
ITAR Reforms: Misguided Hope for Australia's Dual and Third Country Nationals

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In an effort to mitigate known conflicts with human rights laws, the past five years has seen the United States implement four independent reforms to the *International Traffic in Arms Regulations* relevant to the treatment of dual and third country nationals in Australia. While full implementation of these reforms awaits, the complexity of the concessions and the significant omissions from their scope suggests that the reforms will not materially improve existing difficulties and cannot be expected to negate Australia's defence industry's reliance on local exemptions from anti-discrimination and equal opportunity legislation. Given the imposition of additional cost on defence industry to leverage such concessions for limited gain, the enthusiasm with which they will be embraced remains to be seen.

International Traffic in Arms Regulations

LEGISLATIVE AUTHORITY AND SCOPE

The *Arms Export Control Act* (AECA) grants the President of the United States the legislative authority to control the export of military technology.¹ This authority is delegated to the US Secretary of State² and implemented by the *International Traffic in Arms Regulations* (ITAR).³ In its opening text, the AECA declares its objective to ensure

a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which international adjustments to a changing world are achieved peacefully.⁴

Although export control regulatory regimes apply in Australia and across the world,⁵ the breadth of scope of the ITAR is unparalleled.⁶ Pursuant to the ITAR, any person intending to export 'defense articles',⁷ 'technical data'⁸ or

¹ *Arms Export Control Act*, 22 USC §§2751-2799aa-2 (AECA), §2778.

² *International Traffic in Arms Regulations*, 22 CFR §§120-130 (2010) (ITAR).

³ *Executive Order 11958*, 3 CFR 79 (1977).

⁴ AECA, §2751.

⁵ In Australia, export control is regulated by the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) and the *Customs Act 1901* (Cth).

⁶ Roland L. Trope and Dr Monique Witt, 'Allies at Sixes and Sevens: Sticky Issues in Australian—US Defence Trade Controls', *Security Challenges*, vol. 3, no. 2 (2007), p. 76.

⁷ Items designated as 'defence articles' are detailed in, and constitute, the US Munitions List: ITAR, §§120.2 and 121.1. Note that the US Munitions List is a somewhat misleading title as the scope of the US Munitions List extends beyond munitions to include items that are "seemingly non-defence related": Trope and Witt, 'Allies at Sixes and Sevens', p. 79.

'defense services'⁹ (together 'ITAR-controlled material'), must obtain the prior written approval of the US Department of State, through its Directorate of Defense Trade Controls (DDTC). Under the ITAR, export is an extremely broad concept that encompasses both tangible and intangible transfers. For example, an export may include the sending, transfer or disclosure (including oral or visual) of any 'defense article' outside of the United States (or within the United States to a foreign government), transfer or disclosure of 'technical data' to a person who is a foreign person¹⁰ (whether in the United States or abroad), or performing a 'defense service' on behalf of, or for the benefit of, a foreign person (whether in the United States or abroad).¹¹ In today's digital age, the potential opportunity for export is ever increasing—including email exchange, telephone discussions and internet postings.

The type of export authorisation granted by the DDTC is dependent upon the category of the ITAR-controlled material, the nature of the export (permanent or temporary) and any national security classifications.¹² The export of 'defense services' (which may also include 'technical data' and/or 'defense articles') requires that an agreement (or contract) be entered into, a common form of which is a Technical Assistance Agreement (TAA). Of the statutorily prescribed provisions recited in TAAs,¹³ the following is of significance:

This agreement is subject to all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations.¹⁴

As a result, while the ITAR itself does not have extra-territorial scope, by signing a TAA the non-US party "has voluntarily acceded to extraterritorial application of all export-related U.S. laws".¹⁵ Arguably, the scope of the TAA

⁸ 'Technical data' includes any information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of 'defense articles': ITAR, §120.10.

⁹ Furnishing to foreign persons of any 'technical data', whether in the United States or abroad, constitutes a 'defense service' as does the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of 'defense articles': ITAR, §120.9.

¹⁰ ITAR, §120.16 defines 'foreign person' as any natural person who is not a lawful permanent resident of the United States or who is not otherwise a protected individual (as defined by 8 USC 1324b(a)(3)). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organised to do business in the United States, as well as international organisations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).

¹¹ ITAR, §120.17.

¹² The ITAR addresses licences for the export of 'defense articles' in Part 123, agreements for the export of 'defense services' in Part 124 and licenses for the export of 'technical data' and classified 'defense articles' in Part 125.

¹³ ITAR, §124.8.

¹⁴ *Ibid.*, §124.8(2).

¹⁵ Trope and Witt, 'Allies at Sixes and Sevens', p. 84.

will also extend beyond the ITAR to encompass all other export laws and regulations of the US Government.¹⁶

DUAL NATIONALS AND THIRD COUNTRY NATIONALS

The strategic importance of export control regimes is clear—unauthorised release of, or access to, sensitive military technology has the potential to jeopardise national security. It is, therefore, not surprising that the ITAR strives to ensure control is maintained over 'defense articles', 'defense services' and 'technical data'—particularly from threats posed by foreign interests.

To ensure that the recipient of ITAR-controlled material is similarly conscious of the need to protect against unauthorised disclosure to foreign persons, all TAAs include mandatory language acknowledging that

technical data or defense service[s] exported from the United States ... and any defense article which may be produced or manufactured from such technical data may not be transferred to a foreign person

unless subject to an exemption specified in the ITAR, specified in the TAA or otherwise authorised by the US Department of State.¹⁷ Consistent with this, all third country national and dual national employees (and contract workers) anticipated to have access to the ITAR-controlled material must be known and anticipated in the TAA.¹⁸

Despite this process, the ITAR is clear that

it is the policy of the U.S. to deny licenses and other approvals for exports and imports of 'defense articles' and 'defense services', destined for or originating in ... countries with respect to which the U.S. maintains an arms embargo or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the U.S.¹⁹

¹⁶ Ibid. Examples of other US export laws and regulations include the *Export Administration Regulations* managed by the Department of Commerce (for 'dual use items'), economic embargos and sanctions regulations managed by the Treasury Department and licensing of nuclear material, equipment and technology managed by the Nuclear Regulatory Commission and Department of Energy: Dennis J. Burnett, 'United States of America', in Yann Aubin and Arnaud Idiart (eds.), *Export Control Law and Regulations Handbook: A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance* (Netherlands: Kluwer Law International, 2007), pp. 341-2.

¹⁷ ITAR, §124.8(5).

¹⁸ Although not defined by the ITAR, any individual holding nationality from a country or countries other than the country of the foreign signatory to the TAA is considered to be a third country national. Similarly, a dual national is any individual that holds nationality from one or more foreign countries in addition to the country of the foreign signatory to the TAA: Office of Defense Trade Controls Licensing, Department of State, United States of America, 'Guidelines for Preparing Electronic Agreements (Revision 3.0)', 17 August 2011 (Guidelines), <[http://www.pmddtc.state.gov/licensing/documents/Guidelines%20for%20Preparing%20Electronic%20Agreements%20Revision%203%20\(2\).pdf](http://www.pmddtc.state.gov/licensing/documents/Guidelines%20for%20Preparing%20Electronic%20Agreements%20Revision%203%20(2).pdf)> [Accessed 27 August 2011], p. 23.

¹⁹ ITAR, §126.1(1)(a).

Export is also prohibited to countries that support acts of international terrorism or against whom the United Nations Security Council has mandated an arms embargo. Such 'proscribed countries' currently include Afghanistan, Belarus, Burma, China, Cuba, Democratic Republic of Congo, Eritrea, Haiti, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Sierra Leone, Somalia, Sri Lanka, Sudan, Syria, Venezuela and Vietnam, unless otherwise determined on a case by case basis by the US Department of State.²⁰

Inherent Conflicts

NATIONALITY THROUGH THE EYES OF THE ITAR

Notwithstanding the extensive use and importance of the terms national or nationality, neither is defined by the ITAR nor the AECA. The best guidance of how such terms are to be interpreted is provided by the US Department of State in its supporting guidelines and in supplementary information to the ITAR which make clear that "when determining nationality, the [US] Department of State considers country of origin or birth in addition to citizenship".²¹

However, as the term 'nationality' is not limited to the US Department of State's interpretation above, what remains unexplained is how such interpretation is applied or the extent to which other factors may be considered.²² Indeed, the US Department of State's reluctance to publish a definition of nationality simply serves to grant it leeway to exercise its discretion and apply the term in a manner that may differ from case to case.²³ The inconsistent application of this term has led to commentary that the US Department of State's assessment of a person's nationality at any one time may extend to consider

nationality of parents, the time the person lived in various countries, passports the person holds, passports the person is eligible to hold, the first letter of the first name of the US exporter, DDTC policy of the week, [and] current state of mind of [the] licensing officer.²⁴

²⁰ Ibid.

²¹ Office of Defense Trade Controls Licensing, 'Guidelines', p. 27; *Amendment to the International Traffic in Arms Regulations: Regarding Dual and Third Country Nationals*, Federal Register, vol. 72, no. 243 (19 December 2007), pp. 71785-6.

²² Clif Burns, 'DDTC Amends Rules on Transfers of Technical Data', *Export Law Blog*, 19 December 2007, <<http://www.exportlawblog.com/archives/268>> [Accessed 14 July 2011].

²³ John Black, 'DDTC Announces New Dual and Third Country National TAA and MLA Rule', Export Control Training Institute, *Export Control Update*, 31 December 2007, <<http://learnexportcompliance.bluekeyblogs.com/>> [Accessed 14 July 2011].

²⁴ Ibid.

In essence, "the *ITAR* use 'nationality-by-national origin' as a crude proxy for national allegiance, and a person who is not a US national is presumptively a risk to US security".²⁵

AUSTRALIAN LEGISLATIVE POSITION

In 1975, Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination (Convention)*.²⁶ In doing so, it undertook to

prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... economic, social and cultural rights, in particular ... the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.²⁷

The *Racial Discrimination Act (RDA)*²⁸ implements the obligations contained in the *Convention* in domestic law, borrowing much of its statutory language.²⁹ While neither the *RDA* nor the *Convention* define the term 'race', guidance can be found in the operative provisions which make clear that

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life [will be unlawful].³⁰

The prohibition of discrimination on the basis of race is also reflected at State and Territory level.³¹ However, while reference is consistently made in the enacting legislation to an individual's race, the meaning given to that term varies widely across jurisdictions. Consensus is reached across State and Territory jurisdictions that the concept of race extends to the 'colour',

²⁵ Simon Rice, 'Discriminating for World Peace', in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), pp. 1-34.

²⁶ *International Convention on the Elimination of All Forms of Racial Discrimination 1975 (Convention)*, 21 December 1965, <<http://www2.ohchr.org/english/law/cerd.htm>> [Accessed 14 July 2011].

²⁷ *Ibid.*, art. 5.

²⁸ *Racial Discrimination Act 1975 (Cth) (RDA)*.

²⁹ Australian Human Rights Commission, 'Federal Discrimination Law', 31 March 2010, <www.hreoc.gov.au/legal/FDL/pdf/3_RAD.pdf> [Accessed 14 July 2011].

³⁰ *Convention*, Art. 1.1; *RDA*, s. 9(1).

³¹ *Discrimination Act 1991 (ACT) (ACT Act)*; *Anti-Discrimination Act 1977 (NSW) (NSW Act)*; *Anti-Discrimination Act (NT) (NT Act)*; *Anti-Discrimination Act 1991 (Qld) (Queensland Act)*; *Equal Opportunity Act 1984 (SA) (SA Act)*; *Anti-Discrimination Act 1998 (Tas) (Tasmanian Act)*; *Equal Opportunity Act 1995 (Vic) (Victorian Act)*; *Equal Opportunity Act 1984 (WA) (WA Act)*.

‘nationality’ and ‘national origin’ (or ‘country of origin’) of an individual and, with the exception of South Australia, his ‘descent’ and ‘ethnic origin’.³²

Throughout Commonwealth, State and Territory legislation, racial discrimination in the area of employment is prohibited. Although the provisions are not drafted in equivalent terms, generally speaking, it is unlawful for an employer to discriminate against employees and job applicants when making decisions in relation to offers of employment, conditions of work, training and promotion opportunities, and termination of employment.³³ Some jurisdictions extend the prohibition of racial discrimination to contract workers,³⁴ agents,³⁵ commission agents³⁶ and independent contractors.³⁷

Seeking Exemptions

DISCRIMINATION BY DEFENCE INDUSTRY

To comply with the ITAR, Australian defence industry must know and declare all third country nationals and dual national employees who will access ITAR-controlled material. Given the US Department of State’s interpretation of the term ‘nationality’, it is therefore required that Australian defence industry request details of, and make decisions on the basis of, the nationality and country of birth/origin of its workers. However, as discrimination on the basis of national origin and nationality is prohibited in each Australian State and Territory, the Australian defence industry is faced with a dilemma: compliance with the ITAR will likely place the company in breach of Australian anti-discrimination and equal opportunity legislation.

RECOGNISED EXEMPTIONS

At State and Territory level, anti-discrimination and equal opportunity legislation permits the granting of exemptions—subject to specified conditions. Generally speaking, an empowered individual or body (usually the Commissioner or Tribunal created to hear complaints under the relevant Act), may grant an exemption in respect of discriminatory conduct that would otherwise be in breach of the legislation.³⁸ The term of permitted exemptions varies across jurisdiction from three years to ten years³⁹ and

³² ACT Act, Dictionary; NSW Act, s. 4; NT Act, s. 4; Queensland Act, Sch. 1; SA Act, s. 5; Tasmanian Act, s. 3; Victorian Act, s. 4; WA Act, s. 4.

³³ RDA, s. 15; ACT Act, s. 10; NSW Act, s. 8; NT Act, s. 31; Queensland Act, ss. 14-15; SA Act, s. 52; Tasmanian Act, s. 22(1)(a); Victorian Act, ss. 13-14; WA Act, s. 37.

³⁴ ACT Act, s. 13; NSW Act, s. 10; SA Act, s. 54; Victorian Act, s. 15; WA Act, s. 39.

³⁵ SA Act, s. 53.

³⁶ ACT Act, s. 12; NSW Act, s. 9; WA Act, s. 38.

³⁷ SA Act, s. 53.

³⁸ ACT Act, s. 109(1); NSW Act, s. 126(1); NT Act, s. 59(1); Queensland Act, s. 113(1); SA Act, s. 92(1); Tasmanian Act, s. 56(1); Victorian Act, s. 83(1); WA Act, s. 135(1).

³⁹ ACT Act, s. 109(1); NSW Act, s. 126(1); NT Act, s. 59(1); Queensland Act, s. 113(1); SA Act, s. 92(1); Tasmanian Act, s. 56(1); Victorian Act, s. 83(1); WA Act, s. 135(1).

there is no consistent approach to matters that may be considered in determining whether to grant an exemption.

Since 2003, the Australian defence industry has sought exemptions from the relevant legislation at State and Territory level to allow them to comply with the requirements imposed by the ITAR and not fall foul of legislation making racial discrimination unlawful.⁴⁰

Notwithstanding that exemption judgments have expressed the view that long-term resolution of the conflict between the ITAR and anti-discrimination and equal opportunity legislation is the responsibility of the Australian Government leveraging its special status as a key ally to the United States,⁴¹ the exemptions sought by the Australian defence industry have consistently been granted—seemingly because the ITAR presents the decision maker with “no real choice”.⁴² The potential consequences in not granting exemptions from anti-discrimination and equal opportunity law have been acknowledged by the judiciary—ranging from detrimental impacts on the commercial operations of defence industry (and the consequential diminished employment and negative economic effect) to potential ramifications on Australia's defence capability and national security. This

⁴⁰ Exemptions have been granted to Australian defence industry in the Australian Capital Territory: *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19; and *ACT Human Rights Commission v Raytheon Australia Pty Ltd & Ors* [2009] ACTSC 55, New South Wales: Attorney General (NSW), 'Exemption Order (Re. Boeing)', *NSW Government Gazette*, No. 25, 11 February 2005, p. 391; Attorney General (NSW), 'Exemption Order (Re. ADI)', *NSW Government Gazette*, No. 81, 1 July 2005, pp. 3495-6; Attorney General (NSW), 'Exemption Order (re. Thales Australia Ltd)', *NSW Government Gazette*, No. 38, 19 September 2008, p. 9366; Attorney General (NSW), 'Exemption Order (re. Raytheon Australia)', *NSW Government Gazette*, No. 134, 24 October 2008, pp. 10379-80; Attorney General (NSW), 'Exemption Order (Re. BAE Systems Australia Ltd)' (Unreported, 22 December 2008); 'Exemption Order (Re. Boeing Australia Pty Ltd)' (Unreported, 22 December 2008); and 'Exemption Order (Re. Lockheed Martin Australia Pty Ltd)' (Unreported, 27 January 2011), Queensland: *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21; *Exemption application re: Raytheon Australia Pty Ltd & Ors* [2008] QADT 1; and *Boeing Australia Holdings Pty Ltd & related entities* (No. 3) [2008] QADT34, South Australia: *BAE Systems Australia Ltd* [2008] SAEOT 1; and *Raytheon Australia P/L Ors* [2008] SAEOT 3 (*Raytheon Exemption (SA) 2008*), Victoria: *ADI Ltd (Exemption)* [2004] VCAT 1963; *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 (*Boeing Exemption (Vic) 2007*); *Raytheon Australia Pty Ltd and Others Exemption Application* [2007] VCAT 2230; *ADI Ltd (Anti-Discrimination)* [2007] VCAT 2242; *BAE Systems Australia Ltd (Anti-Discrimination)* [2008] VCAT 1799 (*BAE Exemption (Vic) 2008*); *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination)* [2011] VCAT 796; and *Thales Australia Limited and ADI Munitions Pty Ltd (Anti-Discrimination)* [2011] VCAT 729, Western Australia: *ADI Limited & Ors and Commissioner for Equal Opportunity & Ors* [2005] WASAT 259 (*ADI Exemption (WA) 2005*); *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261; and *Raytheon Australia Pty Ltd and Commissioner for Equal Opportunity* [2008] WASAT 266 (*Raytheon Exemption (WA) 2008*).

⁴¹ *ADI Exemption (WA) 2005*; *Boeing Exemption (Vic) 2007* and *Raytheon Exemption (SA) 2008*; and Human Rights and Discrimination Commissioner, *Application for Exemption under s109(1) of the Discrimination Act 1991 (ACT)*, 20 November 2007, <www.hrc.act.gov.au> [Accessed 14 July 2011].

⁴² Rice, 'Discriminating for World Peace', p. 27.

notwithstanding, permission to engage in acts or omissions which would otherwise be in breach of anti-discrimination and equal opportunity legislation has, in all cases, been expressly limited to the extent that it is necessary for the company to meet the requirements of the US Department of State and engage in ITAR-controlled activities, and subject to specific conditions intended to minimise the impact of the exemption on the affected individuals.⁴³ The need to obtain exemptions remains contentious and the Australian judiciary has commenting on the “misconceived”⁴⁴ nature of the ITAR and its use as a “blunt and imperfect instrument” to achieve national security goals.⁴⁵ However, in the absence of significant amendment to either the ITAR or local anti-discrimination and equal opportunity laws, the Australian defence industry has no practical alternative.

ITAR Reforms

TECHNOLOGY TRANSFER PROCESS IMPROVEMENT INITIATIVE

Following the US Congress’ three-year failure to approve a proposed exemption to the ITAR, the Australian Government commenced discussions with the US Department of State in an effort to agree an alternative relaxation of the ITAR requirements specifically for Australia. In late 2006, the Australian Department of Defence announced the outcome of this ‘Technology Transfer Process Improvement Initiative’—highlighting relaxation of the requirement to specifically identify nationals of third countries in export agreements where the Australian Department of Defence was a party or identified as an end-user of the transferred ITAR-controlled material.⁴⁶ Such concessions were stated to apply only to third country national (and dual national) recipients having a ‘need to know’ and holding a security clearance issued by the Australian Department of Defence, and specifically excluded nationals of ‘proscribed countries’.⁴⁷

While these reforms are not reflected in the text of the ITAR, the supporting documentation notes the “country specific exemptions for [Australian]

⁴³ Common conditions imposed in the exemptions include: mandatory reporting of compliance and employment statistics to the relevant State or Territory body; communication of the exemption to those affected and an explanation of their rights of complaint under the law; implementation of company education and training in anti-discrimination issues; development of anti-discrimination internal policies and practices; and obligations to pursue approval from the US Department of State for dual national and third country nationals to access ITAR-controlled material where appropriate.

⁴⁴ *Boeing Exemption (Vic) 2007*, para. 41.

⁴⁵ *BAE Exemption (Vic) 2008*, para. 79.

⁴⁶ Letter from Kerry Clarke, Head Industry Division, Defence Materiel Organisation to John O’Callaghan, AIG Defence Council, 15 May 2007, <<http://www.aigroup.com.au/>> [Accessed 14 July 2011].

⁴⁷ *Ibid.*

dual/third country foreign nations⁴⁸ and designates the standard text to be included in TAA's:

Employees of the foreign licensees/sub-licensees who are nationals of a third country (including dual nations) who hold an Australian Department of Defence (ADOD) security clearance and who do not hold nationality of a country proscribed by §126.1 are authorized and exempted from the requirement to sign Non-Disclosure Agreements (NDAs). Employees who hold nationality of a country proscribed by §126.1 are not authorized.⁴⁹

Notwithstanding the arrangements implemented under the Technology Transfer Process Improvement Initiative, the US Department of State has retained the right to veto access to ITAR-controlled material by third country nationals and dual nationals regardless of whether they meet the specified criteria.⁵⁰

TREATY ON DEFENCE TRADE COOPERATION

Further Australia-specific reforms to the ITAR await implementation as part of the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation (Treaty).⁵¹ Signed on 5 September 2007, the Treaty reflects Australia's status as a "trusted ally"⁵² of the United States and aims to provide operational benefits and improved capability development for the Australian Defence Force, and enhanced industrial cooperation and technology sharing for defence industry through reduced obstacles, time and costs involved in obtaining necessary export approvals.⁵³ Compliance with the procedures set out in the Treaty "constitute an exemption to the applicable licensing requirements and the implementing regulations of the [AECA]"⁵⁴.

The Treaty establishes a framework which facilitates the movement of specified ITAR-controlled material⁵⁵ between a designated Australian/US

⁴⁸ Office of Defense Trade Controls Licensing, Guidelines, p. 33.

⁴⁹ *Ibid.*, p. 33.

⁵⁰ *Raytheon Exemption (SA) 2008; Raytheon Exemption (WA) 2008.*

⁵¹ *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation (Treaty)*, 5 September 2007, [2007] ATNIF 31 .

⁵² Bruce Vaughn, 'The U.S.-Australia Treaty on Defense Trade Cooperation', *CRS Report for Congress*, 12 December 2007, <http://assets.opencrs.com/rpts/RS22772_20071212.pdf> [Accessed 14 July 2011].

⁵³ Defence Export Control Office, Department of Defence, 'Fact Sheet: Australia US Treaty on Defence Trade Cooperation', <http://www.defence.gov.au/publications/Treaty_fact_sheet.pdf> [Accessed 14 July 2011]; Joint Standing Committee on Treaties, Parliament of Australia, 'Report 94: Treaty between Australia and United States of America concerning Defense Trade Cooperation', September 2008, <<http://www.aph.gov.au/house/committee/jsct/14may2008/report1/chapter3.pdf>> [Accessed 14 July 2011], Ch. 3, pp. 33-44.

⁵⁴ *Treaty*, art. 13.

⁵⁵ The *Treaty* uses the term 'Defense Articles', which is defined to mean "articles, services, and related 'technical data', including software, in a tangible form, listed on the United States Munitions List": *Ibid.*, art 1(c). Technology permitted to be transferred under the *Treaty* is limited to Defence Articles required for combined military or counter-terrorism operations, cooperative

'approved community' without the need for prior written authorisation.⁵⁶ Pursuant to the Treaty, the 'Australian Community' includes facilities of the Government of Australia located within the territory of Australia, and non-governmental Australian entities and facilities also located within Australian territories that meet "mutually determined eligibility requirements".⁵⁷ In assessing a non-governmental entity or facility's eligibility for inclusion in the 'Approved Community' (noting that participation in the Treaty arrangements are voluntary),⁵⁸ the Australian Department of Defence will take into account any foreign ownership, control or influence and the potential for risks to national security, "including interactions with countries identified or proscribed by Australian or United States laws or regulations".⁵⁹

Personnel of the Government of Australia and the approved Australian entities and facilities must have a 'need to know' and hold appropriate Australian security accreditation to receive ITAR-controlled material under the Treaty.⁶⁰ For this purpose, personnel requiring access must be

cleared to at least the level of a Government of Australia RESTRICTED security clearance, which includes indicators such as identity, nationality and police record, and undergo an additional check for indicators of significant ties.⁶¹

In the event that the additional check indicates that the individual has significant ties to a 'proscribed country' under the ITAR, then a further assessment, of the same standard as that applicable for an Australian SECRET security clearance will be conducted.⁶² Of note, the Treaty does not apply to third country nationals (i.e. non-Australian citizens) without the prior authorisation of the Australian and US Governments.⁶³

Before the Treaty will be binding, the Commonwealth Parliament must enact legislation to incorporate the rights and obligations contained within the

security and defence research, development, production and support programs, mutually determined specific security programs where the Australian Government is the end-user and US Government end use: *Ibid.*, art 3(1).

⁵⁶ *Ibid.*, recitals and art. 7.

⁵⁷ *Ibid.*, art. 4(1).

⁵⁸ Defence Export Control Office, 'Fact Sheet: Australia US Treaty on Defence Trade Cooperation'.

⁵⁹ *Implementing Arrangement pursuant to the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation* (14 March 2008) (*Implementing Arrangements*),

<http://www.defence.gov.au/strategy/deco/reports/Treaty_IA.pdf> [Accessed 14 July 2011], s. 6(4).

⁶⁰ *Treaty*, art. 4(1).

⁶¹ *Implementing Arrangements*, s. 6(11).

⁶² *Ibid.*, s. 6(12).

⁶³ *Ibid.*, s. 6(13).

Treaty into local law and “exchange notes” with the US Government.⁶⁴ Notwithstanding the finalisation of the Implementing Arrangements in 2008,⁶⁵ recommendations from the Joint Standing Committee of Treaties that Australia take binding action⁶⁶ and approval of the Treaty by the US Senate,⁶⁷ the Defence Trade Controls Bill 2011 has recently completed industry consultation and has yet to be introduced into Parliament.⁶⁸

SECTION 124.16 SPECIAL AUTHORISATION

In December 2007, the US Department of State implemented amendments to the ITAR granting limited approvals to third country nationals and dual nationals from specified countries. In particular, section 124.16 of the ITAR authorises access to unclassified ‘defense articles’, and re-transfer of ‘technical data’ and ‘defense services’ to individuals who are third country national or dual national employees of the foreign signatory to the TAA provided they are nationals exclusively of Australia, New Zealand, Japan, Switzerland or member nations of the European Union or North Atlantic Treaty Organisation.⁶⁹ Re-transfer must occur within the United States or the physical territories of those listed countries. Export to third country nationals and dual nationals from a ‘proscribed country’, or any other country not specifically authorised in the TAA by the US Department of State, is not permitted.

SECTION 126.18 AMENDMENTS

Recognising “conflicts with human rights laws as well as the burden of compliance”, the US Department of State issued, on 16 May 2011, a broad-sweeping exemption to the ITAR to specifically address authorisation for export of ITAR-controlled material to dual nationals and third country nationals employed by end-users.⁷⁰ Such reforms, initiated by the Obama Administration’s Task Force on Export Control Reform, recognise that existing ITAR requirements had “become a focus of contention between the U.S. and allies and friends without commensurate gain in national security” and that the majority of diversions of ITAR-controlled material in recent times

⁶⁴ Joint Standing Committee on Treaties, ‘Report 94: Treaty between Australia and United States of America concerning Defense Trade Cooperation’, para. 3.3.

⁶⁵ *Implementing Arrangements*, s. 6(4).

⁶⁶ Joint Standing Committee on Treaties, ‘Report 94: Treaty between Australia and United States of America concerning Defense Trade Cooperation’.

⁶⁷ Following amendments to the AECA, the US Senate ratified the *Treaty* on 29 September 2010: Covington & Burlington LLP, ‘Senate Ratifies Defense Trade Cooperation Treaties with the United Kingdom and Australia’, *E-Alert: Foreign Trade Controls*, 8 October 2010, <<http://www.cov.com>> [Accessed 14 July 2011].

⁶⁸ *Defence Trade Controls Bill 2011* (Cth), <<http://www.defence.gov.au/strategy/deco/usec/treaty.htm>> [Accessed 28 August 2011].

⁶⁹ ITAR, §124.16.

⁷⁰ *International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users*, Federal Regulations, vol. 76, no. 94 (16 May 2011), pp. 28174-8.

had occurred outside of approved licenses.⁷¹ Reform efforts were broadly welcomed by Defence industry worldwide who had previously expressed to the DDTC “dissatisfaction with the rule regarding dual and third-country nationals ... [and cited] conflicts with foreign human rights laws as well as the burden of compliance”.⁷²

Effective from 15 August 2011, the reforms added a new section 126.18 to the ITAR which makes clear that, where certain criteria are satisfied, no approval is needed from the DDTC for the transfer of unclassified ‘defense articles’ and ‘technical data’ to or within an end-user or consignee (whether a foreign business entity, foreign government entity or international organisation), including the transfer to dual or third country nationals “who are bona fide regular employees” directly employed by that foreign consignee or end-user.⁷³ These new provisions apply in addition to the existing measures under section 124.16 of the ITAR.

The primary condition attached to the section 126.18 exemption is that the foreign business entity, foreign government entity or international organisation must have processes and procedures in place to enable compliance with the ITAR and the AECA, particularly to prevent diversion of the ITAR-controlled material to unauthorised destinations or entities and use other than as authorised by the applicable export authorisation. This condition may be satisfied where the end-user or consignee requires that, prior to receiving ITAR-controlled material, its employees hold a security clearance issued by the applicable national government.

Alternatively, the end-user or consignee may implement or rely on existing internal vetting processes and screen employees for ‘substantive contacts’ with ‘proscribed countries’.⁷⁴ The screened individuals must sign a Non-Disclosure Agreement assuring that the received ITAR-controlled material will not be transferred to other persons or entities unless authorised by the consignee or end-user.⁷⁵ While the US Department of State has not provided a definitive list of those activities or behaviours that may be

⁷¹ *Amendment to the International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users*, Federal Regulations, vol. 75, no. 154 (11 August 2010), pp. 48625-7.

⁷² *International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users*, p. 28175.

⁷³ *Ibid.*, p. 28177. A definition to ‘regular employee’ is to be inserted at section 120.39 of the ITAR to state: “A regular employee means for the purposes of this subchapter: (1) an individual permanently and directly employed by the company, or (2) an individual in a long term contractual relationship with the company where the individual works at the company’s facilities, works under the company’s direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing the individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license)”.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 28175.

considered to constitute 'substantive contact', it has indicated that nationality (to include country of birth) of a 'proscribed country' would not automatically prohibit access to ITAR-controlled material. Substantive contact with people from 'proscribed countries' is, however, presumed to raise a risk of diversion unless DDTC determines otherwise.⁷⁶ A technology security/clearance plan detailing the screening procedures, and records of screening undertaken, must be maintained by the end-user or consignee.⁷⁷

Barriers to Progress

LIMITED APPLICATION

Examining the commonalities and contrasts between the four ITAR reforms applicable in Australia is key to understanding the likely success that each will have in avoiding the need to act in a discriminatory manner under Australian law. The consequence of all attempted reforms is to cater for access to ITAR-controlled material by third country nationals and dual nationals, however, there are a number of restrictions contained within the Technology Transfer Process Improvement Initiative, the *Treaty*, the Section 124.16 Special Authorisation and the Section 126.18 Amendments which will limit the defence industry's ability to rely on these reforms, either individually or cumulatively, in the performance of their ITAR-related contractual obligations. A summary of these restrictions is contained in Table 1 for ease of reference.

Firstly, none of the concessions apply to the full scope of ITAR-controlled material that may be transferred to Australia. The *Treaty*, in particular, does not extend to "highly sensitive exports" (which are yet to be determined),⁷⁸ with the consequence being that "the *Treaty* operates to merely remove some defence technology from the effect of [the] ITAR and place it under a different regime".⁷⁹ Similarly, the Technology Transfer Process Improvement Initiative requires, as a pre-condition to its application, that the Australian Department of Defence be a party to the export authorisation or be identified as an end-user of the transferred ITAR-controlled material. The Section 124.16 Special Authorisation and Section 126.18 Amendments apply only to the transfer of UNCLASSIFIED ITAR-controlled material.

Secondly, the Technology Transfer Process Improvement Initiative does not permit the transfer of ITAR-controlled material to third country nationals and dual nationals from 'proscribed countries', while the *Treaty* applies only to Australian citizens and does not apply to third country nationals except with prior authorisation. The Section 124.16 Special Authorisation is limited in its

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Defence Export Control Office, *Fact Sheet: Australia US Treaty on Defence Trade*.

⁷⁹ Simon Rice, 'Supplementary Submission No. 11.1 to Joint Standing Committee on Treaties', 1 September 2008, <http://www.aph.gov.au/house/committee/jsct/14may2008/subs/sub11_1.pdf> [Accessed 14 July 2011], p. 2.

application to only dual nationals and third country nationals of Australia, New Zealand, Japan, Switzerland or member nations of the European Union or North Atlantic Treaty Organisation. Transfer of ITAR-controlled material may be permitted to both third country nationals and dual nationals under the Section 126.18 Amendments; however, this is subject to satisfaction of the security procedures imposed.

Table 1 – Summary of Recent Reforms to the ITAR

	Technology Transfer Process Improvement Initiative	<i>Treaty</i>	Section 124.16 Special Authorisation	Section 126.18 Amendments
ITAR-Controlled Material	Limited to ITAR-controlled material transferred to the Australian Department of Defence (as a party or end-user)	Limited to ITAR-controlled material identified in the <i>Treaty</i>	Limited to UNCLASSIFIED ITAR-controlled material	Limited to UNCLASSIFIED ITAR-controlled material
Employment Status				
Employees	✓	✓	✓	✓
Contract Workers and Job Applicants	Not permitted	Not permitted	Not permitted	Permitted only to the extent that a contract worker falls within the definition of a 'regular employee'
	Technology Transfer Process Improvement Initiative	<i>Treaty</i>	Section 124.16 Special Authorisation	Section 126.18 Amendments
Individuals				
Australian Nationals	✓	✓	✓	✓
Dual Nationals	Denied where nationality or national origin from a 'proscribed country'	✓	Permitted only where from Australia, New Zealand, Japan, Switzerland or member nations of the EU or NATO	Presumed risk of diversion where 'substantive contacts' with a 'proscribed country'
Third Country Nationals	Denied where nationality or national origin from a 'proscribed country'	Denied except with prior written authorisation	Permitted only where from Australia, New Zealand, Japan, Switzerland or member nations of the EU or NATO	Presumed risk of diversion where 'substantive contacts' with a 'proscribed country'

Approvals Required				
Security Clearance	Access permitted with a RESTRICTED Security Clearance and on the basis of a 'need to know'	Access permitted with a RESTRICTED security clearance	Not required	Access permitted with a security clearance (RESTRICTED level assumed)
Security Vetting	Not required	Assessment for 'significant ties' conducted as part of the security clearance	Not required	Assessment for 'substantive contacts' conducted by Defence industry as an alternative to security clearance

Thirdly, all four reforms apply only to the existing workforce of the intended recipient of ITAR-controlled material.⁸⁰ The position of job applicants and contract workers is not considered⁸¹ and, in the case of the Technology Transfer Process Improvement Initiative, *Treaty* and Section 126.18 Amendments, it cannot be expected that job applicants and contract workers will possess the necessary security clearance issued by the Australian Department of Defence to allow reliance on the reforms. Thus, for these individuals, the reforms present no notable improvement to the existing difficulties and Australian defence industry will still either need to make initial employment decisions on the basis of the nationality and national origin of its job applicants and contract workers or accept the risk that these individuals may ultimately not be allowed to access ITAR-controlled material after the appropriate vetting processes or seeking of approvals has been completed.

SECURITY CLEARANCES

The Technology Transfer Process Improvement Initiative, *Treaty* and Section 126.18 Amendments all place heavy reliance on dual nationals and third country nationals holding a security clearance issued by the Australian Government. Thus the obligation previously imposed on defence industry to determine whether its employees, contract workers and job applicants hold nationality of, or were born in, a third country shifts to an examination of

⁸⁰ Simon Rice, 'Submission No. 11 to Joint Standing Committee on Treaties', 12 June 2008, <<http://www.aph.gov.au/house/committee/jsct/14may2008/subs/sub11.pdf>> [Accessed 14 July 2011], pp. 1-3; and Lorraine Romero and Andrew Irwin, 'Feature Comment: A Long-Awaited Reform—the State Department's Proposal to Liberalize ITAR Requirements for Dual and Foreign Nationals', *The Government Contractor*, vol. 52, no. 35 (2010), p. 311.

⁸¹ The US Department of State has indicated that the omission of contract workers, other than those falling with the definition of 'regular employee' as per the Section 126.18 Amendments, was intentional given the "transactional, temporary nature of the contractual arrangement" and the fact that companies, international organisations and government entities are prepared to bear "significantly more legal responsibilities for the acts of their regular employees than they do for the acts of contractors": *International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users*, pp. 28175-6.

whether those individuals hold a valid security clearance issued by the Australian Government.⁸² The onus of requesting details of, and making decisions based on, an individual's nationality and national origin is thus transferred to the Australian Department of Defence. This is arguably a more appropriate allocation of risk given that the Australian Government is in the 'driver's seat' when selecting to source military technology from the United States.

A RESTRICTED security clearance is the minimum security clearance required of employees and contractors working for, and with, the Australian Department of Defence.⁸³ When considering an application for the grant of a RESTRICTED clearance, the Department of Defence examines the identity, nationality and police record of the individual.⁸⁴ This has the potential to be significantly more intrusive than seeking information on nationality and place of birth. It is also a mandatory requirement that the applicant for a security clearance be an Australian citizen, unless a specific waiver has been granted by the Department of Defence.⁸⁵ It is, therefore, inherent in the requirement to obtain a security clearance that third country nationals will be automatically excluded and will not benefit from the ITAR reforms to the extent that they rely on the holding of a valid security clearance.

While pursuant to the Section 126.18 Amendments, and Technology Transfer Process Improvement Initiative reforms, the grant of a security clearance will be sufficient evidence to allow access to ITAR-controlled material for the relevant individuals, the *Treaty* requires that an additional check for significant ties also be conducted. On this basis, it appears that the concessions granted in the *Treaty* will be rendered largely redundant by the introduction of the more relaxed Section 126.18 measures under which the standard process for a security clearance—assumed to be at the RESTRICTED level—would apply. Similarly, the concessions obtained by the Technology Transfer Process Improvement Initiative will also be made obsolete by the broader Section 126.18 Amendments.⁸⁶ However, given the process and considerations formalised under the *Treaty* it remains to be seen whether the Australian Department of Defence will require an additional criteria—such as screening for indicators of 'significant ties'—as part of the process for obtaining a security clearance for the purposes of the ITAR.⁸⁷ Following from the process established in the *Treaty*, in the event that

⁸² Simon Rice, 'Supplementary Submission No. 11.1 to Joint Standing Committee on Treaties'.

⁸³ Department of Defence, 'Defence Security Manual: Personnel Security Clearance Process', (Version 3 – 28 September 2010) <<http://www.defence.gov.au/>> [Accessed 14 July 2011].

⁸⁴ *Implementing Arrangements*, s. 6(11).

⁸⁵ Department of Defence, 'Defence Security Manual: Personnel Security Clearance'.

⁸⁶ Department of Defence, 'Australian Guidance to develop an Employee Screening Model for the §126.18 U.S. ITAR exemption', <<http://www.defence.gov.au/strategy/deco/publications/brochures/screen.pdf>> [Accessed 28 August 2011].

⁸⁷ Should this approach be adopted, it is unclear what status will be given to existing RESTRICTED security clearances where 'significant ties' of the individual have not been examined.

significant ties to a 'proscribed country' under the ITAR are shown, it is expected that an assessment to the standard of an Australian SECRET security clearance will be conducted.⁸⁸

The process for obtaining a SECRET security clearance is significantly more onerous than that for a RESTRICTED security clearance. In addition to requiring the applicant to have a 'checkable background' for the previous ten years, details about the individual's identity, background, dependents and relatives, previous employment and education, overseas connections, travel and residences, contact with foreign officials and diplomats, and political and religious affiliations are assessed.⁸⁹ The potential for discrimination on the basis of race is heightened given the need for disclosure of such personal information.

The judiciary has previously provided guidance on whether decisions made as part of the security clearance process could amount to racial discrimination. In *Commonwealth of Australia v Stamatov*,⁹⁰ the Federal Court set aside the decision of the Human Rights and Equal Opportunity Commission which had found that the Department of Defence had engaged in unlawful conduct under the *RDA*. The case involved the termination of Mr Stamatov's employment with the Department of Defence on the basis that the necessary SECRET security clearance could not be obtained—specifically because Mr Stamatov was a third country national born in Bulgaria and held Bulgarian nationality, and a request for waiver of the Australian citizenship requirement could not be made because he did not have a checkable background.

In examining whether racial discrimination had occurred in breach of the *RDA*, the Federal Court confirmed that the mandatory requirement that security clearance applicants hold Australian citizenship was not discrimination as "distinctions based on citizenship are not prohibited by the *RDA*".⁹¹ Notwithstanding Mr Stamatov's arguments that the refusal to grant a security clearance was based upon his national origin (Bulgaria being a country in which background checks could not be conducted), the Federal Court held that the required security checks "were concerned with the activities of the applicant and were unrelated to [his] national origins".⁹² Consequently, the Court found that the Department of Defence had not breached the *RDA* by terminating the employment of Mr Stamatov because

⁸⁸ *Implementing Arrangements*, s. 6(12).

⁸⁹ Defence Teaming Centre, 'Security Clearance', <<http://www.dtc.org.au/asp/securityClearance.aspx>> [Accessed 14 July 2011]; Defence Science and Technology Organisation, Department of Defence, 'Frequently Asked Questions: Do I need a security clearance to work for DSTO?', <<http://www.dsto.defence.gov.au/page/3277/>> [Accessed 14 July 2011].

⁹⁰ [1999] FCA 105 (*Stamatov*).

⁹¹ *Ibid.*, para. 24 (Judge Von Doussa).

⁹² *Ibid.*, para. 35 (Judge Von Doussa).

he was unable to be provided with a security classification at the SECRET level.

The implications of the *Stamatov* decision are significant. Applied to the conduct of security clearances required for access to ITAR-controlled material, it may be expected that the focus on whether an individual has a 'checkable background' will divert attention from the previous considerations relating to nationality and national origin of the individual. However, there is an inherent Catch-22 in this approach given that the 'checkability' of a particular country is dependent upon the trustworthiness of the country in which the checks are to be undertaken. As the Federal Court stated in *Stamatov*:

Checkability is possible where there can be a reasonable belief that the answer which may be obtained from another country can be regarded as meaningful. The notion of checkability is elastic and goes to issues of credibility, not just objective facts. Checkability is very much dependent on national politics and defence and other relationships... The checkability of a person's background may change, and a country may change its checkable status as international arrangements and political issues change.⁹³

On this basis, it is reasonable to conclude that those 'proscribed countries' listed in the ITAR will, in practice, be the same countries as those deemed to be 'uncheckable' for the purpose of assessing security clearances. Thus, those third country nationals and dual nationals that hold nationality of, or were born in, a 'proscribed country' and consequentially lived or worked in that 'proscribed country' will continue to suffer disadvantage and denied access to ITAR-controlled material under the new reforms. However, pursuant to the *Stamatov* case, decisions made as part of the security clearance process by the Australian Department of Defence will not be considered discriminatory under the *RDA*.

This notwithstanding, initial indications are that the Australian Department of Defence will not issue security clearances solely to allow access to ITAR-controlled material—unless the relevant information is also Australian security classified.⁹⁴ This is an inherent contradiction given that the Section 124.16 Special Authorisation and Section 126.18 Amendments apply only to the transfer of unclassified ITAR-controlled material and are unlikely to hold a national security classification. The ability of the Australian defence industry to rely on the issuance of security clearances to overcome non-compliance with anti-discrimination and equal opportunity legislation is therefore significantly undermined.

⁹³ *Stamatov*, para. 19 (Judge Von Doussa).

⁹⁴ Department of Defence, 'Australian Guidance to develop an Employee Screening Model for the §126.18 U.S. ITAR exemption'.

INDIVIDUAL VETTING

Both the *Treaty* and the Section 126.18 Amendments place focus on security vetting of individuals requiring access to ITAR-controlled material. The key distinction between the two is that the criteria applicable under the *Treaty* relates to an assessment of 'significant ties' which is conducted by the Australian Department of Defence (in addition to the security clearance process), while the Section 126.18 Amendments require defence industry to examine the 'substantive contacts' of its employees as the alternative to obtaining a security clearance. Neither 'significant ties' nor 'substantive contacts' are defined within the applicable texts.

Pursuant to the *Treaty*, overseas travel and affiliations of the individual will be considered in the 'significant ties' assessment, along with inquiry into a person's place of birth.⁹⁵ However, the Department of Defence has made clear that "national origin is not a factor in determining if significant ties exist under the *Treaty*", thereby minimising the potential for unlawful discrimination.⁹⁶ This lower threshold applicable under the *Treaty* is likely to reflect that the assessment of 'significant ties' is undertaken in addition to the conduct of a RESTRICTED security clearance.

The Section 126.18 Amendments make clear that the following may be considered indicative of an individual's 'substantive contact' with 'proscribed countries':

regular travel to [proscribed] countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion.⁹⁷

The US Department of State has indicated that nationality of, or birth in, a third country (including a 'proscribed country') would not automatically prohibit access to ITAR-controlled material, nor would having family members in a 'proscribed country', although both may raise a risk of diversion (unless DDTC determines otherwise).⁹⁸ While further guidance on the issues to be considered in assessing 'substantive contact' has been released by both the DDTC and the Australian Department of Defence⁹⁹ the

⁹⁵ Tony Corcoran, 'Submission No. 23 to Joint Standing Committee on Treaties', 5 August 2008, <<http://www.aph.gov.au/house/committee/jsct/14may2008/subs/sub23.pdf>>, [Accessed 14 July 2011].

⁹⁶ *Ibid.*, p. 4.

⁹⁷ *International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users*, p. 28178.

⁹⁸ *Ibid.*

⁹⁹ Department of Defence, 'Australian Guidance to develop an Employee Screening Model for the §126.18 U.S. ITAR exemption'; Directorate of Defense Trade Controls, 'Implementation Considerations: Dual/Third National Rule', <http://www.pmdt.state.gov/licensing/documents/D-TCN_Policy_ImplementationFinal.pdf> [Accessed 28 August 2011].

absence of definitive instructions may result in inconsistent application and “make the new rule difficult for authorised entities to administer”.¹⁰⁰ It does, however, grant Australian defence industry some discretion as to implementation.¹⁰¹

While the vetting process to be undertaken by the Australian defence industry has the potential to focus discussions on issues other than the nationality or national origin of its employees, the risk of non-compliance with the ITAR may lead to the defence industry taking an “ultra-conservative approach” to the assessment of its employees.¹⁰² Additionally, requesting from employees the detailed information necessary to make an assessment as to whether substantive contacts exist—for example, in relation to personal relationships and private activities—is potentially more intrusive than seeking information on nationality and country of birth. Given that the test for ‘substantive contacts’ is aligned with nationality and national origin criteria—for example, birth or nationality from ‘proscribed countries’ where nationality cannot be renounced may be deemed as an indicator of continued allegiance of those countries, as will ongoing contact with nationals of those countries, and will be presumed to raise a risk of diversion—the risk of claims under anti-discrimination and equal opportunity legislation remains. Any subjective judgements and decisions made on the basis of such information could be similarly challenged.¹⁰³ In the absence of implementation of both the *Treaty* and Section 126.18 Amendments, the practical application and the likely consequences are not yet quantified, and the ability to extend the conclusions reached in the *Stamatov* case to protect Australian defence industry in their assessments that an individual has significant contacts remains untested.

COST

Access to ITAR-controlled material by dual nationals and third country nationals may currently be achieved by one of five means: prior approval of the US Department of State; specific authorisation by the DDTC and identification in the export licence of the relevant countries where dual or third country nationality is held; reliance upon section 124.16 of the ITAR allowing transfer to nationals of Australia, New Zealand, Japan, Switzerland and member nations of the European Union and the North Atlantic Treaty

¹⁰⁰ Simon Rice, ‘Supplementary Submission No. 11.1 to Joint Standing Committee on Treaties’, p. 3.

¹⁰¹ Letter from Salli Swartz and Donald Featherstun, American Bar Association to Directorate of Defense Trade Controls, US Department of State, 10 September 2010, <<http://apps.americanbar.org/dch/committee.cfm?com=IC716000>> [Accessed 14 July 2011].

¹⁰² Letter from Innes Willox, Australian Industry Group to Directorate of Defense Trade Controls, US Department of State, 10 September 2010, <<http://www.aigroup.com.au/>> [Accessed 14 July 2011].

¹⁰³ Litigation Department, ‘New Export Control Rules on Dual and Third-Country Nationality Not Likely to Ease ITAR Compliance Burdens on Non-US Entities’, on Latham & Watkins, *Client Alert Number 1195* (27 May 2011), <<http://www.lw.com>> [Accessed 14 July 2011].

Organisation; holding of a security clearance issued by the Australian Government; or successful passing of 'substantive contacts' screening. Thus, while recent reforms do acknowledge that "nationality is not a valid indicator of loyalty or trustworthiness"¹⁰⁴ and reflect a "significant step forward in that [the US Department of State] no longer equates individuals with certain proscribed countries solely on the basis of their nationality",¹⁰⁵ the reforms simply present multiple solutions to address the one common problem. The cost and resource implications are significant.

To be in a position to leverage the concessions granted to the ITAR, significant time and cost investment will have to be made by the Australian defence industry to implement parallel compliance processes under the ITAR. For example, application for membership to the 'Approved Community' pursuant to the *Treaty* will require the Australian defence industry to demonstrate the existence of physical, information and personal security measures.¹⁰⁶ The expected cost for defence industry to develop and maintain such security controls was estimated in 2008 at \$50 million,¹⁰⁷ including maintaining security clearances and relevant training for employees and ensuring compliance with information security systems and physical security standards.¹⁰⁸ According to the Australian Government, these enhanced security measures would "provide a more robust security environment that offers benefits beyond the provisions of the *Treaty*" and that the associated costs would be "offset by savings due to the streamlining of the U.S. export license process".¹⁰⁹ However, add to this commitment the new requirements to implement vetting processes and conduct internal screening of employees, and the cost to defence industry can be expected to significantly rise. This due diligence burden is heightened for small to medium enterprise and "may act as a barrier ... to enter the US export market and place them at a disadvantage to the primes".¹¹⁰

Additionally, the requirement to process RESTRICTED security clearance applications, in addition to assessing significant ties (and further

¹⁰⁴ Litigation Department, 'New Export Control Rules on Dual and Third-Country Nationality Not Likely to Ease ITAR Compliance Burdens on Non-US Entities'.

¹⁰⁵ Lorraine Romero and Andrew Irwin, 'Feature Comment: The New ITAR Rule on Dual and Third-Country Nationals', *The Government Contractor*, vol. 53, no. 21 (2011), p. 176.

¹⁰⁶ Defence Export Control Office, Department of Defence, 'National Interest Analysis—Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation' [2007] ATNIF 31, [4].

¹⁰⁷ Kerry Clarke, 'Evidence to Joint Standing Committee on Treaties', Parliament of Australia, Canberra, 16 June 2008, <<http://www.aph.gov.au/hansard/joint/commtee/J10940.pdf>> [Accessed 14 July 2011].

¹⁰⁸ Robert Wylie, 'Facilitating Defence Trade Between Australia and the United States: A Vital Work in Progress', *Security Challenges*, vol. 4, no. 3 (2008), pp. 115-34.

¹⁰⁹ Defence Export Control Office, *Fact Sheet: Australia US Treaty on Defence Trade Cooperation*.

¹¹⁰ Jonathan Darby, 'Submission No. 19 to Joint Standing Committee on Treaties', 18 June 2008, <<http://www.aph.gov.au/house/committee/jsct/14may2008/subs/sub19.pdf>>, [Accessed 14 July 2011], p. 1.

investigations where required), for all individuals requiring access to ITAR-controlled material imposes a significant burden on the Department of Defence.¹¹¹ The cost of undertaking such activities required under the ITAR was assessed in 2008 at close to \$27 million per year for the scope of the *Treaty* only and it is expected that this figure will grow as a consequence.¹¹² Existing timelines for obtaining a security clearance, already taking several months,¹¹³ will be further protracted. Whether the Department of Defence is resourced for such activity remains to be seen, notwithstanding recommendations by the Joint Standing Committee of Treaties that “security assessment processes need to be adequately resourced to minimise delays and costs for industry”.¹¹⁴

The significant costs to be incurred by the Australian defence industry to leverage off the concessions granted to the ITAR raises interesting considerations from a cost/benefit perspective. Noting that these costs will be incurred for the primary purpose of allowing dual and third country nationals to access ITAR-controlled material, it could be reasoned that a heavy burden is imposed for the benefit of a few. This is supported by the substantial variation in consequences between breaches of the ITAR versus violation of Australia’s anti-discrimination and equal opportunity commitments. For example, in the event of a violation of the ITAR, penalties of up to US\$ 1 million for each violation, imprisonment for up to ten years and debarment from export activity can be imposed by the US Department of State.¹¹⁵ This is compared against the remedies offered by Australian anti-discrimination and equal opportunity law which may range from an apology to small value financial compensation.¹¹⁶ While not intending to diminish the detrimental impact that racial discrimination may have on an individual, given that the reforms fail to resolve the conflicts with anti-discrimination and equal opportunity laws, from an economic perspective the balance is certainly in favour of continuing the status quo and seeking exemptions as required to

¹¹¹ Romero and Irwin, ‘Feature Comment: A Long-Awaited Reform—the State Department’s Proposal to Liberalize ITAR Requirements for Dual and Foreign Nationals’.

¹¹² Defence Export Control Office, ‘*National Interest Analysis—Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*’, para. 25.

¹¹³ *Raytheon Exemption (SA) 2008*.

¹¹⁴ Joint Standing Committee on Treaties, ‘Report 94: Treaty between Australia and United States of America concerning Defense Trade Cooperation’, para. 3.30.

¹¹⁵ ITAR, §§124.3–7. Recent examples have seen the US Department of State impose a fine of US\$100 million on ITT Corporation for the unauthorised export of ITAR-controlled night vision technology to China and a criminal penalty of US\$400 million on BAE Systems for various breaches including conspiracy to violate the ITAR: Department of Justice, ‘Summary of Major U.S. Export Enforcement and Embargo Criminal Prosecutions: 2007 to the Present’, February 2011, <<http://www.pmdtc.state.gov/compliance/documents/OngoingExportCaseFactSheet.pdf>> [Accessed 14 July 2011].

¹¹⁶ Australian Human Rights Commission, ‘Federal Discrimination Law: Chapter 7 Damages and Remedies’, <http://www.hreoc.gov.au/legal/FDL/FDL_2008_2009/chap7.html> [Accessed 14 July 2011].

permit the conduct of racial discrimination.¹¹⁷ From this perspective, the enthusiasm with which the recent ITAR reforms will be adopted by the Australian defence industry will be interesting to follow.

Conclusion

The application of the ITAR within Australia brings with it a myriad of consequences from a human rights perspective. Required denial of access to ITAR-controlled material for dual nationals and third country nationals, other than those benefiting from country-specific exemptions, places the Australian defence industry in an awkward position—comply with the ITAR and breach local anti-discrimination and equal opportunity law or vice versa. Temporary reprieve has been found in the form of exemptions issued under State and Territory law allowing the relevant companies to lawfully engage in racial discrimination. The judiciary has acknowledged that failure to grant such exemptions would jeopardise defence industry's ability to fulfil contractual commitments to the Australian Government, with potential impact on the commercial viability of Australian defence industry companies and implications for national security, defence capability, employment and the economy.

Recognising the inherent conflicts between the ITAR and human rights laws, the US Department of State has sought to implement concessions to the strict requirements imposed regarding dual and third country nationals. However, as each ITAR reform adopts a different focus, particularly in terms of the individuals and technology to which it applies, it is not easy to conclude which of the recent reforms, if any, will be most beneficial to the Australian defence industry. The consequences of the varying approaches adopted by the Technology Transfer Process Improvement Initiative, the *Treaty*, Section 124.16 Special Authorisations and the Section 126.18 Amendment are that none, individually or collectively, provide full coverage to all individuals or technology that may be impacted by ITAR constraints. The decision of which reform or reforms to be leveraged in any particular instance must be considered on a case by case basis depending upon the ITAR-controlled material to be transferred, the permanent or temporary nature of the workforce, the nationalities of affected dual nationals and third country nationals and any pre-existing security clearances or individual vetting conducted.

As the analysis above confirms the continuing need to request information on, and make decisions on the basis of, nationality and national origin, the Australian defence industry remains obliged to seek and rely on exemptions under Australian anti-discrimination and equal opportunity law. When

¹¹⁷ The costs of obtaining exemptions from anti-discrimination and equal opportunity legislation are also significant. For example, the exemption obtained by ADI Limited in Western Australia reportedly cost \$2 million in legal costs and staff time: Wylie, 'Facilitating Defence Trade Between Australia and the United States'.

considered in light of the expected cost imposition on the Australian defence industry, the utility of the reforms is significantly undermined. This is notwithstanding the intent of the Australian and US Governments to implement a regime under which exemption from anti-discrimination laws would no longer be required.¹¹⁸

Given that four successive reforms have failed to satisfactorily resolve the human rights conflicts arising out of the application of the ITAR in Australia, further consideration of this issue is necessary. For as long as the Australian Government continues to purchase military technology originating from the United States, including as the alternative to developing its own defence industry,¹¹⁹ the ITAR will continue to pose vexed issues. This burden is borne most heavily by defence industry, which remains subject to the Australian judiciary's discretion as to whether to grant an exemption from the conflicting anti-discrimination and equal opportunity legislation and is also at risk of significant penalties imposed by the US for non-compliance with the ITAR. Seeking improvements to the ITAR through diplomatic channels appears futile given recent efforts, however it remains within the power of the Australian Government to address this issue at the local level and ameliorate the effects that foreign laws are having on Australian defence industry.

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¹¹⁸ Corcoran, 'Submission No. 23 to Joint Standing Committee on Treaties'.

¹¹⁹ Hugh White, 'Defence and Discrimination', *Background Briefing*, ABC Radio, 24 August 2008, <<http://www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm>> [Accessed 14 July 2011].