

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI-DISCRIMINATION LIST

VCAT Reference: A292/2010

Re: the Victorian Civil & Administrative Tribunal’s consideration of an application by the Raytheon Australia Pty Ltd (ACN:063709295) for an exemption from various aspects of the prohibition on discrimination in the *Equal Opportunity Act 1995* (Vic)

**SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY &
HUMAN RIGHTS COMMISSION**

A. BACKGROUND

1. The Victorian Equal Opportunity and Human Rights Commission (‘Commission’) has the following functions under the *Equal Opportunity Act 1995* (Vic) (‘EOA’)¹:
 - (a) to establish policies and issue guidelines and directions on the manner in which conciliation procedures under this Act should be conducted;
 - (b) to receive and investigate complaints on the manner in which conciliation procedures under this Act have been or are being conducted;
 - (c) to establish and undertake information and education programs;
 - (d) any other functions conferred on it by or under this Act or any other Act, including the Charter of Human Rights and Responsibilities.
2. The Commission also performs a range of functions under the *Charter of Human Rights and Responsibilities Act 2006* (‘Charter’).² In its performance of those functions the Commission

¹ Section 161 *Equal Opportunity Act 1995* (Vic).

² These are listed in section 40 and 41 of the Charter.

aims to promote the principles underpinning the Charter, that are articulated in its preamble, and include:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

3. The Commission intervenes in this matter pursuant to its statutory power to do so in section 40 of the Charter. In intervening in this matter, we seek to assist the Victorian Civil and Administrative Tribunal ('the Tribunal') in its important role of applying and interpreting the Charter and the EOA. Although the Tribunal has extensive experience with the EOA, the Charter is still relatively new legislation and it is vital for courts and tribunals to engage with it and provide guidance to the community on what it means for them in practice.

4. Raytheon Australia Pty Ltd ('the applicant') has applied to the Tribunal for an exemption from the operation of the EOA that, if granted, would allow the applicant to:

(a) request existing and prospective employees and contract workers to provide:

(i) their personal information; and

(ii) any changes in the personal information that they have already provided or that may be required for ITAR compliance.

(b) restrict ineligible employees and contract workers from accessing ITAR controlled material;

(c) advertise positions with the applicant as being subject to an ability of the prospective employee or contract worker to obtain approvals for access to ITAR controlled material;

- (d) reject applications by prospective employees and contract workers which expose them to ITAR controlled material in circumstances where the individual concerned is ineligible;
- (e) remove existing employees and contract workers from positions and/or projects which expose them to ITAR controlled material in circumstances where they are ineligible; and
- (f) provide US sponsor companies and the US government with information relevant to the establishment of the eligibility of employees and contract workers of the applicant who require, or are likely to require, access to ITAR controlled material.

5. The applicant has previously applied for, and was granted, a similar exemption on 17 October 2007 by Judge Harbison. In deciding to grant the exemption Her Honor stated:³

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 Applicant's 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.

6. In granting that exemption Judge Harbison warned the applicant that its next exemption application would have to be framed to take into account the terms of the Charter:

21. I have advised 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,

³ Raytheon Australia Pty Ltd (ACN 063709295) & Ors Exemption Application (Anti-Discrimination) [2007] VCAT 2230.

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.

7. The Commission makes submissions in this matter in support of refusing the applicant's exemption application on the basis of the material currently before the Tribunal in support of the application.

B. DEVELOPMENTS IN THE LAW SINCE THE FIRST EXEMPTION

8. Since the 2007 exemption was granted to Raytheon, Justice Bell, then sitting as President of the Tribunal, undertook a detailed analysis of the interaction between the EOA exemption provision and ss 32 and 38 of the Charter in *Lifestyle Communities (No 3)* [2009] VCAT 1869 (*Lifestyle Communities*). Subsequently, the Court of Appeal in *Momcilovic* handed down a further Charter decision, not relating to exemptions but relevant to the interpretation of the EOA using s 32 of the Charter.⁴ The Supreme Court has also provided *obiter* guidance about the obligations of public authorities under s 38 of the Charter, which also post-dates the *Lifestyle Communities* decision and the last exemption decision in relation to this applicant.⁵ The Commission will outline below what these subsequent developments mean for the decision in *Lifestyle Communities*, which remains the leading decision on the interaction between the EOA exemption power and the Charter.
9. *Lifestyle Communities* considered the impact of both the obligations that the Charter imposes on public authorities (s 38) and the Charter's interpretation provision (s 32) on s 83 of the EOA. Justice Bell found that both provisions had the effect of requiring proposed exemptions that would limit the Charter's equality right to be decided on the basis of the criterion in s 7(2) of the Charter.

⁴ *R v Momcilovic* [2010] VSCA 50. This decision is currently on appeal to the High Court of Australia, which heard the appeal on 8, 9 and 10 February 2011. The High Court's decision is reserved.

⁵ *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 310.

10. Since the *Lifestyle Communities* decision, the Court of Appeal in *Momcilovic* has taken a different approach to applying the s 32 interpretation provision in the Charter.⁶ However, the approach to s 38 (the obligations of public authorities in the Charter) adopted by Justice Bell in *Lifestyle Communities* is not directly affected by *Momcilovic* and appears to be consistent with the only substantive Supreme Court guidance on s 38 provided in the *Castles* decision.⁷
11. These issues were the subject of consideration in the Tribunal's decision in *Peel Hotel Pty Ltd* Exemption Application (Anti-Discrimination) [2010] VCAT 2005 (*Peel Hotel*). In that decision Senior Member McKenzie discussed the context of s 83 of the EOA:

13. The context of the section is this. An exemption, as I have said, is for a limited and not an indefinite period, although it can be renewed. It is clear from s12 of the Act that while such an exemption operates, it takes the relevant conduct out of the prohibitions of the EO Act. Like the other sections of the EO Act, s35 of the *Interpretation of Legislation Act 1984* applies. That section tells us that we must prefer an interpretation (here, of s83) which promotes the Act's objectives.

14. The Act's objectives appear in s3. Some of those objectives appear appropriate to the Act's prohibitions, such as the elimination of discrimination as far as possible by prohibiting it on the basis of various attributes, or to provide redress against those who have been discriminated against. One of the objectives appears appropriate, in my view, to how the exemption provision is to work. That objective is the promotion of the recognition and acceptance of everyone's right to equality of opportunity.

15. Section 32 of the Charter tells us that all statutory provisions are, so far as is possible consistently with their purpose, to be interpreted in a way that is compatible with human rights. The Victorian Court of Appeal in *R v Momcilovic* has explained that this means that we must interpret statutory provisions like s83 of the EO Act using traditional principles of interpretation, but including the principles in s32 of the Charter. Among the possible interpretations, we must look for the interpretation that is human rights-compatible.

16. On one view, it might be said that a provision like s83, which confers a broad discretion, can always be interpreted in a human rights-compatible way. That can be achieved by always exercising the discretion given in a human rights-compatible way. It is true that there is perhaps no direct inconsistency between s83 and the Charter. But in my view, the subject of the exercise of the discretion must also be taken into account. That means to exercise s83 in the context of the particular exemption applied for. The task is to determine whether the discretion, if exercised in that particular context, would engage a human

⁶ *R v Momcilovic* [2010] VSCA 50 at [105].

⁷ *Castles v Secretary of the Department of Justice & Ors* [2010] VSC 310.

right, and then whether that proposal might constitute a reasonable limit on that human right, that is, whether there is a reasonable justification for any interference with the human right.

17. Section 38 of the Charter requires VCAT, as a public authority when making decisions in the exemptions jurisdiction, not to fail to give proper consideration to any relevant human right. The Victorian Supreme Court in *Castles v Secretary to the Department of Justice & ors* says that proper consideration will involve the Charter issues being seriously considered as part of the decision-making process and a consideration of what rights may be affected and if so, how, and a weighing of the relevant competing interests when determining whether there is a reasonably justified interference.

C. APPLYING S 32 OF THE CHARTER TO S 83 OF THE EOA

12. Section 32(1) of the Charter provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

13. Until such time as the High Court of Australia publishes its decision in *The Queen v Momcilovic*, which is currently reserved, the interpretive exercise set out in s 32 must be approached in the manner set out in *Momcilovic*. In that case the Court of Appeal rejected Justice Bell’s “stepped approach”, where the ordinary interpretation of a provision is ascertained first, without recourse to the Charter.

14. In *Momcilovic* the Court of Appeal made the following findings about the application of s 32 of the Charter:

- (a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.
- (b) Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is ‘possible’ is determined by the existing framework of interpretive rules, including of course the presumption against interference with fundamental rights (otherwise referred to as the ‘principle of legality’).
- (c) The presumption against interference with fundamental rights must now be

understood to extend to the protection and promotion of the human rights set out in the Charter.

- (d) Whether it is “possible” to give a statutory provision a meaning compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.
- (e) Justification under s 7(2) of the Charter becomes relevant only if the provision, so interpreted, breaches a right protected by the Charter.
- (f) Section 32 requires consideration of the purpose of the provision itself rather than the statutory scheme as a whole.⁸

15. As discussed in the *Peel Hotel* decision, to ascertain the meaning of s 83 of the EOA the Tribunal must apply s 32 of the Charter in conjunction with other relevant principles of statutory interpretation. However there are two aspects of the *Peel Hotel* decision that are inconsistent with the approach adopted in *Momcilovic*:

- 1. *Momcilovic* requires the Tribunal to search for the most rights consistent interpretation bounded by what is possible consistent with the purpose of *that specific section* not the legislation as a whole.
- 2. Further, the *Momcilovic* court expressly decided that a consideration of reasonable limitations was not part of the interpretive process under s 32 of the Charter. *Momcilovic* overrules *Lifestyle Communities* on these distinct points.

16. Whilst the exact methodology for applying s 32 of the Charter proposed in *Lifestyle Communities* no longer applies, many of the interpretative observations and conclusions that came out of that decision are still valid and can be applied when following the *Momcilovic* approach. In particular, the Commission commends to the Tribunal, Justice Bell’s observations about the nature and scope of the equality right at international law, and his approach to the ordinary meaning of s 83 of the EOA.

⁸ [2010] VSCA 50 at [35], [103]-[110].

17. When interpreting s 83 in *Lifestyle Communities* Justice Bell considered the background to the EOA exemption provision as it evolved through various iterations:

Turning to exemptions, from the start the power has been to grant temporary exemptions, subject to review and renewal as part of a scheme for both exceptions and exemptions. In respect of the 1977 Act, the Premier said in the second reading speech it was “intended that these exemptions should be reviewed from time to time so that they conform to changing social mores”. In respect of the 1984 Act, the Premier said the re-enacted provision “reiterates the current power of the Equal Opportunity Board to grant temporary exemptions from the provisions of the Act”. The 1995 Act widened the exceptions and re-enacted the exemption provision in its current form in s 83(1). It was not mentioned in the second reading speech but the explanatory memorandum described it as “similar to the existing procedure”.⁹

18. Justice Bell also made the following observations about the ordinary meaning of s 83 that are not disturbed by the *Momcilovic* decision:

Putting the Charter to one side, on my reading of the exemption provisions in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary.¹⁰

The function of the exemption power in s 83 can now be appreciated. Without a power of that nature, justifiable differential treatment not covered by an exception would be prohibited and actionable. The potential danger in the power can also be appreciated. If exemptions are granted too liberally and according to inappropriate principles, the profoundly important values expressed in the legislation could be undermined.¹¹

With great respect, I would find it difficult to reconcile the expansive view of the exemption power which was adopted in *Commissioner for Equal Opportunity v ADI Limited* and *Boeing Australia Holdings Pty Ltd* with the primary purpose of the equal opportunity legislation which was in issue. As regards the decision of Morris J, I cannot accept that the purpose of our *Equal Opportunity Act* permits the discretion to grant an exemption to be exercised for “achieving convenient, economic and practical outcomes”. That is a very wide formulation and seems to allow the discretion to be exercised on grounds

⁹ At [20].

¹⁰ At [30].

¹¹ At [32].

of expedience. That would seem to be inconsistent with the principled purposes of the legislation, even given the provisions for exceptions and exemptions. I am also mindful that the legislation should be interpreted consistently with Australia's international obligations where this is open. Article 26 of the ICCPR requires any differentiation to be objective, reasonable, for legitimate purposes under that Covenant and proportionate to that purpose. If there is ambiguity about the interpretation of s 83(1) in the context of the scope and purpose of the *Equal Opportunity Act*, it seems open to resolve it in favour of such a test, which I would adopt here.¹²

19. The Commission submits that consistently with general principles of statutory construction, the exemption power should be construed narrowly. It is well accepted that courts and tribunals should not impute an intention to abrogate or curtail fundamental rights. This must be "*clearly manifested by unmistakable and unambiguous language before rights are curtailed.*"¹³ Moreover, in accordance with ordinary principles of statutory construction, in determining the meaning of a statutory provision, regard should be had to the object, purpose and scope of the legislation¹⁴. Accordingly, Justice Bell's observations and analysis as to the historical context of the exemption power are instructive.
20. Justice Bell's ordinary interpretation of the exemption provision would only allow 'justifiable differential treatment not covered by any exception'. 'Justifiable' is determined by Justice Bell on the basis of the requirement in Article 26 of the *International Covenant of Civil and Political Rights* ('ICCPR') that any differentiation be objective, reasonable, proportionate and for legitimate purposes under the Covenant. This requirement is equivalent to the s 7(2) reasonable limits provision of the Charter.
21. The question for the Tribunal in this case then is whether there is any 'possible' interpretation of s 83 that respects Charter rights *in their unfettered form* (i.e. *without* at this point taking the extra step of considering interpretations that would be considered 'reasonable' under s 7(2) of the Charter). The Commission submits that the only interpretation of the exemption provision in the EOA that would prevent *any* limitation of the Charter's equality right is one that is limited to measures to assist or advance groups

¹² At [65].

¹³ *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 at [47] (French CJ) and authorities cited herein.

¹⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

disadvantaged because of discrimination within s 8(4) of the Charter ('proposed interpretation'). The Commission submits that this interpretation is not available in the circumstances of this case – the applicant is clearly not seeking to limit the equality right in such a way as to assist or advance groups disadvantaged because of discrimination. The Commission contends that the Applicant's proposed exemption application does not constitute a 'special measure' for the purposes of s 8(4) of the Charter.

22. Whether this interpretation is 'possible' depends on what the purpose of the provision is, and whether this proposed interpretation is consistent with it. Justice Bell's analysis of the extrinsic materials relevant to the exemption provision indicates that the purpose of the provision was to allow short-term exemptions that would be granted from time to time based on 'changing social mores' about what is acceptable differential treatment. This suggests that the purpose of the exemption provision may be broader than the proposed interpretation put forward in the paragraph above.
23. The Commission is not able to propose any other interpretation under s 32 that is more rights protective than that advanced upon ordinary principles of interpretation in the *Lifestyle Communities* decision. In the absence of this, Justice Bell's ordinary interpretation approach would only allow exemptions where a similar assessment to that required by s 7(2) of the Charter has been undertaken. The Commission will address this assessment in relation to the current application below, after first considering the Tribunal's own obligations under the Charter and what this means for the task at hand.
24. In summary, whilst *Momcilovic* remains the authority on the application of s 32 of the Charter, the Commission submits that in the circumstances of this case, s 83 of the EOA cannot be interpreted consistently with human rights. Instead the Tribunal should apply the ordinary interpretation arrived at by Justice Bell in the *Lifestyle Communities* decision, which uses a form of proportionality test based on Article 26 of the *ICCPR* to determine whether an exemption should be granted.

D. APPLYING S 38 OF THE CHARTER TO TRIBUNAL'S ROLE IN S 83 OF THE EOA

25. Section 38(1) of the Charter provides:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

26. Even if the Tribunal accepted the applicant's submission at [8.10] that the discretion in s 83 is completely unconfined, s 38 of the Charter makes it *unlawful* for the Tribunal to exercise this discretion in a manner that does not give *proper consideration* to the equality right and any other rights engaged by a proposed exemption (for example the privacy right).

27. The *Lifestyle Communities* decision was based upon both s 32 and s 38 of the Charter. Justice Bell's approach to applying s 38 of the Charter is not affected by the *Momcilovic* decision (which only considered s 32 of the Charter). Since the *Momcilovic* decision, the Supreme Court in *Castles* commented on the judicial task of considering whether a public authority has given 'proper consideration' under s 38, noting that there must be some evidence that 'the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified'.¹⁵ This accords with the approach to s 38 in *Lifestyle Communities* and in *Peel Hotel*.

28. In *Lifestyle Communities* Justice Bell found that the Tribunal is a public authority within s 4(1) of the Charter when exercising the discretion in s 83, giving it obligations under s 38 of the Charter.¹⁶ Consistent with *Castles*, Justice Bell considered that s 38 requires an assessment of the rights limitation against the countervailing interests under s 7(2) of the Charter.¹⁷ He notes:

The compatibility with human rights of the exercise of the discretion will be determined by reference to what (if any) human rights are engaged and whether any limits on human rights are both under law (legality) and reasonable and demonstrably justified (proportionality) in terms of s 7(2).¹⁸

29. The Commission submits that the obligations imposed by s 38 are mirrored in an analysis of the scope of the discretion in s 83 of the EOA. This is because they both incorporate a form

¹⁵ *Castles v Secretary to the Department of Justice* at [286].

¹⁶ At [46], [73] and [304].

¹⁷ At [306].

¹⁸ At [306].

of proportionality test. Any exemption that does not satisfy the proportionality test will be both *ultra vires* under the exemption power and unlawful under s 38 of the Charter.

F. THE RAYTHEON EXEMPTION

30. In assessing the current application, the Tribunal must consider both its own obligations as a public authority and whether the proposed exemption is within the scope of the exemption power. As a public authority the Tribunal must give proper consideration to human rights, which *Castles* tells us involves an assessment by the decision-maker of whether the proposed limit on Charter rights is allowed for under s 7(2) of the Charter. The limits imposed on the Tribunal as a public authority under the Charter are similar to those that confine the scope of the exemption power itself. The obligation to act within power, and its obligations under the Charter, will involve the application of the same proportionality ‘test’, whether it is phrased using the wording of s 7(2) of the Charter, or in the terms reflected in the *ICCPR*.

31. A number of the considerations that will be relevant to an exercise of the discretion under s 83 are discussed in two assessments of exemption applications by the applicant from other Australian jurisdictions. These are the decision by the ACT Human Rights Commission of 20 November 2007, since overturned by the relevant tribunal¹⁹, and the reasoning of the NT Anti-Discrimination Commission, prepared in July 2007 prior to the applicant’s withdrawal of its application for an exemption in that jurisdiction. The Commission commends the approach taken in these decisions to the Tribunal as they emanate from comparable jurisdictions which operate within a human rights framework.

32. The ACT Human Rights Commission made the following comments in relation to the applicant’s 2007 ACT application:²⁰

I do not believe due consideration was given in other jurisdictions to the profoundly damaging effects of race discrimination (individual as well as systemic). I further believe that undue weight was given to general

¹⁹ Notwithstanding the Commissioner’s decision having been overturned on appeal, the Commissioner’s reasons for decision are still instructive when undertaking the balancing exercise within a human rights framework between competing rights and public interest considerations. Further, we note that the ACT *Human Rights Act* 2004 has been amended since this decision such that a new application for exemption in this jurisdiction may be dealt with in a different manner now.

²⁰ Page 14.

security concerns not fully substantiated in specific evidence, and insufficient weight was given to potential impacts on employment and the alternatives available to resolving the problem (such as international diplomacy).

The reasonable limits test to be applied to human rights in the ACT draws on international jurisprudence. The main elements of proportionality are set out in the Canadian case of *R v Oakes* ('the Oakes case'). The Oakes case held that to be proportionate:

- the limitation/s must be carefully designed to achieve the relevant objective, not be arbitrary, unfair, or based on irrational considerations;
- the limitation or interference should impair as little as possible the right in question; and
- even if the objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups the measure will not be justified by the purpose it is intended to serve.

33. The decision then goes on to consider the following five factors:

1. the nature of the right to equality and freedom from discrimination;
2. the importance of the purpose of the exemption;
3. the nature and extent to which the proposed exemption limits the right to equality and non-discrimination;
4. whether or not the proposed exemption is necessary for and achieves the identified purpose (rational connection);
5. whether or not there is a reasonable alternative to the proposed exemption that would achieve the purpose.

34. In relation to the second factor the ACT Human Rights Commission notes:²¹

Although Raytheon and other submissions have asserted that the grant of this exemption is vital to the survival of Raytheon's business in the ACT, and thus in turn to the delivery of a range of defence, scientific and intelligence services to the Australian Government, I am not fully persuaded that this is the case. I understand that an exemption would simplify the process of compliance with contractual obligations

²¹ Page 15.

imposed by the US. However, the threshold for limiting the right to equality and non-discrimination on racial grounds is high.

I am not satisfied that sufficient efforts have been made to challenge the discriminatory terms of the ITAR as they apply in Australia. As Raytheon have acknowledged, it will not be open to another company to do the work that requires an exemption. Either the work will have to cease (and the evidence is that it is of such scientific and national significance that this is unlikely) or the ITAR will have to be renegotiated in a non-discriminatory way, to apply a security clearance procedure that identifies risk on an empirical individual basis rather than on the basis of individuals having been born in a proscribed country, which changes from time to time.

I am willing to make submissions to both the Australian Government and the US State Department on behalf of Raytheon to assist in this endeavour. In my view, there appears to be no convincing or acceptable logic to the nature of some of the proscriptions in ITAR. As a matter of international law, the ITAR may be considered to be an arbitrary law in their terms and application, because they include elements of inappropriateness, injustice and unpredictability.

35. In relation to the third factor the ACT Human Rights Commission notes:²²

The adverse consequences of race discrimination for an individual can be serious and long lasting. That is why there is scope under the Discrimination Act for the Discrimination Tribunal to award compensation not only for economic or financial loss, but also for distress, injury to feelings, loss of dignity and psychological suffering.

Individuals who are discriminated against for reasons such as race, including their nationality or national origin may experience feelings of humiliation, rejection, insecurity, loss of confidence, identity and self-esteem. Their physical and mental health as well as their personal and social relationships can be adversely affected. Discrimination is understood to adversely affect mental health by contributing to stress and poor self-perception and by limiting access to other resources required for good health (such as employment and education). Studies indicate a strong link between perceived racial and ethnic discrimination and sense of well-being, self-esteem and psychological stress, major depression and anxiety and other mental disorders. Many of these effects have been identified in discrimination complaints before the Commission, as well as in other jurisdictions.

The grant of this exemption would send out a message that the right to equality and non-discrimination is not fundamental to the values of a civilized, democratic society, but is a commodity subordinate to other tradeable interests. This is not a time of national emergency when such measures may be necessary or

²² Pages 15-16.

justified through a formal derogation by Australia from its international human rights obligations.

Already some members of ethnic or religious minority backgrounds are feeling vulnerable to racial hostility and the grant of this exemption may serve to legitimize such hostility, despite the genuine mitigation efforts that Raytheon is committed to. It is particularly important to uphold human rights and combat expressions of racism in the current environment where people can be branded as terrorist suspects just by virtue of their ethnic/national origin or religious belief, as evidenced by actual complaints to the Commission.

36. The NT Anti-Discrimination Commission came to the following conclusions, before the applicant withdrew its application:²³

I accept that Raytheon reluctantly finds itself caught between (on Raytheon's own admission) the discriminatory requirements of a foreign power and the prohibitions on 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 minimize the impact of its discriminatory behavior. 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 behavior, 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.

Raytheon asserts that a failure to grant the exemption would substantially undermine Australia's defence capabilities, and lead to a down-turn 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.

37. The Commission submits that the following matters will be relevant to considering whether the requirements of these proportionality tests have been met, and thus whether the

²³ Page 11.

exemption can be granted:

- The Charter stipulates that human rights can be subject ‘under law’ only to such limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors (see ss 7(a)-(e) of the Charter). Proving that it is ‘necessary’ to limit human rights will usually require some form of evidence.²⁴ Given that the previous exemption has been in operation for over three years, the applicant should be able to provide evidence of whether the reasons put forward by the applicant for requiring an exemption are in fact grounded in reality and show that the exemption has operated to provide the ‘public interest’ benefits agitated in the applicant’s submissions. For example, in light of the applicant’s reporting to the Commission that the previous exemption has not been relied on for the entire period of its currency:
 - Is there any evidence that the previous exemption has contributed to the ‘national security’ of Australia?
 - Is there any evidence that the previous exemption has resulted in the applicant employing more Victorians?
 - Is there any evidence that the exemption was needed so that the applicant could compete with its competitors on an equal footing?
- Any limits on human rights must be justifiable in the context of a free and democratic society based on human dignity, *equality* and freedom (s 7(2) of the Charter). Because the main right that would be limited by the proposed exemption is the equality right, which reflects one of the very qualities that is said to define the society we aspire to live in, the factors weighing in favour of the exemption will have to be of cardinal importance to that same society (one th
- at is based on human dignity, equality and freedom). The Commission submits that, in accordance with its obligations as a public authority, the Tribunal should give rigorous

²⁴ *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 at [147].

consideration to the applicant's purported purposes for the limitation on the equality right to ensure that any limit imposed by the proposed exemption is warranted having regard to the fundamental nature of the right to equality.

- Any less restrictive means available to achieve the purpose of the proposed exemption. For example, the Commission submits that there are lawful and non-discriminatory measures that Raytheon could take to achieve the desired result without engaging in discriminatory conduct. Some examples follow²⁵:
 - 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.
- A less restrictive means of achieving the applicant's purposes in seeking the exemption may also be to lobby the US Government to remove some or all of the discriminatory elements of ITAR. In this regard the Commission notes that on 11 August 2011 the US Department of State proposed an amendment to ITAR that would appear to address some of the discriminatory aspects of ITAR. The information accompanying this

²⁵ These examples have helpfully been articulated by the NT Discrimination Commissioner's decision of July 2007 in response to an application for exemption from the *Anti-Discrimination Act* 1992 (NT) made by Raytheon Pty Ltd.

amendment notes:²⁶

As a result of the President's Task Force on Export Control Reform, the previous policy regarding the treatment of dual nationals and foreign nationals was reconsidered. The current requirement for the provision of additional information within a license to cover dual national and third-country national foreign employees has created a tremendous administrative burden on approved end-users and has evolved into a human rights issue, which has become a focus of contention between the US and allies and friends without commensurate gain in national security.

G. CONCLUSIONS

²⁶ *Federal Register* Vol 75 No 154 at 48625.

38. The Commission submits that, following *Momcilovic*, and in light of the existing relevant jurisprudence, the Tribunal is mandated by section 32 of the Charter to interpret the exemption power in s 83 of the EOA compatibly with human rights so far as it is possible consistently with the purpose of the provision. To this end, the Commission submits that the Tribunal should adopt an interpretation of s 83 which only allows exemptions that are objective, reasonable, proportionate and for legitimate purposes under the ICCPR (as propounded by Justice Bell in *Lifestyle Communities*). Such an interpretation accords with the approach to s 32 set out in *Momcilovic* and is a human rights compatible interpretation, whilst being consistent with the purpose of s 83 of the EOA.
39. The Commission submits that the Tribunal must exercise its discretionary power under s 83 of the EOA in a manner compatible with its obligations as a public authority pursuant to section 38 of the Charter. That is, the Tribunal must give proper consideration to human rights when determining whether the exemption power should be exercised in favour of the applicant, and such consideration involves an examination of whether any limitation on human rights imposed as a result of the exemption, if granted, is demonstrably justifiable in a free and democratic society.
40. The Commission submits that the applicant has not discharged the onus required to demonstrably justify the limits to the equality right that it seeks to have excused by the granting of the proposed exemption.
41. The Commission submits that the Tribunal cannot be satisfied on the evidence available, that the applicant has given due consideration to whether there are any alternative lawful measures available to the applicant which would achieve the desired object, without having to engage in conduct that is prohibited by the EOA.