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12 June 2008

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

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Dear Secretary,

Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation

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 a 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 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

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