Northern Territory Anti-Discrimination Commissioner said it is “fatuous to presume that people of a particular racial background behave in a predictable way”. There are many ways of ensuring the security of the technical data that do not make a crude equation between nationality and national allegiance, for example, simply requiring that all staff be subject to security clearances, even of a prescribed type.

Qualified only in the event of dual nationality discussed below, the effect of the ITAR is that Australian companies who import defence-related material from the US can transfer that material only to a person who is an Australian national. In a population with a high proportion of recently arrived migrants, none of whom is required to become an Australian citizen, many in the Australian workforce are ‘nationals of a third country’ and so fall outside the ITAR’s narrow ambit. Consequently a large number of Australia defence contractors’ employees are excluded by the ITAR from carrying out their normal duties in defence manufacturing, without any assessment of the actual risk they pose to US security.

Australia has reached agreement with the US over ‘dual nationality’ clearance to a limited extent, in much the same terms as Canada has: “as a concession to Australia, and as a result of the Technology Transfer Process Improvement Initiatives discussions ... the State Department has agreed that Australian dual-national employees of the Defence Department and Australian companies do not need to provide nationality information for US licensing purposes if they have at least a restricted security clearance and a need to know ... [and] Defence is the ultimate end-user ... This agreement does not apply to non-citizens, including third country exchange officers with the ADF, or to dual-nationals of proscribed countries listed at ITAR 126.1 (eg, Cuba, China, Iran, Libya, North Korea and Vietnam). In such cases, prior written approval must be sought from the State Department before access to US technology is granted ... ”. This agreement is a very narrow concession. It is applicable only where the Australian Defence Department is the ultimate end-user, and it continues to exclude any employee who, although a visa holder or even long-term permanent resident of Australia, is not an Australian citizen. Most importantly, the agreement does not alter the fact that employers must continue to discriminate on the ground of nationality; indeed, it assumes that employers will continue to ask employees their nationality and to identify them by nationality.

The US knows that the ITAR mandate discriminatory conduct, but is unmoved. DTAG minutes repeatedly record the fact that ITAR requires discriminatory conduct in other countries. When questioned about “other country [sic] laws not allowing questions about citizenship”, the Deputy Assistant Secretary of State for Defense Trade, Greg Suchan, said “We are aware that countries

13 Exemption Application by Raytheon Australia Pty Ltd and related companies, Northern Territory Anti-Discrimination Commission, ADC 2007/027 at [8.1].
14 a range of alternative measures is discussed below
such as Australia do not allow questions about citizenship … Dual nationalities could have divided loyalties, and we have responsibilities to our country that must be protected.”\textsuperscript{17}

**Perceptions of the ITAR in Australia**

In 2006 the Australian Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade Committee reported on Australia’s defence relations with the US,\textsuperscript{18} but made no mention of the mandatory discrimination clause. The Committee in its report did not refer to the part of the submission from the Department of Tourism Industry and Resources which stated that “Australian companies have been required to seek exemptions from relevant anti-discrimination laws to be able to ask their employees if they have dual nationality and to allocate individuals to work on the basis on their nationality”.\textsuperscript{19} 

A discussion paper produced for the Australian Government’s Defence Industry Policy Review in June 2006 made no reference to the ITAR at all, let alone to the compliance difficulties they pose. The resulting ‘Defence and Industry Policy Statement 2007’ says only that “creating an environment in which SME [small to medium enterprises] can prosper as defence suppliers … is complicated by a number of factors including … defence-specific security and compliance requirements such as the US International Traffic in Arms Regulations (ITARs) that are a significant impost on firms”.\textsuperscript{20} The inconsistency between the ITAR mandatory discrimination clause and Australian law is here characterised by the Australian Government only as a complicating factor, and a “significant impost”.

In preparation of a submission to the Defence Industry Policy Review, the Australian Industry Group Defence Council surveyed the Australian defence industry. In its 2006 submission the Council reported that: “[a]s a general rule, larger firms have developed the processes necessary to satisfy US International Traffic in Arms Regulations (ITAR) while most smaller firms were extremely frustrated in their attempts to do so, finding the compliance requirements onerous, and at times unjustifiable … Almost all respondents expressed frustration at the time it takes to get security clearances for staff and many had experienced difficulty with restrictions on the nationality of personnel”.\textsuperscript{21} Again, the mandatory discrimination clause is characterised only as a “difficulty” that causes “frustration”.

The Australian Government in 2006 held “a series of International Traffic in Arms Regulations seminars aimed at raising awareness and assisting industry in understanding U.S. export control requirements”.\textsuperscript{22} Consistently with the Australian Industry Group Defence Council’s survey results noted above, “the most often repeated questions were in regard to dual citizenship and sub-licensing; with confusion over dual citizenship by far the most recurring theme of the seminars”.\textsuperscript{23} As if to reinforce the perception that ITAR poses only a business problem, and not an issue in principle, an account of the seminar made passing reference to the fact that “Australian law, particularly the anti-discrimination legislation prohibits employers asking nationality questions”.\textsuperscript{24}

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\textsuperscript{17} US Department of State Defense Trade Advisory Group ‘Minutes of 21 April 2006 Plenary Session’ page 4, at \texttt{<http://www.pmddtc.state.gov/docs/dtag/dtag_plenary_april_2006_minutes.pdf>}

\textsuperscript{18} Inquiry into Australia’s Defence Relations with the United States, 22 May 2006.

\textsuperscript{19} Department of Tourism Industry and Resources, Submission at 7-8, at \texttt{<http://www.aph.gov.au/house/committee/jfadt/usrelations/subs/sub14.pdf>}


\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid.
The opening presentation, from the Australian Government’s Department of Industry Tourism and Resources, was similarly dismissive of any concerns in principle with the effect of the ITAR mandatory discrimination clause, going as far as to point out how companies could take steps to avoid Australia’s anti-discrimination legislation. Mr Lawson said that “The Government is aware that some Australian defence companies have faced questions from their employees or their unions about difficulties complying with State and Territory anti-discrimination and equal opportunity legislation as a result of their ITAR obligations”. He suggested that equal opportunity complaints “need to be handled sensitively”, and drew attention to the success that some companies had had in seeking exemptions from anti-discrimination legislation.  

Presentations to the workshop had a pragmatic ‘how to comply with ITAR’ approach, with repeated emphasis from Australian and US speakers on the need for compliance. As ‘compliance’ carries with it the requirement to discriminate, the workshop presentations that promoted compliance, without reservation and in the absence of any suggested alternative, can only be read as an exhortation to discriminate, or to avoid the prohibition against doing so.

A 2006 information booklet on defence export controls for Australian companies fails to see the ITAR as raising serious issues of principle. Instead, as did Mr Lawson in his presentation, it encourages employers to take steps to avoid the effect of anti-discrimination laws and to apply for an exemption, saying that “companies should be mindful that certain forms of discrimination in employment are unlawful under Australia law ... In a number of [Australian] States exemptions from the legislation have been granted ... in order to comply with ITAR requirements. Certain time limits and safeguards may be applied to exemptions. Companies should seek advice from State and Territory Government on their application.”

In summary, Australian public policy has seen the effect of the ITAR as a problem for business to deal with, with no apparent concern about the enforced requirement to discriminate. Most references to the ITAR have been in advice as to how best to comply with them. The problem posed by the ITAR is, understandably from the businesses’ point of view, the time and expense necessary to comply, including complying with the requirement to discriminate.

**Australian anti-discrimination laws**

The effect of Australia’s anti-discrimination laws is that it is unlawful for an employer to treat one applicant or employee less favourably than another on the ground of their race, specifically their nationality, or to impose a requirement that a person of a particular nationality is unable to comply with. This discrimination is exactly what the ITAR’s mandatory discrimination clause demands of an employer.

The ITAR’s mandatory discrimination clause puts an Australian employer in an impossible position: the employer is required to do in Australia something that is unlawful in Australia. Neither declining the terms of the licensing contract, nor acting unlawfully, is a realistic option. But while there is no way out of accepting the terms of the contract, there is at least one way out of discriminating unlawfully: obtain an exemption from the anti-discrimination legislation, and so discriminate lawfully. Indeed, this is the course that the Australian companies have taken, and that the Australian Government to date has encouraged.

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Australia’s State and Territory anti-discrimination laws all make provision for an exemption to be granted, so that otherwise unlawful conduct is permitted. In seeking exemptions the employers have been at pains to make clear that they are seeking the exemption reluctantly, and only because they have been forced into doing so by the mandatory discrimination clause they have had to agree to. Just as the employers have been apologetic and restrained in the requests for exemptions, so have the tribunals been at pains to limit the scope of the exemptions to accommodate the ITAR only as far as necessary. Nevertheless, the conduct that is permitted by the exemptions described below is wide ranging.

In 2003, for example, an exemption granted to the ADI companies in Victoria allowed a wide variety of employment-related conduct on the basis of an employee’s nationality. One permitted measure, starkly illustrating the discrimination involved, was “[i]dentifying (by means of a badge, inclusion in a list or otherwise) those in that workforce whose nationality or national origin is included in those who are permitted, under the United States law, to work on defence related projects or have access to related technology, materials or information, so as to distinguish them from those not so permitted.” Similarly in Western Australia and Queensland, employee are badged according to their nationality: “the badge will have a green bar to indicate that the holder does not have export privileges and that the employee is a foreign person”. The same ‘badging’ practice is reported in Canada, as well as workers’ being “barred from certain parts of the workplace, and in some companies are escorted by a security guard at all times”.

It is precisely this humiliating differentiation of people that anti-discrimination laws are intended to prevent, but which is required to comply with the ITAR mandatory discrimination clause.

**Exemption applications**

In a series of exemption applications around Australia, defence manufacturing companies have brought into local Australian tribunals the vexed question raised by the ITAR mandatory discrimination clause: what weight to give the US’s claim for national security (and world peace) against Australia’s own human rights laws. The first of the applications for exemption from anti-discrimination legislation was heard in the Anti-Discrimination Tribunal Queensland on 12 June 2003. The application was made by Boeing Australia Holdings Pty Limited and its associated companies, which included Aerospace Technologies of Australia Limited, Preston Aviations Solutions Pty Limited, and a number of Hawker de Havilland companies. A decision was handed down on 19 November 2003, granting an exemption from relevant parts of the *Anti-Discrimination Act 1991 (Qld)* until 18 November 2008. It appears that at much the same time the Boeing companies were granted an exemption by the Victorian Civil and Administrative Decisions Tribunal (‘VCAT’) from relevant parts of the *Equal Opportunity Act 1995 (Vic)*, although there is no published decision. Reference to the decision is made in the 2007 decision that extended the exemption for a further three years.

In 2004 an application was made to VCAT by ADI Limited and its associated companies, which included Thales Underwater Systems Pty Limited and Thales Training and Simulation Pty Limited. On 5 July the Tribunal granted an exemption from relevant parts of the *Equal
Opportunity Act until 7 July 2007. In 2007 the exemption was extended for a further three years. The ADI companies applied to the State Administrative Tribunal of Western Australia for an exemption in April 2005, and in September an exemption was granted from relevant parts of the Equal Opportunity Act 1991 (WA) until 28 September 2010. That decision was appealed to the Supreme Court of Western Australia by the Equal Opportunity Commissioner, the Trades and Labour Council of Western Australia and Western Australians for Racial Equality Inc, and on 28 November 2007 the Court dismissed the appeal, confirming the exemption.

The Boeing Companies and the ADI companies applied in 2005 to the NSW Anti-Discrimination Board for an exemption from relevant parts of the Anti-Discrimination Act 1977 (NSW), and the NSW Attorney General gazetted the exemptions on 8 February and 28 June 2005, each for a period of three years. In 2007 applications for exemptions were made by Raytheon Pty Limited and its associated companies. On 17 October 2007 VCAT granted an exemption from the relevant parts of the Victorian Equal Opportunity Act for three years. On 28 January 2008 the Queensland Anti-Discrimination Tribunal granted an exemption from the relevant parts of the Anti-Discrimination Act 1991 (Qld) for three years, and on 31 March 2008 the South Australian Equal Opportunity Tribunal granted an exemption from the relevant parts of the South Australian Equal Opportunity Act for three years.

BAE Systems Australia Ltd applied for exemption from relevant parts of the Equal Opportunity Act 1984 (SA), and on 21 January 2008 the Equal Opportunity Tribunal of South Australia granted an exemption for three years.

In 2007, the Raytheon companies had applied for an exemption from the Anti-Discrimination Act 1992 (NT) but in January 2008 they withdrew their application. The Northern Territory Anti-Discrimination Commissioner (NTADC), mindful of his functions to promote understanding, acceptance and discussion of equal opportunity and of the Anti-Discrimination Act, and to promote non-discriminatory attitudes acts and practices, published what “would have been my decision ... but for the Applicant’s withdrawal of its application”. The NTADC would have refused the application, the first published decision to do so. One decision has been made to refuse an exemption application: the NTADC refers in his draft decision to “the rejection of a similar application [by the Raytheon companies] by the ACT Human Rights Commissioner (No 6 2007)”. That decision has not been published, but is the

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38 ADI Limited (Anti-Discrimination) [2007] VCAT 2242.  
39 the exemption is provided for in s135 of the Act.  
42 Exemption Order (Re Boeing), NSW Government Gazette 2005 No 25, p 391.  
43 Exemption Order (Re ADI), NSW Government Gazette 2005 No 81, pp 3495-6.  
44 Raytheon Australia Pty Ltd and Others Exemption Application [2007] VCAT 2230.  
45 Exemption application re: Raytheon Australia Pty Ltd & Ors [2008] QADT 1.  
46 Raytheon Australia P/L & Ors [2008] SAEOT 3.  
47 The exemption is provided for in s92 of the Act.  
48 BAE Systems Australia Ltd [2008] SAEOT 1  
49 Section 59.  
50 Section 13(1)(g)-(j) Anti-Discrimination Act 1992 (NT).  
51 Exemption Application by Raytheon Australia Pty Ltd and related companies, ADC 2007/027.  
52 Such a decision would have been made under s109 of the Discrimination Act 1991 (ACT). The decision is referred to as well in Exemption application re: Raytheon Australia Pty Ltd & Ors [2008] QADT 1, at note 6.
subject of a reserved decision on Raytheon’s review application that was heard by the ACT Administrative Appeals Tribunal on 11 and 12 June 2008.

The various exemption decisions have dealt with similar arguments from similar parties in similar circumstances. Despite quite extensive procedural differences among the jurisdictions, the substantive decisions are very alike, in both their reasoning and their result. The published exemption decisions show that in every application an argument such as this is made: “[t]he Applicants cannot avoid discriminating [in breach of anti-discrimination legislation] if they are to comply with the United States export laws and meet their contractual obligations”.54

The public interest

In every published decision the tribunal has been confronted by the employer’s dilemma, and has felt that there is no alternative to it but to grant the exemption. The employer’s need to discriminate has been characterised, for example, as being in the “community interest” because of the adverse impact on the employer and its work force, and regard has been had to Australia’s national economy. It has been said that an exception is in the “public interest,” and in the “national interest”, because of the risk of the loss of contracts, employment and research funding.

The effect of the inflexible demands of the ITAR is to present a tribunal with no real choice, and the tribunals have engaged in no genuine ‘weighing up’ exercise. Rather, they have deferred to what one tribunal called the ‘over-riding’ public interest of maintaining the viability of the businesses that are party to the ITAR-regulated contracts. Unless the exemption is granted the contracts will be breached with serious consequences, not the least of which (it is has been asserted by the employers) is that large numbers of people will be unemployed. In the face of this threatened consequence, the tribunals have had to find a way to make a credible decision to grant an exemption, and they have done this by adopting a considerably wider approach to the “public interest” than has previously been the case.

A factor that could explain the refusal of an exemption in the ACT is that the exemption provision of its Discrimination Act has to be given effect in a manner that is “consistent with human rights as far as possible”.58 As well, the human rights guaranteed in the ACT are “subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society”.59 The situation in Canada is similarly governed by explicit human rights provisions, and could be an indication of how exemption applications will fare in Australia as jurisdictions adopt those human rights standards.

Alternatives to complying with the ITAR

Whatever the merits of the various tribunals’ approach to granting the exemptions, it is the extra-territorial reach – the global reach – of the ITAR that has caused exemption applications outside the spirit and aims of anti-discrimination legislation to be made at all, and it is the inflexibility of the ITAR, backed up by its very severe penalties, that has dictated to the tribunals only one realistic decision. The ITAR show no deference to the legitimacy of non-discrimination as a principle of international law, or to the integrity of domestic legal systems. If there were some flexibility, then ways would be found to achieve the ITAR’s goals that would be consistent with, in Australia’s case, its extensive and established prohibitions against race discrimination.

53 Eg whether the application is advertised, and whether the proceedings are adversarial.
54 re: Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption) [2007] VCAT 532, at [15.1].
55 Ibid, at [16.1].
56 Ibid at [16.2].
57 ADI Limited (Exemption) [2004] VCAT 1963 at [48].
58 section 30(1), Human Rights Act 2004 (ACT).
59 Ibid, s28.
A range of measures would achieve the ITAR’s desired result without resorting to discrimination: restricting access to ITAR controlled material based on work record, experience, time of service, and internal security clearance; screening employees without stereotyping, by referral to criminal history and integrity checks; seeking job references from every employee; inwards and outwards bag inspections for all employees execution by all employees of non-disclosure agreements with consequences for breach; and keeping the number of persons required to access ITAR-controlled materials to a minimum.\textsuperscript{60}

Implementing steps such as these would incur additional expense and require additional administration. They are, however, measures that are both lawful and non-discriminatory. But it is for the US Government to amend the ITAR in a way that recognises the sufficiency of such measures, and until and unless that happens, an Australian importer of ITAR-regulated material, even if it were to take all these proposed measures, would continue to be in breach of the ITAR’s mandatory discrimination clause.

It is impractical for the Australian company to obtain authorisation from the US State Department on every occasion that one of their employees who is a national of a third country has access to the imported defence-related material. Nor is it a realistic option for the Australian company simply to breach the contract by allowing nationals of a third country access to the imported defence-related material: to do so would expose the Australian importer to liability for the breach and to blacklisting, and would expose the US exporter to sanctions under the ITAR.

When a contracting party \textit{must} source its technology from a US company – as the Australian companies have said is the case – the US can impose ITAR-mandated conditions on them without risk to the US businesses of loss of trade or competitive advantage. When faced with the prescribed contractual terms, an importing company’s only real choice is to not carry out the work for which it requires the US technology, or to sign on the dotted line and comply with the contractual terms.

\textbf{International human rights compliance}

The US’s discrimination on the ground of race when controlling access to defence technology is in violation of Article 26 of the \textit{International Covenant on Civil and Political Rights} (ICCPR), and is not excused in the name of ‘national security’. Article 4 of the ICCPR allows a state party to derogate from its non-discrimination obligations only “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”, and never if the measures taken in derogation involve “discrimination solely on the ground of race, colour, sex, language, religion or social origin”.\textsuperscript{61}

But the US takes a narrow approach to interpreting the extent to which the ICCPR both constrains anti-terrorism measures\textsuperscript{62} and limits discrimination on the ground of race.\textsuperscript{63} Further, the US’s ratification of the ICCPR is subject to the “Understanding”\textsuperscript{64} that “distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and article 26 – [are] permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective”.

\textsuperscript{60} Exemption Application by Raytheon Australia Pty Ltd and related companies, ADC 2007/027 at [8.2].

\textsuperscript{61} and see UN Human Rights Committee General Comment 29.

\textsuperscript{62} Ibid at [10] and [11].

\textsuperscript{63} Ibid at [23] and [24].

\textsuperscript{64} An ‘understanding can amount to a reservation: Vienna Convention on the Law of Treaties Art. 2(1)(d): “‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (cf J King Gamble, Jr. ‘Reservations to Multilateral Treaties: A Macroscopic View of State Practice’ (1980) 74 American Journal of International Law 372 at 374.
The purported effect of this “Understanding” is that the US has effectively reserved to itself the right to discriminate on any ground for its own ‘legitimate objectives’, of which national security is presumably one. And it has not recognised the competence of the Human Rights Committee to receive and consider communications alleging a violation of the rights set out in the ICCPR. The US is, therefore, effectively free of any international accountability for its violations of the ICCPR. Nor is it comprehensive in reporting on its implementation of and compliance with the ICCPR.

Australia is, however, accountable for its violations of Articles 2 and 26 of the ICCPR, and is vulnerable to a communication being made to the UN Human Rights Committee by an employee affected by discriminatory conduct that has been exempted from anti-discrimination legislation, although no such complaint has yet been reported.

**Conclusion**

Through the ITAR the US dictates the terms of private conduct by non-US people and corporations outside the US. The ITAR causes them to act unlawfully under the law of another state, and causes that state to breach its international human right obligations.

The workers who are discriminated against have no standing to challenge the validity of the ITAR-mandated discrimination clause and, if their employer is granted an exemption from the law designed to protect them, the exemption will be a defence to a claim they make for the discrimination that they then suffer. The non-US employees of non-US companies pay the price for the US maintaining national security interest through crude reliance on nationality as an exclusive indicator of national allegiance.

What could – and in principle should – be an impasse between US national security and Australia’s commitment to non-discrimination is largely one-way traffic in favour of the US. The US is aware of the conflict between the ITAR’s mandatory discrimination clause and anti-discrimination laws in Australia and Canada, but appears unfazed. The ‘one-way’ nature of any engagement over the issue is highlighted by, for example, insistence that “Australia must recognize the very real security concerns of protecting highly sensitive military technology that underlie [the ITAR]”. Trope and Witt call on “Australian policy makers [to] appreciate the ... rigor required for lawful compliance with [the ITAR’s] provisions,” and to “create a regulatory regime that mirrored the ITAR standard”.

It is hard to credit that such absolute primacy could be given to the ITAR’s heavy handed means of addressing what are undoubtedly real security concerns. Far from creating a regulatory regime that ‘mirrors’ the US-oriented concerns of the ITAR, Australia ought be promoting a much more nuanced regulatory regime that is both rights-compliant and respectful of international law and the sovereignty of states.

Simon Rice

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65 First Optional Protocol to the International Covenant on Civil and Political Rights.
68 Ibid at 92.