

LOCATION: DARWIN

**APPLICATION: EXEMPTION APPLICATION BY RAYTHEON
AUSTRALIA PTY LTD AND RELATED
COMPANIES**

**APPLICANTS: RAYTHEON AUSTRALIA PTY LTD
AEROSPACE TECHNICAL SERVICES PTY
LTD
AUSTRALIAN MARITIME SURVEILLANCE
PTY LTD
AERONAUTICAL CONSULTING, TRAINING
AND ENGINEERING PTY LTD**

**BEFORE: TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER**

DATE OF DECISION: JULY 2007

REFERENCE: ADC2007/027

The following would have been my decision in the above application for exemption but for the Applicant's withdrawal of its application.

Subsequent to the chronology appearing in paragraphs 1.3 and 1.4 of the Decision, the final draft (unreleased) of the Decision was completed in July 2007 shortly before the Applicant successfully sought further time to provide additional material in support of the Application.

In January 2008 it was suggested to the Applicant that sufficient time had been provided to gather the material. In January 2008 the Applicant withdrew its application.

In spite of the said withdrawal I have decided to release the Decision in furtherance of my statutory obligations under section 13 of the *Anti-Discrimination Act* namely,

"13. Functions of Commissioner

(1) The Commissioner has the following functions:

...

(g) to promote in the Territory an understanding and acceptance, and public discussion, of the purposes and principles of equal opportunity;

(h) to promote an understanding and acceptance of, and compliance with, this Act;

(j) to promote the recognition and acceptance of non-discriminatory attitudes, acts and practices;

..."

The Decision is notable as it analyses whether it is in the public interest to allow the economic arguments raised by the Applicant to override fundamental protections against racial discrimination contained in the Act.

The Applicant, Raytheon, has been granted a similar exemption application by the Queensland Anti-Discrimination Tribunal (January 2008) and has appealed the rejection of a similar exemption application by the ACT Human Rights Commissioner (No 6 2007). Similar exemption applications by other Australian defence contracting companies have been granted by Tribunals in all other mainland Australian states eg

Boeing Australia Holdings P/L (Victoria, 2007)

ADI Limited (Victoria 2004)

Boeing Australia Holdings P/L (Qld, 2003)

ADI Limited (WA 2005)

BAE Systems (SA, 2007).



TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER

DECISION

1. INTRODUCTION

- 1.1 This is an application for exemption pursuant to section 59(1) of the *Anti-Discrimination Act 1992* (NT) (“the Act”).
- 1.2 The application is brought by a group of companies incorporated in Australia namely Raytheon Australia Pty Ltd and each of its wholly owned Australian subsidiaries including Aerospace Technical Services Pty Ltd, Australian Maritime Surveillance Pty Ltd, and Aeronautical Consulting Training and Engineering Pty Ltd. For the purposes of this decision the group of applicant companies shall be collectively referred to as “Raytheon”.
- 1.3 By application dated 28 March 2007, the exemption was sought from the provisions of sections 25, 26 and 31 of the Act in so far as those sections extend to the nationality and national origin of current and prospective employees and contract workers of Raytheon.
- 1.4 On 11 April 2007 Raytheon sought to extend the exemption to the provisions of section 23 of the Act in the mistaken belief that section 23 pertained to “requests for information on which discrimination might be based”. In fact section 23 prohibits and provides protection from victimisation of complainants under the Act. The section under the Act pertaining to “requests for information on which discrimination might be based” is section 26, an exemption from the provisions of which had already been sought by Raytheon.

2. STATUTORY PROVISIONS

- 2.1. The exemption application involves sections 3, 4 (especially where the attribute of “race” is defined to include “nationality” or “national origin”), 13, 19, 20, 25, 26, 31, 53(a) and (b) and 59 of the Act. These sections are reproduced at the end of this Decision for reference.

3. APPLICATION OVERVIEW

- 3.1 The sections of the Act from which exemption is sought prohibit discriminatory advertising (section 25), seeking unnecessary information (section 26) and discrimination in the areas of recruitment and employment (section 31).
- 3.2 Raytheon has entered into various defence contracts described in paragraph 4.2.
- 3.3 In order to perform the contracts Raytheon requires access to certain information and technology originating in the United States of America (US) and controlled and administered by US government departments and US legislation (US-controlled materials).

- 3.4** Permission to access US-controlled materials is granted by the US government on condition that Raytheon enter into, and comply with, certain agreements and licences required by US legislation.
- 3.5** The US legislation decrees that persons of certain nationality and/or national origin are a security risk and are not permitted to access the US-controlled materials, and requires Raytheon to ensure that those persons are prevented from accessing the US-controlled materials if they are Raytheon employees.
- 3.6** The exemption is sought to enable Raytheon to meet the requirements of the US legislation specifically by allowing Raytheon to discriminate against current or prospective employees or contract workers by demanding from them details of their nationality and national origin, and by allowing Raytheon to treat such employees differently in various other ways based on their nationality and national origin. For instance if exempted from section 25 of the Act, Raytheon may seek to advertise that prospective recruits of certain nationalities need not bother applying for employment.
- 3.7** Discrimination on the basis of nationality or national origin is prohibited under the Act in that “race” is defined under section 4 to include nationality or national origin and discrimination on the ground of race is prohibited under section 19(1)(a). Section 31 of the Act prohibits discrimination in employment.
- 3.8** In support of its application for exemption Raytheon has provided written submissions and lengthy supporting affidavits of Scott Leigh Jones, Director of Legal Affairs, Raytheon Australia Pty Ltd sworn 19 March 2007 and Edward J Krauland, a private lawyer practising in Washington DC USA and expert in the fields of international trade, US export controls and economic sanctions law, also sworn 19 March 2007. There were no oral submissions.
- 3.9** Among other things the submissions and supporting affidavits set out in considerable detail the various contracts entered into by Raytheon with the Commonwealth of Australia and various other companies incorporated in Australia or the US, the defence-related nature of those contracts, Raytheon’s links with its parent company incorporated in the US, the structure of Raytheon, the extent of operations of Raytheon in defence-related activities and in space programs, the reliance of Raytheon on technology and information originating in the US, the protection and control of that technology and information by the US, the requirement by the US that Raytheon restrict access of current and prospective employees to protected technology and information, the reasons for and nature of exemption sought, the impact of a failure to grant the exemption, and the effect of the exemption on current Raytheon workplace procedure.

4. BACKGROUND

- 4.1** Raytheon is a wholly owned subsidiary of the Raytheon Company incorporated in the US.

- 4.2** Raytheon has entered into various contracts with the Commonwealth of Australia through the Department of Defence (ADF), and other Australian and US incorporated companies, pertaining to defence systems, sensor systems, logistical and maintenance support systems and other defence related goods and services for ultimate use by the ADF and space programs within Australia (the defence contracts).
- 4.3** US legislation and regulations control the transfer, import and export of defence articles and defence services. One such regulation is the International Traffic in Arms Regulations (ITARs), which restrict the transfer of certain defence articles, technical data and defence services (ITAR-controlled material) within and outside the US and to non-US citizens.
- 4.4** The ITAR is administered by the Director of Defence Trade Controls (DDTC) on behalf of the US Department of State.
- 4.5** It is necessary for Raytheon to access US technology and ITAR-controlled material to perform the Defence Contracts. Access is obtained through authorisation granted by DDTC in the form of licence agreements under US law (licence agreements).
- 4.6** The ITARs provide that the licence agreements prohibit the transfer of ITAR-controlled material to a “national of a third country” or a “dual national” (except as specifically authorised in the licence agreement) without the prior written approval of the US Department of State. (As such Raytheon is contractually bound not to transfer ITAR-controlled material to persons of that description.)
- 4.7** “Dual nationals” or “nationals of a third country” are not defined in the ITARs or the DDTC guidelines, but Raytheon accepts legal advice obtained from Mr Krauland (contained in his said affidavit sworn 19 March 2007) to the effect that a
- “Dual National” is a non-US citizen who is a citizen of Australia; and
 - (i) currently holds a passport or is a citizen of a third country (ie not Australia or the US); or
 - (ii) has previously held a passport from, or citizenship of, a third country; or
 - (iii) has other legal ties, such as permanent residency, to a third country; or
 - (iv) was born in a third country.
 - “Third Country Foreign National” is a non-US citizen who is a permanent resident visa holder or other non-citizen of Australia who:
 - (i) currently holds a passport or is a citizen of a third country (ie not Australia or US); or
 - (ii) has previously held a passport from, or citizenship of, a third country; or

- (iii) has other legal ties, such as permanent residency, to a third country; or
- (iv) was born in a third country.

➤ “Australian National” is an Australian citizen by birth, or an Australian citizen by naturalisation.

4.8 Furthermore the ITAR states that licence agreements for the transfer of ITAR-controlled material will be denied for citizens of certain countries including Belarus, Cuba, Iran, North Korea, Syria, Venezuela, Vietnam, Burma, China, Liberia, Somalia and Sudan (proscribed countries) and any other country where a transfer “would not otherwise be in furtherance of world peace and the security and foreign policy of the United States”.

4.9 In a nutshell the upshot of the foregoing is that:

4.9.1 Raytheon needs access to ITAR-controlled material to perform its contracts with ADF and others.

4.9.2 In order to access ITAR-controlled material Raytheon must comply with the ITARs by virtue of the licence agreements into which it has entered.

4.9.3 Compliance with the ITARs as administered by the DDTC means that Raytheon is obliged to ensure that ITAR-controlled material is only accessed by Australian citizens (not including Australian citizens who are “dual nationals”) and not by dual nationals, third country foreign nationals, or citizens of proscribed countries.

4.9.4 Raytheon realises that restricting transfer of ITAR-controlled material to authorised Australian citizens can only be achieved by requiring all of its existing and prospective employees to provide details of their place of birth and their nationality, and by then treating them differently on the basis of the details provided.

4.9.5 Raytheon is aware that treatment of existing and prospective employees in the manner described in paragraph 4.9.4 may well amount to discrimination on the basis of race in breach of the Act.

4.9.6 Accordingly Raytheon has sought exemption from the operation of sections 25, 26 and 31 of the Act in so far as those sections extend to the nationality and national origin of employees, prospective employees, and contract workers.

4.9.7 Raytheon’s purpose in seeking the exemption is to ensure compliance with its contractual obligations under the licence agreements. Unfortunately Raytheon is unable to comply with both its contractual obligations and the Act.

5. TERMS OF EXEMPTION SOUGHT

5.1 Broadly speaking Raytheon is seeking an exemption under section 59 of the Act to enable it to discriminate on the grounds of nationality or national origin against current or prospective Raytheon employees where their employment will require access to ITAR-controlled material.

- 5.2** Specifically the discriminatory conduct proposed by Raytheon to enable it to restrict employee access to ITAR-controlled material includes:
- 5.2.1** demanding from prospective and existing employees details of their place of birth, nationality or national origin, and details of any changes in information already provided by employees in that regard;
 - 5.2.2** distinguishing those Raytheon employees permitted to access ITAR-controlled material from those not so permitted by requiring the former to wear a badge, including them on a list, or otherwise;
 - 5.2.3** restricting access to ITAR-controlled material to some employees and contractors on the basis of their nationality or national origin;
 - 5.2.4** rejecting applications for employment from prospective employees based on their nationality or on national origin;
 - 5.2.5** removing employees or contract workers from projects requiring access to ITAR-controlled material based on their nationality or national origin;
 - 5.2.6** providing companies that transfer ITAR-controlled material to Raytheon details of the nationality or national origin of employees or contract workers who may access that material.
- 5.3** If granted the exemption under section 59 of the Act, Raytheon would be entitled to discriminate against employees, or prospective employees, on the ground of race (sections 19 and 20), publish, advertise or promote its intention to engage in prohibited conduct (section 25), seek information from employees on which unlawful discrimination might be based (section 26), and discriminate in the area of work against certain employees (section 31).

6. THE LAW

- 6.1** The Act was assented to in 1992 with the ambitious objectives under section 3 of promoting the principle of equality of opportunity, and eliminating discrimination.
- 6.2** Among other things the purpose of the Act is to define and prohibit discrimination based on certain attributes, protect people from discrimination, and provide remedies for discrimination.
- 6.3** A number of exceptions and exemptions to the Act provide for situations where discrimination is not unlawful. Exceptions include for example fixing reasonable terms and conditions of employment where a person has restricted work capacity due to age or impairment (section 35) and discrimination on the ground of irrelevant criminal record if employment involves the care of vulnerable persons (section 37).
- 6.4** In addition to specific statutory exceptions under the Act, section 59 of the Act (see section 2 above) entitles a person to seek exemption for discriminatory conduct that would otherwise contravene the Act. The Anti-

Discrimination Commission NT, through its Commissioner, has not acceded to any requests for section 59 exemption since its inception in 1992. No doubt the reluctance of the Commission in this regard to date is grounded in the reality that the granting of such an exemption would in effect permit unlawful conduct. In the past the Commission has preferred to achieve the desired outcome without resorting to discriminatory conduct.

- 6.5** The granting of an exemption under section 59 is in the virtually unfettered discretion of the Commissioner, who in considering an application may have regard to the desirability of certain discriminatory conduct being permitted to redress the effect of past discrimination, and any other factor that the Commissioner considers relevant.
- 6.6** One example of permitting discriminatory conduct to redress past discrimination is the application of a special measure for disadvantaged groups or engaging in positive discrimination. Clearly the conduct sought to be exempted by Raytheon is not intended to operate in this way. Rather Raytheon seeks to make lawful 'negative' discrimination where none existed before.
- 6.7** In the absence of any statutory guidance on how to exercise my broad discretion I first look to Hansard for assistance. However Hansard Extracts (Parliamentary Record No. 13, 1/10/1992, at page 6521) containing the presentation and first reading of the *Anti-Discrimination Bill* by Mr Stone, the former Minister for Public Employment, and the response (Parliamentary Record No. 14, 17/11/1992, at page 6661) by Mr Stirling of the Opposition contain no reference to the discretion under section 59.
- 6.8** It is settled law that when an instrument is silent on the limits of an unfettered discretion, the discretion is in fact limited by the objects, purpose and scope of the instrument in its entirety. (See Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption) [2007] VCAT at 532.30, and ADI & Ors and Commissioner for Equal Opportunity & Ors [2005] WASAT at 259.97.)
- 6.9** On the face of it the objects and purpose of the Act (see paragraphs 6.1, 6.2) are not compatible with Raytheon's application. However an exemption is not always refused because it is inconsistent with the scope and purpose of the Act. The appropriate principles to be applied in the exercise of an unfettered discretion to grant an exemption are set out in Stephens v Fernwood Fitness Centres Pty Ltd (1996) EOC 92-782 as follows:
- 6.9.1** For an exemption to be granted it must be necessary. That is unless the conduct proposed by Raytheon has a strong likelihood of constituting unlawful discrimination under the Act it need be considered no further. The applicant Raytheon is convinced that unequal treatment of employees based on nationality or national origin will contravene the Act. I agree. In addition, it would be unnecessary to grant an exemption if the proposed conduct was already the subject of a statutory exception. After consideration of

the express exception provisions in the Act I believe this is clearly not the case. Also I am not aware of any other Act or regulation of the Territory or the Commonwealth which would activate the general exemption for discriminatory conduct found under section 53(a) and (b) of the Act. Therefore the exemption is necessary if Raytheon is to achieve its aims without contravening the Act.

6.9.2 Secondly, I must consider whether the conduct sought to be exempted is consistent with the objectives and scheme of the Act. I have already indicated (paragraph 6.9) that on its face Raytheon's application is incompatible with the Act, but I agree with President Morris of VCAT (in the Boeing Australia case *ibid*, at paragraph 31) that in considering this question I must also take into account the reasonableness of the conduct sought to be exempted because it is conceivable that an exemption may not always be inappropriate if sought for reasons unrelated to the objectives of the Act.

6.9.3 Thirdly, I need to consider what interests, including any overriding public interest, might arise in the application which would justify the granting of the exemption. In the context of principles two and three above some aspects of "reasonableness" and "interests" are not mutually exclusive so a discussion of both principles may overlap. This is especially so if the "reasonable limitations test" advanced by the Victorian Equal Opportunity Commission in Boeing (*ibid*, paragraph 34) is adopted (as I propose to do) in the analysis of those issues. The test proposes a consideration of:

- the nature of the right to equality and freedom from discrimination;
- the importance of the purpose that is the reason for the proposed exemption;
- the nature and extent to which the proposed exemption limits the right to equality and freedom from discrimination;
- whether in fact the proposed exemption is in fact necessary for and achieves the identified purpose;
- whether or not there is a reasonable alternative to the proposed exemption that will achieve the identified purpose with no, or a lesser, restriction on the right to equality and freedom from discrimination.

6.10 Under section 91(2) of the Act the applicant Raytheon has the burden of raising and proving, on the balance of probabilities, that the exemption applies.

7. ANALYSIS AND FINDINGS

7.1 I have already found (paragraph 6.9.1) that the threshold principle of necessity laid down in Fernwood (*ibid*) has been met. Accordingly I need

to further consider this exemption application in accordance with paragraphs 6.9.2 and 6.9.3.

- 7.2** I find that the conduct sought to be exempted by Raytheon is clearly outside the terms of the Act, but as we have seen there are other considerations which I must take into account in deciding whether the exemption sought is reasonable.
- 7.3** In Raytheon's view it is acting reasonably because the only way it can both meet its contractual obligations to the Commonwealth of Australia and comply with US legislation restricting the transfer of ITAR-controlled materials is to obtain exemption from Australian/NT anti-discrimination legislation. In an ideal world Raytheon would conduct itself in such a way as to comply with the Act without exemption, but the rigid requirements of the US Department of State force Raytheon to reluctantly seek exemption out of necessity.
- 7.4** Raytheon's belief in the reasonableness of its behaviour is reinforced by its determination if the exemption is granted to minimise the impact of its discriminatory behaviour through such measures as continuing to strive for permission from the US government for non-authorized workers to access ITAR-controlled material, continuing to appraise the US government (through DDTC) of the conflict between ITAR requirements and Australian discrimination laws, attempting to minimise the amount of personal information required from workers in the future, and taking all reasonable steps to ensure that any workers adversely affected by the proposed exemption order will not lose their employment or any other benefits but will be transferred to another position not requiring access to ITAR-controlled material.
- 7.5** Moreover Raytheon already has in place comprehensive policies addressing discrimination and diversity.
- 7.6** It is of course not a reasonable option for Raytheon to attempt to continue its defence contract-related operations without the necessary approvals authorised under the ITAR. Clauses 42 and following of Mr Jones' said affidavit set out in no uncertain terms the serious consequences – including revocation of export licences without notice, 'debarment' from future use of ITAR-controlled materials, and massive civil and criminal penalties – for breaching the ITAR.
- 7.7** Other interests advanced by Raytheon which might justify granting the exemption include the maintenance of Australia's defence capabilities, the commercial benefit to Raytheon and Australia (and I presume by implication the NT, the commercial benefit to which was not specifically considered by Raytheon), and the maintenance of national security.
- 7.8** Raytheon warns that a refusal to grant the exemption would result in a substantial interference with Australia's defence capabilities because current and future defence projects requiring access to ITAR-controlled materials will go offshore (probably to the US), the Commonwealth of Australia and its Defence Department will accordingly be forced to bear

increased costs and delays in defence related projects, and as a result the defence-related industrial base in Australia will be eroded.

7.9 Also, Raytheon predicts that an economic downturn will ensue if an exemption refusal prevents it from operating projects in Australia using ITAR-controlled materials. In this regard Raytheon claims to have “sales figures” nationally of over \$300 million for 2006, and a national workforce of 1100 people. Raytheon asserts that restrictions on the use of ITAR-controlled material “could directly impact” 50% of Raytheon’s Australian workforce (see clause 60 Jones affidavit), that current Raytheon business would suffer because of Raytheon’s lessened ability to undertake contracts, and that this would have significant national economic implications due to negative flow-on effects on Raytheon’s potential employees, contractors and suppliers. In addition Raytheon says that a likely consequence of a refusal to grant the exemption is that its ability to continue to support a range of community projects (eg charities, sporting teams, disability support organisations and research institutes) will be compromised.

7.10 Finally Raytheon says that the foregoing is “relevant to and important for Australia’s national security”. This assertion is not argued or addressed in any way. I presume that it means that US government restrictions on ITAR-controlled materials enhance our national security and/or that the negative impact of an exemption refusal on the national economy will compromise Australia’s defence capability and thereby detrimentally affect national security.

7.11 I accept that Raytheon reluctantly finds itself caught between (on Raytheon’s own admission) the discriminatory requirements of a foreign power and the prohibitions against discrimination under the Act. I accept that Raytheon has no choice in the circumstances but to seek exemption from the Act in respect of the discriminatory conduct required by the US government. I accept that if the exemption is granted Raytheon will genuinely seek to take every reasonable step to minimise the impact of its discriminatory behaviour (infra paras 7.2-7.6 inclusive). Also I have seen in the supporting materials that Raytheon, like most other modern companies, currently operates comprehensive discrimination and diversity policies. However I find that this case does not turn on the reasonableness or otherwise of Raytheon’s behaviour, but on the weighing up of the various interests, including the public interest, that arise in the application due to the discriminatory impact of the conduct sought to be exempted.

7.12 Raytheon asserts (infra paras 7.7-7.9 inclusive) that a failure to grant the exemption would substantially undermine Australia’s defence capabilities, and lead to a downturn in the defence-related economy. I accept that Raytheon’s economic and defence predictions are made on oath, but nonetheless they are unproven and unsupported by evidence. For instance there is nothing before me to indicate how much of Raytheon’s reputed \$300 million in national sales is attributable to contracts involving ITAR-controlled materials, and how much is not. There is no evidence of the amount of time lost and the level of cost increase occasioned by defence projects requiring access to ITAR-controlled materials going

offshore, and no evidence of the level of impact of predicted negative flow-on effects to Raytheon suppliers and contractors. I accept that these indicators might be difficult to measure and that there is considerable public interest in employment and economic progress, but I do not believe that Raytheon has done enough to convince me of the accuracy of its economic forecasts at a national level, and I am unable to find for Raytheon on this point.

7.13 Raytheon has drawn attention (paragraph 80) to a link between economic downturn and national security. This assertion is unsupported by evidence or discussion. In my view the important subject of national security deserves a rigorous analysis. As Raytheon has made no attempt beyond mere assertion to convince me of the accuracy of this proposition I do not accept it. I cannot accept that the economic downturn described by Raytheon would compromise national security to any greater extent than the already existing danger to national security presented by Australia's inability to defend itself from external threat without assistance. No argument has been advanced by Raytheon that economic downturn in the NT will adversely impact on security nationally. In short Raytheon has failed to convince me that Australia would be any less secure nationally without the NT exemption.

7.14 The imprecision of Raytheon's supporting economic evidence means that I am unable to assess the significance of its forecast of economic downturn for the defence/technology sector nationally. By comparison with the NT however it is likely that economic downturn through loss of defence contracts would have greater impact (and generate greater public interest) on the bigger Australian states because of their larger defence sector workforce. This was of course one of the factors which persuaded various interstate tribunals to grant in the public interest similar (to that of Raytheon) exemption applications brought by other defence-related contracting companies (eg ADI Limited (ibid) VCAT; ADI Ltd and Commissioner for Equal Opportunity (ibid) WASAT; Boeing Australia Holdings Pty Ltd [2003] QADT 21; Boeing Australia Holdings Pty Ltd [2007] VCAT).

7.15 Raytheon submits (Jones affidavit clauses 7, 63 and exhibit 1 thereto) that its NT workforce numbers 253 people in Alice Springs and that the subject of its NT defence contracts is "Patrol Boat In-Service Support". I presume that patrol boat support is Darwin-based, which would increase the number of NT-based Raytheon employees, but I am not told. I presume that Raytheon's Alice Springs workforce is linked in some way to Pine Gap Joint Defence Facility but I am not told. There is nothing before me to indicate what proportion of Raytheon's NT-based defence contracts are dependant on ITAR-controlled material nor is anything before me as to whether the loss of defence contracts might detrimentally affect Raytheon's NT-based suppliers and contractors. In fact Raytheon has made no attempt whatsoever to demonstrate or estimate how its forecasts of economic downturn nationally will specifically impact on the NT, which is after all the limit of my jurisdiction. There is insufficient evidence to persuade me to find that Raytheon's prediction of unsavoury economic consequences nationally for failure to grant the exemption also applies to the NT, and I do not so find.

- 7.16** In any event there is no evidence before me that the impact on the NT economy of a reduction in those Raytheon defence contracts which require access to ITAR-controlled materials will be commercially significant. Perhaps this is to be expected given the relatively modest extent of Raytheon's NT operations and the small number of its employees in the NT (ie. importantly, job losses, if any, will be small).
- 7.17** Also I am not persuaded, from an NT perspective, that a reduction in Raytheon's defence contracts will necessarily compromise Raytheon's ability to provide philanthropic support for community projects (see paragraph 7.9). There is no evidence before me about Raytheon's involvement in NT-based community projects. Evidence of Raytheon's community work (Jones affidavit, clause 66) is directed towards projects outside the NT and I think it unlikely that any loss of NT revenue will affect the latter.
- 7.18** Accordingly, in the process of weighing up the public interest in the NT in granting the exemption from an economic point of view against the public interest in projecting NT citizens from unfair discrimination I find that the impact of loss of defence contracts resulting from an exemption refusal would not be as significant as Raytheon contends. In other words the potential for economic loss and the potential for loss of NT jobs due to the need to relinquish defence contracts incorporating ITAR controlled materials is likely to be minimal. Moreover there is no evidence that Raytheon will be forced to shut down its NT operation. It may need to look outside the NT to perform those of its contracts requiring access to ITAR-controlled materials.
- 7.19** In considering Raytheon's submissions and the paucity of evidence in support thereof, I am unable to completely dismiss the conclusion that Raytheon's application for exemption is based on convenience rather than necessity. The reason for the absence of economic downturn for Australia and the NT may be that the evidence does not presently exist, so that the exemption application is precautionary to minimise inconvenience to Raytheon in the event that the need for exemption might actually arise in the future.
- 7.20** It appears that the evidence may only be sufficient to support the proposition that Raytheon itself will suffer commercial disadvantage if the exemption is refused and Raytheon is required to forego some of its defence-related contracts. Commercial advantage is prima facie inconsistent with the objectives of the Act. All the case authorities cited however agree that if granting an exemption creates a commercial advantage for the applicant then it is still appropriate to consider "commercial interest" alongside any other interests in weighing up the costs and benefits of the exemption. Nonetheless it is also clear that if the only benefit of the exemption is a commercial advantage to the applicant then the exemption is inappropriate. (Fernwood Case ibid page 78805.)
- 7.21** In relation to the public interest in compliance with, rather than exemption from, prohibitions against discrimination, the clear purpose of the Act is to protect persons from unfair discrimination (supra para 6.2) including discrimination based on various categories of "race" amongst which are

“nationality” or “national origin” (infra Statutory Provisions section 4). Statutory protections against racial discrimination are in the public interest because of the social damage to the broader community that racial discrimination can cause, and because of the psychological effects on some of its victims.

7.22 In spite of its vast area the NT population of 192,898 is small by comparison with other Australian states. The NT prides itself on its uniquely harmonious and conspicuous cultural mix of original Australians and their descendants and arrivals from overseas during the last 219 years and their descendants. NT residents of overseas nationality amount to 14% of the overall NT population. 44% of the NT population speak a language other than English at home – well exceeding the proportion for the rest of Australia which stands at 29.10%. Fully 28% of NT’s population is of Aboriginal and Torres Strait Islander descent. Consequently every day life in the NT contains a relatively heavy emphasis on matters racial and cultural. Race issues are never far from the surface. (All statistics in this para derived from ABS Census 2006.)

7.23 With a population exhibiting the foregoing features public interest in protection from racial discrimination is likely to be higher in the NT than in the rest of Australia. In the absence of overriding financial or other interests it would be especially inappropriate in race-conscious NT to approve an exemption application which in effect authorises race-based distinction in employment. I find that in the NT the public interest is better served by the avoidance of racial discrimination and I reject Raytheon’s application for exemption. I also reject the notion, implicit in Raytheon’s application, that suitability for employment in the area of defence related manufacturing and technology should primarily depend on race rather than ability to perform the duties of a particular job.

8. CONCLUDING REMARKS

8.1 President Morris (VCAT) suspected that the ITAR is misconceived (Boeing Aust Case VCAT 2007, para 41). I share his concerns. While it will make not the slightest difference to US policy, it is fatuous to presume that people of a particular racial background behave in a predictable way. It is futile to design policy containing the presumption that race-based restrictions will enhance US or corporate security.

8.2 Even though it appears to be beyond Raytheon’s power to persuade the US government to change its ITAR requirements, there are lawful security measures which Raytheon could take to achieve the desired result without resorting to discrimination as follows:

- restrict access to ITAR controlled material based on work record, experience, time of service, internal security clearance (eg passport, visa irregularity checks for all employees) rather than race-based restriction;
- screen employees without stereotyping like many other employers – criminal history checks and integrity checks for every employee;

- seek job references from every employee;
- bag inspections, inwards and outwards, for all employees;
- require all employees accessing ITAR-controlled materials to execute non-disclosure agreements with consequences for breach; and
- minimise the number of persons required to access ITAR-controlled materials so as to lower the perceived security risk.

Essentially this is the approach which found favour with the Victorian Equal Opportunity Board in City of Brunswick – re Application for Exemption from Provisions of Equal Opportunity Act (1992) EOC 92-450 where an application for exemption was rejected as unreasonable because lawful alternatives to obtain the same result were available.

8.3 In view of the foregoing I reject Raytheon’s application for exemption from the provisions of the Act.

**TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER**

STATUTORY PROVISIONS

“3. Objects

The objects of this Act are –

- (a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute;
- (b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannuation; and
- (c) to eliminate sexual harassment.

4. Interpretation

- (1) In this Act, unless the contrary intention appears –

"accommodation" includes –

- (a) business premises;

- (b) a house or flat;
- (c) a hotel or motel;
- (d) a boarding house or hostel;
- (e) a caravan or caravan site;
- (f) a mobile home or mobile home site;
- (g) a camping site; and
- (h) a building or construction site;

"advertisement" means every form of advertisement or notice, however displayed, and whether or not displayed to the public, and includes an advertisement –

- (a) in a newspaper or other publication;
- (b) by television or radio;
- (c) by display of notices, signs, labels or goods;
- (d) by distribution of samples, circulars, catalogues, price lists or other material; and
- (e) by exhibition of pictures, models or films;

"artificial fertilisation procedure" means any artificial insemination procedure or in vitro fertilisation procedure;

"artificial insemination procedure" means a procedure where human sperm are introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilisation procedure;

"attribute" means an attribute referred to in section 19;

"child" means a person who has not attained the age of 18 years;

"club" means an incorporated or unincorporated association of not less than 30 members that –

- (a) is established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or any other similar lawful purpose;
- (b) provides and maintains its facilities, wholly or partly, from funds of the association; and
- (c) sells or supplies liquor for consumption on its premises;

"Commissioner" means the person appointed under section 6 to be the Anti-Discrimination Commissioner and includes a person appointed under section 11 to act as the Commissioner, when so acting;

"committee of management", in relation to a club, means the group or body of people, by whatever name called, that manages the affairs of the club;

"complainant" means the person making a complaint and includes a person joined as a complainant under section 73;

"complaint" means a complaint made under Part 6;

"document" includes –

- (a) paper or other material on which there is writing;
- (b) paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) an article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;

"educational authority" means the body or person administering an educational institution;

"educational institution" means a school, college, university or other institution at which any form of training or instruction is provided and includes –

- (a) a training institution within the meaning of the *Training Guarantee (Administration) Act 1990* of the Commonwealth; and
- (b) a place at which training or instruction is provided by an employer;

"guide dog" means a dog that is trained to provide assistance to a person who has a visual, hearing or mobility impairment;

"impairment" includes –

- (a) the total or partial loss of a bodily function;
- (b) the presence in the body of an organism which has caused or is capable of causing disease;
- (c) the presence in the body of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease;
- (d) total or partial loss of a part of the body;
- (e) the malfunction or dysfunction of a part of the body;
- (f) the malformation or disfigurement of a part of the body;

- (g) reliance on a guide dog, wheelchair or other remedial device;
- (h) physical or intellectual disability;
- (j) psychiatric or psychological disease or disorder, whether permanent or temporary; and
- (k) a condition, malfunction or dysfunction which results in a person learning more slowly than another person without that condition, malfunction or dysfunction;

"insurance" includes –

- (a) an annuity;
- (b) life assurance;
- (c) accident insurance; and
- (d) illness insurance;

"in vitro fertilisation procedure" means a procedure which –

- (a) is consequent on the removal of an egg from the body of a woman, and carried out for one or more of the following purposes:
 - (i) the fertilisation of the egg, within or outside her body;
 - (ii) the keeping or use of the egg with intent to derive from it an egg in the process of fertilisation or an embryo; or
 - (iii) the keeping or use of the egg in the process of fertilisation or embryo so derived; or
- (b) is directed at the introduction into the body of a woman of –
 - (i) an egg, whether produced by the woman or by another woman; or
 - (ii) an egg in the process of fertilisation or an embryo, whether produced by the woman or by another woman and whether or not fertilisation began outside the body into which it is introduced;

"irrelevant criminal record", in relation to a person, means –

- (a) a spent record within the meaning of the *Criminal Records (Spent Convictions) Act*; or
- (b) a record relating to arrest, interrogation or criminal proceedings where –
 - (i) no further action was taken in relation to the arrest, interrogation or charge of the person;

- (ii) no charge has been laid;
- (iii) the charge was dismissed;
- (iv) the prosecution was withdrawn;
- (v) the person was discharged, whether or not on conviction;
- (vi) the person was found not guilty;
- (vii) the person's finding of guilt was quashed or set aside;
- (viii) the person was granted a pardon; or
- (ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises;

"man" means a member of the male sex irrespective of age;

"marital status" means whether a person is –

- (a) single;
- (b) married;
- (c) married but living separately and apart from the person's spouse;
- (d) married, or has been married, to a particular person;
- (e) divorced;
- (f) widowed;
- (g) a de facto partner; or
- (h) the de facto partner, or was the de facto partner, of a particular person;

"near relative", in relation to a person, means –

- (a) a parent, child, grandparent, brother or sister of the person; or
- (b) the spouse or de facto partner of the person or a person referred to in paragraph (a);

"parent" includes a step-parent, adoptive parent, foster parent, guardian and a person who provides care, nurturing and support to a child;

"parenthood" means whether or not a person is a parent;

"pregnancy" includes child bearing capacity;

"prohibited conduct" means –

- (a) discrimination, other than discrimination exempted from the application of this Act;
- (b) sexual harassment;
- (c) victimisation;
- (d) discriminatory advertising;
- (e) seeking unnecessary information;
- (f) failure to accommodate a special need; or
- (g) aiding a contravention of this Act;

"race" includes –

- (a) the nationality, ethnic or national origin, colour, descent or ancestry of a person; and
- (b) that a person is or has been an immigrant;

"respondent", in relation to a complaint, means the person alleged in the complaint to have engaged in prohibited conduct and includes a person joined as a respondent under section 73;

"services" include –

- (a) access to or use of any land, place, vehicle or facility that members of the public are, or a section of the public is, permitted to use;
- (b) banking or the supply of loans, finance, credit guarantees, hire purchase schemes or any other type of financial accommodation;
- (c) services connected with the selling or leasing of an interest in land;
- (d) recreation, including entertainment, sports, tourism and the arts;
- (e) the supply of refreshments;
- (f) services connected with transport and travel;
- (g) services of any profession, occupation, trade or business; and
- (h) services provided by a government, statutory corporation, a company or other body corporate in which a government has a controlling interest, or a council or community government council within the meaning of the *Local Government Act*,

but does not include insurance and superannuation;

"sexuality" means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality;

"supervision", in relation to a child, means to oversee or superintend the execution of or performance of work or other tasks by the child;

"woman" means a member of the female sex irrespective of age;

"work" includes work –

- (a) in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment);
 - (b) under a contract for services;
 - (c) remunerated in whole or in part on a commission basis;
 - (d) under a statutory appointment;
 - (e) by a person with an impairment in a sheltered workshop; and
 - (f) under a guidance program, vocational training program or other occupational training or retraining program.
- (2) For the purposes of this Act, a person may be discriminated against on the ground of race even if the person is, in addition to that race, of one or more other races.
 - (3) For the purposes of this Act, trade union or employer association activity shall be construed to include membership or non membership of a trade union or employer association and a lack or absence of trade union or employer association activity.
 - (4) For the purposes of this Act, religious belief or activity shall be construed to include Aboriginal spiritual belief or activity.
 - (5) For the purposes of this Act, political opinion, affiliation or activity shall be construed to include a lack or absence of political opinion, affiliation or activity.
 - (6) For the purposes of this Act, refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure.
 - (7) Unless the contrary intention appears, a reference in this Act to a person includes a reference to an unincorporated association.
 - (8) A reference in this Act to the provision of a service does not include the carrying out of an artificial fertilisation procedure.

13. Functions of Commissioner

- (1) The Commissioner has the following functions:
 - (a) to carry out investigations and hearings into complaints and endeavour to effect conciliation;

- (b) to examine Acts and regulations and proposed Acts and regulations of the Territory to determine whether they are, or would be, inconsistent with the purposes of this Act, and to report the results of such examinations to the Minister;
- (c) to institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination and the effects of discrimination;
- (d) to consult with organisations, departments and local government and community government bodies and associations to ascertain means of improving services and conditions affecting groups that are subjected to prohibited conduct;
- (e) to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds in this Act;
- (f) to examine practices, alleged practices or proposed practices of a person, at the Commissioner's own initiative or when required by the Minister, to determine whether they are, or would be, inconsistent with the purposes of this Act, and, when required by the Minister, to report the results of the examination to the Minister;
- (g) to promote in the Territory an understanding and acceptance, and public discussion, of the purposes and principles of equal opportunity;
- (h) to promote an understanding and acceptance of, and compliance with, this Act;
- (j) to promote the recognition and acceptance of non-discriminatory attitudes, acts and practices;
- (k) to promote within the public sector the development of equal opportunity management programs;
- (m) to prepare and publish guidelines and codes of practice to assist persons to comply with this Act;
- (n) to provide advice and assistance to persons relating to this Act as the Commissioner thinks fit;
- (p) to advise the Minister generally on the operation of this Act;
- (q) if the Commissioner considers it appropriate to do so, to intervene in a proceeding that involves issues of equality of opportunity or discrimination with the leave of the court hearing the proceeding and subject to any conditions imposed by the court;
- (r) such functions as are conferred on the Commissioner by or under this or any other Act;
- (s) such other functions as the Minister determines.

- (2) The Commissioner shall not regard, for the purposes of subsection (1)(b), an Act or regulation or a proposed Act or regulation of the Territory as being inconsistent with the purposes of this Act by reason of a provision of the Act or regulation or proposed Act or regulation that is included solely for the purpose of promoting equal opportunity for a group of persons who are disadvantaged or have a special need because of any of the attributes referred to in section 19.
- (3) The Commissioner shall not regard an act or practice as being inconsistent with the purposes of this Act where the act or practice is done or engaged in solely for the purpose referred to in subsection (2).

19. Prohibition of discrimination

- (1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:
 - (a) race;
 - (b) sex;
 - (c) sexuality;
 - (d) age;
 - (e) marital status;
 - (f) pregnancy;
 - (g) parenthood;
 - (h) breastfeeding;
 - (j) impairment;
 - (k) trade union or employer association activity;
 - (m) religious belief or activity;
 - (n) political opinion, affiliation or activity;
 - (p) irrelevant medical record;
 - (q) irrelevant criminal record;
 - (r) association with a person who has, or is believed to have, an attribute referred to in this section.
- (2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.

20. Discrimination

- (1) For the purposes of this Act, discrimination includes –

- (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and
 - (b) harassment on the basis of an attribute,
in an area of activity referred to in Part 4.
- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –
- (a) an attribute;
 - (b) a characteristic imputed to appertain to an attribute; or
 - (c) a characteristic imputed to appertain generally to persons with an attribute,
less favourably than a person who has not, or is believed not to have, such an attribute.
- (3) For discrimination to take place, it is not necessary that –
- (a) the attribute is the sole or dominant ground for the less favourable treatment; or
 - (b) the person who discriminates regards the treatment as less favourable.
- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

25. Discriminatory advertising

A person shall not publish, cause to be published or authorise the publication of an advertisement which promotes or expresses or could reasonably be understood to promote or express prohibited conduct or an intention to engage in prohibited conduct.

26. Unnecessary information

- (1) A person shall not ask another person, whether orally or in writing, to supply information on which unlawful discrimination might be based.
- (2) Subsection (1) does not apply to a request that is necessary to comply with, or is specifically authorised by –
 - (a) a law of the Territory or the Commonwealth;
 - (b) an order of a court;
 - (c) a provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment;

- (d) a provision of an industrial agreement; or
 - (e) an order of the Commissioner.
- (3) Subsection (1) does not apply if the person proves, on the balance of probabilities, that the information was reasonably required for a purpose that did not involve discrimination.

31. Discrimination in work area

- (1) A person shall not discriminate –
- (a) in deciding who should be offered work;
 - (b) in the terms and conditions of work that is offered;
 - (c) in failing or refusing to offer work;
 - (d) by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or
 - (e) in developing the scope or range of a program referred to in paragraph (d).
- (2) A person shall not discriminate –
- (a) in any variation of the terms and conditions of work;
 - (b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker;
 - (c) in dismissing a worker; or
 - (d) by treating a worker less favourably in any way in connection with work.
- (3) A person shall not discriminate against a worker on the grounds of the worker's religious belief or activity by refusing the worker permission to carry out a religious activity during working hours being an activity –
- (a) of a kind recognized as necessary or desirable by persons of the same religious belief as that of the worker;
 - (b) the performance of which during working hours is reasonable having regard to the circumstances of the work; and
 - (c) that does not subject the employer to any detriment.

53. Acts done in compliance with legislation, &c.

Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by –

- (a) an Act or regulation of the Territory;

- (b) an Act or regulation of the Commonwealth;

...

59. Commissioner may grant exemptions

- (1) A person may apply to the Commissioner for an exemption from this Act in respect of discriminatory conduct that would otherwise contravene this Act.
- (2) A person to whom an exemption under this section has been granted may, before the expiration of the exemption, apply to the Commissioner for the renewal of the exemption.
- (3) In considering an application under subsection (1) or (2), the Commissioner may have regard to –
 - (a) the desirability of certain discriminatory conduct being permitted to redress the effect of past discrimination; and
 - (b) any other factor that the Commissioner considers relevant.
- (4) After considering an application under subsection (1) the Commissioner may grant an exemption from this Act in respect of discriminatory conduct, or may refuse the application.
- (5) The Commissioner –
 - (a) may grant an exemption under subsection (4), subject to such conditions as the Commissioner thinks fit, for a period of not longer than 3 years; and
 - (b) may revoke an exemption granted under subsection (4) on breach of a condition to which the exemption is subject.
- (6) After considering an application under subsection (2) the Commissioner may renew the exemption for a further period not longer than 3 years or may refuse to renew the exemption.
- (7) The Commissioner shall cause a notice of the grant, renewal or revocation of an exemption under this section to be published in the *Gazette*.
- (8) A notice under subsection (7) of the grant or renewal of an exemption shall specify –
 - (a) the period for which the exemption is granted or renewed; and
 - (b) the conditions, if any, to which the exemption is subject.
- (9) If the Commissioner refuses to grant or renew an exemption under this section, the Commissioner shall provide to the applicant a written statement of the reasons for the refusal.”

91. Burden and standard of proof

- (1) ...

- (2) Where a respondent wishes to rely on an exemption, it is for the respondent to raise and prove, on the balance of probabilities, that the exemption applies.