
CITATION: *Exemption application re: Raytheon Australia Pty Limited & Ors. [2008] QADT 1*

PARTIES: **RAYTHEON AUSTRALIA PTY LTD and its wholly owned subsidiaries including AEROSPACE TECHNICAL SERVICES PTY LTD, AUSTRALIAN MARITIME SURVEILLANCE PTY LTD and AERONAUTICAL CONSULTING, TRAINING & ENGINEERING PTY LTD**

FILE NO/s: EXE07/27

PROCEEDING: Application for Exemption

DELIVERED ON: 25 January 2008

DELIVERED AT: Brisbane

BEFORE: Member Boddice SC

HEARING DATES: 13 December 2007

ORDERS: 1. Pursuant to section 113 of the Anti-Discrimination Act 1991 (Qld) (the Act), the Queensland Anti-Discrimination Tribunal grants an exemption to the applicants from the operation of sections 14, 15, 124 and 127 of the Act on the following conditions:

- (i) 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.
- (ii) 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:

- (A) 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;
- (B) provide all current and prospective employees with:
 - i. 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;
 - ii. a reasonable explanation in plain English of the nature of any adverse effects of such action to them;
 - iii. information about how they can apply for Australian citizenship; and
 - iv. information regarding their rights under the *Racial Discrimination Act 1975 (Cth)* and the *Anti-Discrimination Act 1991 (Qld)*, and, in particular, the complaints procedure under those Acts and the rights of aggrieved persons to take their complaints to the Queensland Anti-Discrimination Commissioner and the (Australian) Human Rights and Equal Opportunity Commission;
- (C) 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;
- (D) provide to the applicants' contractors:
 - i. 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 dual nationality and/or citizenship;
 - ii. 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
 - iii. guidance to enable the contractor to conduct training in anti-discrimination and particularly race discrimination;
- (E) implement comprehensive anti-discrimination policies governing all aspects of the work and workforce, including management, and with particular regard to race discrimination.
- (iii) The applicants are required to provide a written report to the Queensland Anti-Discrimination Commissioner every six months from the date of this exemption order, over the period specified in the order, detailing:
- (A) the steps they have taken to comply with the above conditions;
 - (B) the number of persons affected by this exemption order, the nature of the effects, and the steps taken to redress any adverse effects; and
 - (C) 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 to be considered in connection with any future renewal of these orders.

2. This exemption is to remain in force for a period of three years from the date of this judgment.

CATCHWORDS: Exemption Application

LEGISLATION CITED: *Racial Discrimination Act 1975 (Cth)*;
Anti-Discrimination Act, 1991 ss. 14, 15, 24-36, 113, 124, 127, 213

CASES CITED:

Exemption Application re: *Boeing Australia Holdings Pty Ltd* [2003] QADT 21;

Exemption Application re: *Palmpoint Pty Ltd* [2006] QADT 12 (and the cases cited therein);

Exemption Application re: *J & D Richards Developments Pty Ltd* [2005] QADT 13;

Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption) [2007] VCAT 532;

ADI Limited (Anti-Discrimination) [2007] VCAT 2242;

Commissioner for Equal Opportunity v. ADI Limited [2007] WASCA 261, dismissing an appeal from *ADI Ltd & ors v. Commissioner for Equal Opportunity & ors* [2005] WASAT 259;

Re *ADI Ltd & ors*, exemption order NSW Govt Gazette No. 81, pp 3495-3496;

Re *Boeing Australia Holdings Pty Ltd* exemption order NSW Govt Gazette No. 25, p 391;

ADI Limited & ors [2004] VCAT 1963;

Raytheon Australia Pty Ltd & ors VCAT Ref No. A102/2007

Representation:

Mr J Kirk instructed by Allens Arthur Robinson for the Applicants

Mr S Horneman-Wren instructed by the Anti-Discrimination Commissioner, for the Anti-Discrimination Commissioner

1. By application filed 12 April 2007, Raytheon Australia Pty Limited, and its subsidiaries Aerospace Technical Services Pty Ltd, Australian Maritime Surveillance Pty Ltd, and Aeronautical Consulting, Training & Engineering Pty Ltd (“the applicants”), made application, pursuant to s113 of the *Anti-Discrimination Act 1991* (“the Act”), for exemption from the operation of sections 14, 15, 124 and 127 of the Act for a period of five years.
2. The basis for the application is set out in the affidavits of Scott Leigh Jones, Edward J Krauland, and Geoffrey John Gillespie. As their evidence was not challenged by other evidence, or by cross-examination, I will not canvass the contents of their affidavits in any detail. In essence, the exemption is sought so as to allow the applicants to undertake the commercial supply of defence articles, services and products. As part of that business, the applicants have entered into various contracts with the Commonwealth of Australia and other entities in Australia or the United States of America. These activities require access to defence equipment and technology, the distribution of which are subject to the laws and regulations of the United States, including the *Arms Export Control Act* and the *International Traffic in Arms Regulations* (“ITAR”), which imposes strict restrictions on the provision of defence information and technology to organisations outside the United States and to non United States personnel. Relevantly, for present purposes, the restrictions include the provision of information to persons of certain nationalities, including “dual nationals”, as that term is defined in ITAR.
3. The affidavit material relied upon in the application establishes that the regime imposed by ITAR is extremely strict, with substantial penalties, should companies such as the applicants not comply with its requirements. These penalties include the loss of access to the information and technology in the future. In short, if the applicants do not comply with ITAR’s requirements, they could be prevented from conducting business in relation to defence technology which requires access to United States technology.

4. The application was the subject of public advertisement by the applicants. It is opposed by the Anti-Discrimination Commissioner (“the Commissioner”), the Queensland Council of Unions and the Ethnic Communities Council of Queensland Ltd. Each entity has provided written submissions. The Commissioner, through Counsel, also made oral submissions at the public hearing of the application.
5. Initially, the Commissioner’s opposition was on a number of grounds. At the hearing, largely as a result of the applicants having provided additional information following receipt of the Commissioner’s written submissions, some of the grounds for opposing the exemption were no longer pressed by the Commissioner. This stance also took account of the fact that at the hearing, the applicants pressed for an amended form of order which expressly provided that any exemption would only apply to the extent that it was reasonably necessary for the applicants to engage in conduct which may constitute a breach of the Act for the purposes of carrying out its businesses. This amended order also provided for the provision of six-monthly reports to the Commissioner in relation to the effect of the applicants’ need to comply with the requirements of ITAR.
6. A review of the provisions of the Act, and a consideration of the relevant authorities¹ establishes that the purpose of s113 is to allow applicants to rely upon the exemption process so as to ensure that their activities can be carried out lawfully for the period of the exemption.
7. In *Boeing Australia Holdings Pty Ltd*,² President Sofronoff QC said:-

“For an exemption to be granted I must be satisfied that it would be appropriate and reasonable to do so. Other matters that may be relevant in considering an exemption application include:

¹ Exemption application re : *Palmpoint Pty Ltd* [2006] QADT 12 (and the cases cited therein); exemption application re : *J & D Richards Developments Pty Ltd* [2005] QADT 13.

² [2003] QADT 21.

- (a) whether the exemption is necessary;
 - (b) whether there are any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought;
 - (c) whether the exemption is in the community interests;
 - (d) whether any other persons or bodies other than the applicants support the application”.
8. The applicants submit that, in essence, these considerations amount to a consideration of the objects, scope and purpose of the Act. I agree with that submission. The objects of the Act are to prevent “*unfair discrimination*”. This indicates, as do provisions within the Act itself which provide for specific exemptions³, that there are occasions when discrimination may occur, notwithstanding that the discrimination would be a breach of the Act. The purpose of the Act is to prevent unfair discrimination. The existence of a power to exempt a person from the application of the Act to certain specified conduct is entirely consistent with such a purpose.
9. Significantly, in my view, this application for exemption occurs against the background of competitors to the applicants having, in Queensland and in the other States of Australia, successfully made application for exemption from compliance with the relevant anti-discrimination legislation.⁴ The applicants have also successfully made application for exemption in Victoria.⁵ An application by the applicants to the Human Rights & Discrimination

³ see, generally, ss.24 - 36 of the Act .

⁴ See, *Exemption application re: Boeing Australia Holdings Pty Ltd & ors* [2003] QADT 21; *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)* [2007] VCAT 532; *ADI Limited (Anti-Discrimination)* [2007] VCAT 2242; *Commissioner for Equal Opportunity v. ADI Limited* [2007] WASCA 261, dismissing an appeal from *ADI Ltd & ors v. Commissioner for Equal Opportunity & ors* [2005] WASAT 259; *Re ADI Ltd & ors*, exemption order NSW Govt Gazette No. 81, pp 3495-3496; *Re Boeing Australia Holdings Pty Ltd* exemption order NSW Govt Gazette No. 25, p 391; *ADI Limited & ors* [2004] VCAT 1963.

⁵ *Raytheon Australia Pty Ltd & ors* VCAT Ref No. A102/2007.

Commissioner for an exemption under the ACT's legislation has been refused.⁶ This refusal is subject to appeal.

10. Having considered the material relied upon by the applicants, and the submissions made by the applicants and by the Commissioner and the other entities, I am satisfied that it is appropriate and reasonable for the applicants be given an exemption under s113 of the Act, subject to the conditions proposed in the amended form of Order provided at the hearing. Those conditions, in my view, will give proper and adequate protection to ensure that the exemption is appropriately limited in its scope, and will only be used consistently with the scheme and objects of the Act. It also ensures there are adequate safeguards for protecting those persons likely to be affected by its operation. I propose to exercise my discretion and grant the exemption application.
11. I am satisfied the exemption is necessary, and that there are no other non-discriminatory ways reasonably open to the applicants to continue in their business activities. I am also satisfied the granting of an exemption in the present circumstances is not inconsistent with the objects and scheme of the Act.
12. Further, I am satisfied there are considerable benefits to the Australian community in being able to access the relevant defence technology, and in its own workers having the ability to use their skills in these industries. As such, I am satisfied it is in the community interest that the exemption be granted to the applicants. In making this finding, I am mindful the applicants' competitors have been the recipients of exemptions under the Act and under corresponding legislation in other Australian jurisdictions. It would be unreasonable, in those circumstances, to refuse an exemption to the applicants when the Tribunal is satisfied that the granting of an exemption is appropriate and reasonable, having regard to the matters referred to by President Sofronoff QC in *Boeing*.

⁶ Decision dated 20 November 2007.

13. It is also important, in my view, to note that the granting of an exemption does not prevent a complaint of discrimination from being made, and if accepted by the Commissioner, from being referred to the Tribunal. In that event, it will be for the Tribunal to determine whether this exemption applied to the conduct alleged to constitute a contravention of the Act.
14. Whilst I am satisfied an exemption should be granted, there is force in the submissions of the Commissioner that it is appropriate this exemption be for a period of three years rather than the maximum period of five years. The changing nature of the countries the subject of the nationality restrictions under ITAR, together with the possibility of special arrangements being entered into between the United States of America and Australia, be it by the proposed treaty⁷ or other means, render it inappropriate for the exemption to be for five years. I am satisfied a period of three years is appropriate.
15. I order as follows:
 1. Pursuant to section 113 of the *Anti-Discrimination Act 1991* (Qld) (the Act), the Queensland Anti-Discrimination Tribunal grants an exemption to the applicants from the operation of sections 14, 15, 124 and 127 of the Act on the following conditions:
 - (i) 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.

⁷ Exhibit 6.

- (ii) 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:
- (A) 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;
 - (B) provide all current and prospective employees with:
 - i. 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;
 - ii. a reasonable explanation in plain English of the nature of any adverse effects of such action to them;
 - iii. information about how they can apply for Australian citizenship; and
 - iv. information regarding their rights under the *Racial Discrimination Act 1975 (Cth)* and the *Anti-Discrimination Act 1991 (Qld)*, and, in particular, the complaints procedure under those Acts and the rights of aggrieved persons to take their complaints to the Queensland Anti-Discrimination Commissioner and the (Australian) Human Rights and Equal Opportunity Commission;
 - (C) 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;

- (D) provide to the applicants' contractors:
- i. 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 dual nationality and/or citizenship;
 - ii. 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
 - iii. guidance to enable the contractor to conduct training in anti-discrimination and particularly race discrimination;
- (E) implement comprehensive anti-discrimination policies governing all aspects of the work and workforce, including management, and with particular regard to race discrimination.

(iii) The applicants are required to provide a written report to the Queensland Anti-Discrimination Commissioner every six months from the date of this exemption order, over the period specified in the order, detailing:

- (A) the steps they have taken to comply with the above conditions;

- (B) the number of persons affected by this exemption order, the nature of the effects, and the steps taken to redress any adverse effects; and
- (C) 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 to be considered in connection with any future renewal of these orders.

- 2. This exemption is to remain in force for a period of three years from the date of this judgment.
16. There has been no application for costs by any party to the hearing. Having considered the matters set out in s213 of the Act, I would not be inclined to make a costs order in this matter. However, I give the parties fourteen days within which to make written submissions in relation to further Orders, if the parties wish to do so. In that event, each party has seven days within which to respond to the other party's written submissions.

David Boddice SC
Member
Anti-Discrimination Tribunal Queensland