

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT REFERENCE NO.A102/2007

CATCHWORDS

Exemption – defence contracts – requirements of US security legislation – Boeing applied – exemption granted.

APPLICANT: Raytheon Australia Pty Ltd (CAN 063709295)
and Ors

WHERE HELD: Melbourne

BEFORE: Her Honour Judge Harbison

HEARING TYPE: Exemption Hearing

DATE OF HEARING: 17 October 2007

DATE OF ORDER: 17 October 2007

CITATION: Raytheon Australia Pty Ltd (CAN 063709295)
& Ors Exemption Application (Anti-Discrimination) [2007] VCAT 2230

ORDERS

Pursuant to section 83(1) of the *Equal Opportunity Act* 1995 (VIC) (“the Act”), the Victorian Civil and Administrative Tribunal grants an exemption to the Applicants from the operation of sections 13, 14, 15, 100 and 195 of the Act on the following conditions:-

- (a) The exemption applies only in respect of actions or omissions which are reasonably necessary for the Applicants to meet the requirements of the Department of State of the United States of America, the United States Department of Commerce and the United States Federal Aviation Authority, contained in or referable to the International Traffic in Arms Regulations and the Export Administration Regulations (the **US Security Regulations**), so far as those requirements apply directly or indirectly to work carried on, or on behalf of, or at the request of, or under the control or supervision of, an Applicant.
- (b) For an Applicant to take the benefit of the exemption in relation to an action or omission which adversely affects an existing or potential employee or employee of a contractor, it must take reasonable steps to avoid or reduce the adverse effect. In particular, the Applicants are required, prior to taking any action permitted by this exemption order, to:-

- (i) assess the reasonableness of gaining a specific exemption for an employee, prospective employee or employee of a contractor, who does not satisfy the US Security Regulations;
- (ii) provide all current and prospective employees with:-
 - (A) express notice that they may be adversely affected by the exemption if they are not an Australian national or if they hold dual nationality and/or citizenship;
 - (B) a reasonable explanation in plain English of the nature of any adverse effects of such action to them;
 - (C) information about how they can apply for Australian citizenship; and
 - (D) information regarding their rights under the *Racial Discrimination Act* 1975 (Cth) and the *Equal Opportunity Act* (1995) (VIC), and, in particular, the complaints procedure under those Acts and the rights of aggrieved persons to take their complaints to the Victorian Civil and Administrative Tribunal and the (Australian) Human Rights and Equal Opportunity Commission.
- (iii) provide all current employees with ongoing and regular education and training in anti-discrimination, particularly race discrimination, and the internal and external procedures available to receive, investigate and resolve discrimination complaints and grievances and, in particular, those relating to race;
- (iv) provide to the Applicants' contractors:-
 - (A) express notice that the contractor's employees may be adversely affected by the exemption if they are not an Australian national or if they hold a dual nationality and/or citizenship;
 - (B) a document containing a reasonable explanation in plain English of the nature of this exemption order that the contractor may provide to the contractor's employees; and
 - (C) guidance to enable the contractor to conduct training in anti-discrimination and particularly race discrimination.
- (v) implement comprehensive anti-discrimination policies governing all aspects of the work and workforce, including management, and with particular regard to race discrimination.
- (c) The Applicants are required to provide a written report to the Victorian Civil and Administrative Tribunal and the Victorian Equal Opportunity Tribunal and Human Rights Commission every six months from the date of this exemption order, over the three year period specified in the order, detailing:-
 - (i) the steps they have taken to comply with the above conditions;

- (ii) the number of persons affected by this exemption order, the nature of the effects, and the steps taken to redress any adverse effects; and
- (iii) implementation and compliance generally with the terms of this exemption order.

The Applicants' compliance with these orders as demonstrated in its reports will be a factor considered by the Victorian Civil and Administrative Tribunal in connection with any future renewal of these orders.

This exemption is to remain in force until 3 years from the date granted.

SCHEDULE OF APPLICANTS

1. Raytheon Australia Pty Ltd;
2. Aerospace Technical Services Pty Ltd;
3. Australian Maritime Surveillance Pty Ltd;
4. Aeronautical Consulting, Training & Engineering Pty Ltd;
5. Other companies which are now or may in the future be related entities to Raytheon Australia Pty Ltd within the meaning of the *Corporations Act* (2001) (CTH); and
6. Officers and employees of any company which is otherwise an Applicant.

**HER HONOUR JUDGE HARBISON
VICE PRESIDENT**

APPEARANCES:

For Applicant

Mr Peter Arthur, Solicitor,
with Ms Jenni Priestly, Solicitor.

REASONS FOR DECISION

- 1 The Applicant Companies apply for an exemption under section 83 of the *Equal Opportunity Act 1995*.
- 2 Each of the Companies have entered into contracts with the Commonwealth of Australia Department of Defence and with other companies in Australia and in the United States of America, to provide services to the Australian and American Armed Forces. Some of the services involved the use of what is known as “Controlled Material”. Some of the services involve the manufacture of arms and arms technology.
- 3 In order to be able to source Controlled Material and to undertake defence projects in the American market, the Applicant Companies are required, as a condition imposed by the United States of America, to comply with certain US legislation. The principal legislation is the International Traffic in Arms Regulations and the Export Administration Regulations. The Applicant Companies cannot undertake a substantial part of their business at all unless that legislation is complied with.
- 4 The legislation requires the Companies to employ only nationals of certain countries on projects that require access to Controlled Material, or which are Controlled Projects. For these companies to discriminate in this way against or in favour of certain nationalities is a clear breach of the *Equal Opportunity Act*.
- 5 The Applicant Companies have not previously obtained an exemption in respect of this conduct. In making this application, they join a growing number of companies involved in defence related work who have had to similarly seek exemption in order to trade with the United States of America.
- 6 The companies have made this application in each other State of Australia, and been granted an exemption on roughly the terms sought in this application.
- 7 In support of the application, the Applicants have filed a comprehensive folder of submissions, together with an affidavit of Scott Jones, Director of Legal Affairs of Raytheon Australia Pty Ltd, and containing many exhibited documents.
- 8 In addition, I have been provided with a letter of support for this application from Stephen J Gumley, Chief Executive Officer, Defence Materiel Organisation, of the Australian Government Department of Defence.
- 9 I heard this application on 14 September 2007. I had previously ordered that this application be widely advertised, and notice of the application be forwarded to the relevant unions. Neither the Applicant or the Tribunal have received any submissions in response to the application. The Equal Opportunity and Human Rights Commission did not seek to intervene in

this application. There was no appearance for any person at the hearing of the application, except for the representatives of the Applicant.

- 10 I indicated on the hearing of the application that I would grant the exemption sought. I now provide my reasons.
- 11 This is a similar application to that dealt with by the President of this Tribunal in *Boeing Australia Holdings Pty Ltd* (2007) VCAT 532. I have also dealt more recently with a similar application in *Re ADI*. It is not necessary to repeat the matters canvassed in those cases. It is clear that an overwhelming public interest case has been made out for the grant of the exemption.
- 12 There were three main reasons put forward by the Applicant for the grant of this exemption. Broadly, they were as follows.
- 13 Firstly, it was said that the national security of this country required that defence contracts should be filled by companies based in Australia, and employing Australian residents.
- 14 Secondly, it was said that the projected increase in jobs as a result of the Applicants' successful tender for these contracts, both as employees of the Applicant, and as employees of contractors engaged by the Applicants, would be of benefit to the regions of Victoria in which manufacturing was located. It was said that it was in Victoria's interest to host large defence projects such as the projects covered by the contracts in this case.
- 15 And thirdly, it was said that approval of the exemption would promote equity between competitors. Boeing and ADI are direct competitors with Raytheon in the market of defence contracts. It would be inequitable for an exemption to be given to some, and not to others competing in the same market.
- 16 In my view, each of these arguments carry a great deal of weight. In the absence of any opposition at all to the granting of the exemption, it is my view that the exemption should be granted in the terms sought.
- 17 Although the parent company of the Applicant, based in the United States, is a major defence manufacturer and thus has much experience in the application of the regulations to defence work carried out in that country, as I understand it the Applicants have no previous experience in Australia of the way in which US regulations will affect the recruitment and allocation of personnel within their Australian corporate structure.
- 18 At present, the Applicants have a small workforce in Victoria. The Applicant Companies have been successful in tendering for major Commonwealth defence contracts, and anticipate that it will be necessary to establish a number of workforce "hubs" or "nodes" in various States, including Victoria, so as to garner the specialised workforce it needs to fulfil those contracts. It is envisaged that a substantial number of new jobs will be created in Victoria, although no final decision on location has yet

- been made. Those jobs will be advertised within Australia. There is no present intention for them to be advertised overseas.
- 19 In addition, the Applicant envisages that it will need to contract out some of its work to contractors who are yet to be appointed. The Applicant recognises that any such contractors will also have to comply with the US regulations.
 - 20 The orders I have made will not be effective to cover the employment practises of the Applicants' subcontractors. I have indicated to the Applicants' representatives that they will need to make provision in tender documents for subcontractors that those subcontractors obtain their own advice as to the need to obtaining exemption in similar terms.
 - 21 I have advised the Applicants that on the next occasion that an application for exemption is made, the provisions of the *Victorian Charter of Human Rights and Responsibilities Act* 2006 will be operative. By reason of this Act, the Tribunal in considering any further exemption application, will be required to interpret the relevant provisions of the *Equal Opportunity Act* in a way that is compatible with human rights, as those rights are defined in the Charter. International law and the judgments of domestic, foreign and international Courts and Tribunals relevant to a human right may all be considered when interpreting a statutory provision.
 - 22 In its submission to the Tribunal in the *Boeing* case, which was also forwarded to the Tribunal in respect of this case, the Commission has dealt in some detail with the likely application of the charter to exemption applications and the principles to be applied in future determinations.
 - 23 For the purpose of this application, the Charter does not operate. I, however, have pointed out its application to the representatives of the Applicants on the hearing of this application, and have warned them that any further application will have to be framed to take its terms into account.

**HER HONOUR JUDGE HARBISON
VICE PRESIDENT**