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Submission 11.1
TT 14 May 2008

1 September 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

I respectfully take this opportunity to provide a further brief submission to the Committee's inquiry, addressing matters raised by the responses from the Department of Defence to questions on notice from Senator Birmingham (Submission 23, TT 14 May 2008). My submission is intended to clarify the answers given to the Senator's questions.

For reasons I explain below, I submit that, arising from matters raised by the Department, the Committee needs to satisfy itself:

- as to who will bear the burden and cost of the Access scheme described in Section 6(11) of the Implementing Arrangement
- that the meaning that the Australian Government will gives to 'nationality' in its RESTRICTED and SECRET security clearance process for purposes of the Treaty will be the usual meaning in Australia law, and
- whether the process and criteria for determining significant ties does include identifying a person's country of birth, and whether a person's country of birth is determinative of a person's having 'significant ties' to that country.

'Scope' of the Treaty

Senator Birmingham's questions concern what he refers to, quite correctly, as 'ITAR controlled material'. The Department's responses are premised on a distinction within the category of 'ITAR controlled material' that is apparent in its response to Question 5. The distinction is that the proposed Treaty will only apply to defence technology that are within the 'Scope' of the Treaty, as set out in Article 3 of the Treaty and Sections 2-5 of the Implementing Arrangement. There will continue to be defence technology that is not within the scope of the Treaty.

Defence technology that is not within the scope of the Treaty will continue to be dealt with exclusively under the ITAR. This illustrates the fact that the Treaty does not amend ITAR or its effect. Rather, the Treaty operates merely to remove some defence technology from the effect of ITAR and place it under a different regime.

Question 2

Senator Birmingham asks whether 'the Treaty and any associated legislation [will] remove the requirement of industry to obtain such exemptions'.

Because of the limited scope of the proposed Treaty, the Department's answer to Question 2 is, appropriately, in two parts:

- for defence technology that is within the scope of the Treaty, the Department's response is 'yes.'
- for defence technology that is not within the scope of the Treaty the Department says that the situation under the ITAR is unchanged.

I agree that that the situation under the ITAR is unchanged for defence technology that is not within the scope of the Treaty, and industry will continue to rely on obtaining such exemptions, when possible.

As to the possibility of continuing to obtain the exemptions, I note that the Northern Territory Anti-Discrimination Commissioner has indicated that without further evidence he would have refused an exemption (*Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC 2007/027), that the Victorian Tribunal has said that any future application for renewal of the exemptions in Victoria will be considered differently in light of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (*ADI Limited (Anti-Discrimination)* [2007] VCAT 2242), and that the ACT Human Rights Commissioner has refused an application for exemption (a review of that decision allowed the exemption (*Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19), but is now the subject of an appeal to the ACT Supreme Court).

As for defence technology that is within the scope of the Treaty, it is not a complete answer to say, as the Department does, simply that rather than an employer's seeking an exemption, an employee will seek security clearance. Under the Treaty it remains the case for industry that there are significant obstacles to its workforce having access to defence technology. For defence technology that is within the scope of the Treaty, that obstacle will be overcome by a process of each employee obtaining a security clearance. In other words, the 'requirement of industry to obtain exemptions' has been replaced, for defence technology that is within the scope of the Treaty, by a 'requirement for employees to obtain security clearances'.

Whether industry is better off depends on the amount of defence technology that is not within the scope of the Treaty, for which parallel ITAR compliance systems must continue to operate (see Q 6 below), and whether industry will in fact carry any of the burden and cost of the security clearance process (see Q 7 below).

Question 3

Senator Birmingham asks 'what obligations will reside with industry … to inquire about and act upon employees' nationality.'

Again, the Department's answer is, appropriately, in two parts:

- for defence technology that is within the scope of the Treaty, the Department says that employees will be required to have RESTRICTED security clearance and 'significant ties' checks

- for defence technology that is within the scope of the Treaty, the situation remains that industry will be obliged to inquire about and act upon employees' nationality, ie place of birth.

I agree that for defence technology that is not within the scope of the Treaty, the situation remains unchanged.

As to employees' being required to have RESTRICTED security clearance and 'significant ties' checks, this answer is in the passive, and so does not directly answer the Senator's question about whether industry has an obligation. I address this below at Q7.

Question 4

Senator Birmingham asks whether, within the scope of the Treaty, dual nationals will have greater access than they already have.

The Department has not answered the question at all for defence technology that is not within the scope of the Treaty. The answer is 'no, there has been no change'; this is confirmed by the first dot point in the Department's first answer to Question 5.

The Department's answer is only for defence technology that is within the scope of the Treaty, for which the Department says that dual national employees will be required to have 'significant ties' checks. As the Department acknowledges, this does not answer the question: as a 'practical' matter, whether the 'significant ties' check results in greater access for dual nationals will only be 'determined over time'. My understanding is that the Senator's question is directed differently, and asks whether provision is made in the Treaty and Implementing Arrangement for dual nationals to have greater access than they already have. For defence technology that is within the scope of the Treaty, the answer to that question appears to be that 'dual nationals will have only the same access as anyone else has under the system of RESTRICTED security clearance and 'significant ties' checks: see Q5 below.

The Treaty makes no reference to dual nationals. In the Implementing Arrangement the terms of the Access provisions in Section 6(11) refer to 'all personnel'. Reference to 'nationals of third countries who are not also Australian citizens' in Section 6(14) is inconclusive.

Question 5

Senator Birmingham asks how the Treaty will change the existing burdensome requirements on industry to limit dual nationals' access to ITAR controlled material.

Again the Department's answer is, appropriately, in two parts:

- for defence technology that is within the scope of the Treaty, dual nationals will be required to have RESTRICTED security clearance and 'significant ties' checks
- for defence technology that is not within the scope of the Treaty it continues to be the case, under the ITAR, that industry will be obliged to inquire about and act upon dual nationals' place of birth, because of the view that the USA takes that place of birth is determinative of nationality.

The Department's answer does not directly answer the Senator's question about the burdensome requirements on industry. The answer is that for defence technology that is not within the scope of the Treaty the burden will not change because of the continuing compliance requirement of the ITAR. For defence technology that is within the scope of the Treaty it is not clear whether the RESTRICTED security clearance and 'significant ties' checks will be a burden on industry; I address this below at Qs 6 and 7.

Question 6

Senator Birmingham asks how the Treaty will ease the existing administrative burden on industry.

The Department's response says that security clearances will be administratively less burdensome than individual clearances. This could be true only for that defence technology. As the Department acknowledges, industry will have to implement and operate new parallel procedures for defence technology that is within the scope of the Treaty, while maintain its existing ITAR compliance procedures for defence technology that is not within the scope of the Treaty. This raises questions of who will carry the burden of this additional parallel procedure, which I address further below at Q7.

Question 7

Senator Birmingham asks what the Australian Government will do to carry out the Access scheme in Section 6(11) of the Implementing Arrangement.

The Department's response sets out a process for RESTRICTED security clearance and a 'significant ties' check, with a SECRET security clearance to follow if the 'significant ties' check warrants it. (I set out below – Q8 – some concerns about the criteria for these clearances).

It can be inferred from the phrasing of the Senator's question, and from the Department's response, that it is the Australian Government that will carry out RESTRICTED security clearances and 'significant ties' checks and, when necessary, SECRET security clearances, for every employee of every entity and facility who will require access to defence technology that is within the scope of the Treaty (ie employees of Government and Non-Government Members of the 'Approved Community' – Article 4).

This sounds improbable. Unless the amount of material within the scope of the Treaty is very small, the conduct of RESTRICTED security clearances, 'significant ties' checks and, when necessary, SECRET security clearances will be a considerable burden on the Australian Government. It may be cumbersome and slow, and may be a burden and cost that the Australian Government intends sharing with, or somehow transferring to, industry. I note that industry will continue to bear the burden of ITAR compliance for defence technology that is not within the scope of the Treaty.

I submit that the Committee satisfies itself as to who will bear the burden and cost of the Access scheme described in Section 6(11) of the Implementing Arrangement.

Question 8

Senator Birmingham asks what meaning will be given to the word 'nationality' in Section 6(11)(a) of the Implementing Arrangement.

The question is directed to the process of RESTRICTED security clearance, but the Department's answer addresses only the process of checking for 'significant ties'.

The answer to the Senator's question depends on the meaning that the Australian Government will give to 'nationality' in its RESTRICTED security clearance process for purposes of the Treaty. I don't know, but I trust that that meaning will be the usual meaning in Australia law, and a common meaning in international law: nationality is equivalent to citizenship, and is not the same as 'national origin' (Full Court of the Federal Court in *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202 at 211).

I emphasis that this is not the meaning that the USA gives to 'nationality'; for purposes of the ITAR the USA a person's 'nationality' determined by their place of birth, regardless of their citizenship. In light of the USA's well-established different approach to 'nationality', it is notable that this part, at least, of the Treaty process appears to be a concession by the USA that place of birth will not determine access to defence material.

I submit that the Committee satisfies itself that the meaning that the Australian Government will gives to 'nationality' in its RESTRICTED and SECRET security clearance process for purposes of the Treaty will be the usual meaning in Australia law.

The answer that the Department gave relates to a question that the Senator did not ask: what meaning will be given to the word 'nationality' in Section 6(11)(**b**) of the Implementing Arrangement?

The Department says that 'national origin is not a factor in determining if significant ties exist under the Treaty'. This approach too is at odds with the essential importance that the USA places in its ITAR on place of birth as a determinant of 'nationality' (and therefore of security risk). No process or criteria for determining significant ties is described in the Treaty or Implementing Arrangement. If it is the case, as the Department says, that 'national origin is not a factor in determining significant ties', then there is no apparent difference between RESTRICTED security clearance and a check for significant ties.

I submit that the Committee satisfies itself whether the process and criteria for determining significant ties does include identifying a person's country of birth, and whether a person's country of birth is determinative of a person's having 'significant ties' to that country.

Background Briefing

Finally, I draw to the Committee's attention an investigative report on the ITAR that was broadcast recently on ABC Radio National (*Background Briefing*, 24 August 2008). The audio and transcript area available at <http://www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm>.

I hope that this further submission is of assistance.

Yours sincerely,

Simon Rice