STARING DOWN THE ITAR: RECONCILING DISCRIMINATION EXEMPTIONS AND HUMAN RIGHTS LAW

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ABSTRACT

Court and tribunal decisions around Australia have granted exemptions from anti-discrimination legislation, allowing defence manufacturers to lawfully discriminate on the basis of race. The first such decision made under a human rights law, of only two to date, was *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* which was decided under the *Human Rights Act 2004* (ACT). The exemption was granted, and the *Human Rights Act* had no effect on the reasoning. How can racial discrimination – outright prejudice – be permitted under the combined operation of an anti-discrimination law and a human rights law? The answer seems to lie in a confused application of human rights law and, perhaps, in a concern to reach an outcome that responded to the 'public interest' arguments that have been mounted in favour of the successful exemption applications elsewhere. A correct application of the *Human Rights Act* would have excluded the so-called 'public interest' arguments, limiting the exercise of the exemption power to considerations which were consistent with the human rights-compliant, anti-discrimination purpose of the legislation.

I THE NEED FOR AN EXEMPTION

The US International Traffic in Arms Regulations ('the ITAR') are export regulations, promulgated under the United States *Arms Export Control Act*.[1] In the name of 'world peace, or the national security or the foreign policy of the United States',[2] the ITAR prescribe the agreement under which defence-related material can be exported from the United States.[3] The agreement affects the importer of defence-related material by prohibiting that material from being 'transferred to a person in a third country or to a national of a third country' except as authorised or with Department of State approval.[4] There are very substantial penalties (such as multi-million dollar fines) for breach of the agreement.

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[1] 22 USC §2778(a)(1); and see Code of Federal Regulations (CFR) Title 22 – Foreign Relations, Chapter I, Subchapter M.

[2] See, eg, 22 CFR §127.8(a), 126.7(a)(1), 120.5.

[3] For a detailed account of the operation of the ITAR, see Simon Rice, 'Discriminating for World Peace' in Jeremy Farrall and Kim Rubenstein (ed), *Sanctions, Accountability and Governance in a Globalised World*, (Cambridge University Press, Cambridge) 355-377; Sandra Sperino, 'Complying with Export Laws without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules' (2007-8) 52 *Saint Louis University Law Journal* 375; Lorena Allam, *Background Briefing: Defence and Discrimination* (2008) ABC Radio National <www.abc.net.au/rn/backgroundbriefing/stories/2008/2339793.htm>.

[4] 22 CFR §124.8(5).

Australian-based companies, usually subsidiaries of United States companies, engage extensively in defence manufacturing, and import defence material under the ITAR-prescribed agreements. The discriminatory nature of the importing regime is clear: workers at the offices and factories of importing defence manufacturers, who are not Australian or US nationals, are treated less favourably than workers who are. The Australian defence manufacturers seem to be in a dilemma: they 'cannot avoid discriminating [in breach of anti-discrimination legislation] if they are to comply with the United States export laws and meet their contractual obligations'.[5] The companies have so far avoided the dilemma by obtaining an exemption from anti-discrimination legislation, allowing them to discriminate lawfully.

In Australian discrimination law, exemption applications 'are usually, but not necessarily, made for activities that might be described as "special measures"',[6] and special measures are 'for the benefit of some people with an attribute which is protected by that legislation in order to overcome disadvantage which has been experienced by those people because of their shared attribute'.[7] But an exemption application to enable ITAR compliance is in a very different spirit: it seeks permission not to benefit people and overcome disadvantage, but to discriminate against them, causing disadvantage.

In their exemption applications the employers have emphasised that they are seeking the exemptions reluctantly, and in approving the applications the tribunals have similarly been at pains to limit the scope of the exemptions to accommodate the ITAR only as far as necessary. Nevertheless, the discriminatory conduct that is permitted by the exemptions is wide ranging. In 2004, for example, an exemption that allowed a defence manufacturer to discriminate among employees on the basis of nationality permitted the company to identify, 'by means of a badge, inclusion in a list or otherwise', workers whose nationality or national origin gave them access to imported United States technology, so as to distinguish them from workers of another nationality or national origin.[8] In Queensland, workers can be required to wear a special badge 'to indicate that the holder does not have export privileges and that the employee is a foreign person'.[9] Similar steps have been taken in Western Australia,[10] and in Canada where employees have also been 'barred from certain parts of the workplace, and in some companies are escorted by a security guard at all times'.[11]

Almost every application for an ITAR-related exemption in Australia has been granted.[12] An application was not granted in Queensland because it was considered unnecessary in the

[5] *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21 [15.1].
[6] Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004) 547.
[7] Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008) 455.
[8] *ADI Ltd* (*Exemption)* [2004] VCAT 1963 [8b].
[9] *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21 [11.3b].
[10] *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259 [5b].
[11] Jasmin Legatos, 'Settlement Reached in Bell Helicopter Discrimination Case: Company Denied Haitian-Born Canadian a Place in its Internship Program', *The Gazette* (Montreal), 18 January 2008.
[12] For example: *Exemption Application re: Boeing Australia Holdings Pty Ltd & related entities* [2003] QADT 21; *ADI Ltd* (*Exemption)* [2004] VCAT 1963; *Exemption Order* (Re Boeing), NSW Government Gazette 2005 No 25, p 391; *Exemption Order* (Re ADI), NSW Government Gazette 2005 No 81, 3495-6; *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259; *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261; *Boeing Australia Holdings Pty Ltd* (*Anti-Discrimination Exemption)* [2007] VCAT 532 *HRA*; *Raytheon Australia Pty Ltd and Others Exemption Application* [2007] VCAT 2230; *ADI Ltd* (*Anti-Discrimination)* [2007] VCAT 2242; *Exemption application re: Raytheon Australia Pty Ltd & Ors* [2008] QADT 1; BAE Systems Australia Ltd (Anti-Discrimination) [2008] VCAT 1799; *BAE Systems Australia Ltd*

circumstances,[13] and would it would have been refused in the Northern Territory had it not been withdrawn.[14] In the Australian Capital Territory (ACT), an application was refused; on review it was granted,[15] and that review decision, *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission,*[16] ('*Raytheon v ACT HRC*') is the subject of this article.

The significance of *Raytheon v ACT HRC* is that it was decided under human rights legislation, the *Human Rights Act 2004* (ACT) ('*HRA*'). At the time of writing, the only other ITAR-related exemption to have been decided in Australia under human rights legislation is the later case of *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission,*[17] decided under the *Charter of Human Rights and Responsibilities 2006* (Vic) ('*Charter*'), and this article refers to that case, and its scant reasoning.

II *RAYTHEON V ACT HRC*

In 2007 a defence manufacturer, Raytheon Australia Pty Ltd (Raytheon), sought an exemption under s 109 of the *Discrimination Act 1991* (ACT) ('*DA*') so that it could discriminate against workers who are not nationals of Australia or the US. Such treatment is racial discrimination, which is expressly proscribed by the *DA*.[18] The ACT Human Rights and Discrimination Commissioner ('the ACT HRD Commissioner') refused the application in an administrative decision, advised to Raytheon in a letter.[19] The ACT HRD Commissioner's decision was the subject of a merits review application to what was then the Australian Capital Territory Administrative Appeal's Tribunal ('the Tribunal');[20] those review proceedings were *Raytheon v ACT HRC*.

In the review proceedings the Tribunal started again, putting itself in the shoes of the original decision maker to come to what it considered the correct or preferable decision on the basis of the material it had before it.[21] Raytheon was the applicant in the merits review proceedings and the ACT HRD Commissioner responded to the application.[22]

Raytheon's argument for an exemption was the same as that which had succeeded in other exemption cases: that the 'public interest' required an exemption to be granted. In fact, it seems to have been this superficial similarity with other cases which persuaded the Tribunal to grant the exemption. One difference was, or should have been, that evidence in one case is

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[2008] SAEOT 1; *Raytheon Australia P/L Ors* [2008] SAEOT 3; *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796; *Re: BAE Systems Australia Limited* [2011] SAEOT 3; *ASC Pty Ltd, ASC Shipbuilding Pty Ltd & ASC AWD Shipbuilder Pty Ltd* [2011] SAEOT 4; *Raytheon Australia Pty Ltd* [2011] SAEOT 6.

[13] *Boeing Australia Holdings Pty Ltd & related entities (No. 2)* [2008] QADT 34.

[14] *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027.

[15] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19; a subsequent matter, *BAE Systems Australia Limited v ACT Human Rights Commission* [2011] ACACT 53 records the agreed terms of an exemption in settlement of an application to review the initial refusal of an exemption.

[16] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19.

[17] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796.

[18] Dictionary, and ss 7, 8(1), 10 and 13.

[19] Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.

[20] *Discrimination Act 1991* (ACT), s 110.

[21] *Environment Protection Authority v Rashleigh* [2005] ACTCA 42, [25]-[30].

[22] The author was one of the ACT Commissioner's legal representatives.

not evidence in another, and that whatever moved a tribunal or court to accept that a matter such as the 'public interest' had been established once, somewhere, is irrelevant to whether evidence in this case is probative and sufficient.

But a very significant difference was – or should have been – that none of the previous exemption cases had been decided in a jurisdiction which required the exemption provision to be read in light of a human rights law. Differently from any other such decision in Australia at that time, the decision in *Raytheon v ACT HRC* was made in the context of local human rights legislation, the *HRA*. As a result, the Tribunal had to understand the interaction between the *HRA* and the exemption power in the *DA*. This article explores how the Tribunal approached that task, and suggests how, in light of both the terms of the legislation, and the subsequent decision of the High Court in *Momcilovic v The Queen*,[23] that interaction should properly be understood.

III APPLYING THE 'JUSTIFIABLE LIMITS' AND 'COMPATIBLE INTERPRETATION' PROVISIONS

The key to the interaction between a discrimination exemption power and a human rights law lies in the way that the interpretation provision and the 'justified limits' provision of human rights law operate on the discrimination exemption power. What has been uncertain is the order in which the those provisions are applied to the legislation under scrutiny; the question arises because in both the *HRA* and the *Charter* the provisions are separate, and no explicit guidance is given on how they are to interact and operate.

As a point of reference for this article, recognition of justifiable limits on human rights is found in s 28 of the *HRA* and s 7(2) of the *Charter*, and the requirement to interpret legislation compatibly with human rights, so far as it is possible to do so consistently with its purpose, is in s 30 of the *HRA* and s 32 of the *Charter*.

One approach is first to inquire whether the legislation under scrutiny justifiably limits human rights and, if it does not, then to give, as far as possible, a purposive and human rights compatible interpretation to the legislation. This might be called the *Hansen* approach, after the 2007 New Zealand Supreme Court decision in *Hansen v The Queen*,[24] under the *New Zealand Bill of Rights Act 1990*.

On the *Hansen* approach, a court first considers whether the intended meaning of a provision is a justified limit on a human right. Only if the intended meaning of the provision is not a justified limit would there be an inquiry into whether a human rights-compatible meaning could be found. The *Hansen* approach, which considers whether the purposive meaning of a provision imposes justifiable limits, has been held in the ACT to be the correct one,[25] and a substantially similar approach has been adopted in Victoria.[26]

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[23] *Momcilovic v The Queen* [2011] HCA 34.
[24] *Hansen v The Queen* [2007] NZSC 7; (2007) 3 NZLR 1.
[25] *R v Fearnside* [2009] ACTCA 3, [98]; see generally Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 99-109.
[26] See discussion of the 'Hong Kong' approach in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381; *R J E v Secretary to the Department of Justice* [2008] VSCA 265; *RJE v Secretary to the Department of Justice* [2008] VSCA 265, relying on *HKSAR v Lam Kwong Wai* and *Lam Ka Man* [2006] HKCFA 84. It appears to have been the approach in the discrimination exemption decision of *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869.

Differently from the *Hansen* approach, it is possible first to give, as far as possible, a purposive and human rights compatible interpretation to the legislation under scrutiny, and then to inquire whether, so interpreted, the legislation under scrutiny imposes a justifiable limit on human rights. This was the approach preferred by Elias CJ in dissent in *Hansen*, saying that:[27]

> The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the cardinal values it embodies. Collapsing the interpretation of the right and the … justification is insufficiently protective of the right. The later justification is according to a stringent standard, in which a party seeking to justify must show that the limit on a fundamental right is demonstrably justified in a free and democratic society.

In March 2010 the Victorian Court of Appeal, in *R v Momcilovic*,[28] rejected the *Hansen* approach and preferred the dissenting view of Elias CJ, saying that the step of identifying a purposive and human rights-compatible meaning is logically distinct from the step of justifying reasonable limits, and that justification becomes relevant only after the meaning of the challenged provision has been established.[29] The Court of Appeal agreed with Elias CJ when she referred with approval to the approach adopted in Canada, under which the question of justified limits under s 1 of the Canadian Charter of Rights and Freedoms is a distinct and later enquiry,[30] and said that:[31]

> If the reasonable limits provision had to be applied before the meaning of legislation was finally ascertained, there would inevitably be inconsistencies in its application and uncertainties in interpretation . Judges and tribunal members, as well as public officials, would have to determine whether the relevant provision imposed a justifiable limit before determining finally how the provision was to be interpreted. We cannot accept that this is what Parliament is to be taken to have intended.

Debeljak has subjected the Victorian Court of Appeal decision to close scrutiny and strong criticism, saying that 'despite clear parliamentary intent to the contrary it has sanctioned a rights-reductionist method to the statute-related *Charter* mechanisms, undermined the remedial reach of the … interpretation obligation, sidelined the core issue of justification for limitations on rights, and considerably muted the institutional dialogue envisaged under the *Charter*'.[32]

In November 2010 the ACT Supreme Court, in *In the Matter of an Application for Bail by Isa Islam* (*Islam*),[33] followed the Victorian Court of Appeal's approach in *R v Momcilovic*, attracted to it because it retains primacy of the legislature to legislate, even if at times incompatibly with human rights, it avoids an inquiry into justifiable limits if an interpretation can be found that is both consistent with legislative purpose and human rights-compatible, and is a better allocation of tasks as between the courts and the legislature.[34]

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[27] *R v Momcilovic* [2010] VSCA 50, [109].
[28] Ibid.
[29] *R v Momcilovic* [2010] VSCA 50, [105].
[30] Ibid, [109].
[31] Ibid, [110].
[32] Julie Debeljak, 'Who is Sovereign Now? The Momcilovic Court Hands Back Power Over Human Rights That Parliament Intended it to Have' (2011) 22 *Public Law Review* 15, 16; the merits of Debeljak's critique are beyond the scope of this article, which is concerned with exploring how anti-discrimination law is to be read with human rights law in Australia.
[33] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.
[34] Ibid, [224]-[231].

In April 2011 the Victorian Civil and Administrative Tribunal, in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*,[35] granted an ITAR-related exemption and, on its reading of the Victorian Court of Appeal decision in *R v Momcilovic*, it too undertook the interpretation task before the justification task.[36] At that time, therefore, the dissenting view of Elias CJ in *Hansen*, endorsed by the Victorian Court of Appeal's approach in *R v Momcilovic*, was the prevailing view as to the order in which the interpretation and justified limits provisions were to be applied to the legislation under scrutiny. But an appeal against *R v Momcilovic* was pending.

In September 2011, in *Momcilovic v The Queen*, a majority of the High Court rejected the Victorian Court of Appeal's approach in *R v Momcilovic* and preferred the *Hansen* approach. Gummow J,[37] with whom Hayne J agreed on this point,[38] Hayden J[39] and Bell J,[40] each preferred the *Hansen* approach. In the minority on this issue, French CJ, and Crennan and Kiefel JJ, supported the approach in *R v Momcilovic*. French CJ said that '(t)he question whether a relevant human right is subject to a limit … can only arise if the statutory provision under consideration imposes a limit on its enjoyment. Whether it does so or not will only be determined after the interpretive exercise is completed'.[41] Similarly, Crennan and Kiefel JJ said that whether a relevant human right is subject to a limit has no bearing upon the meaning and effect of a statutory provision, which are derived by a process of construction, not any enquiry as to justification.[42]

While *Momcilovic v The Queen* appears to offer the authoritative position, there are at least three qualifications to its ready acceptance. One is that the New Zealand Supreme Court in *Hansen*, when it distinguished a different, earlier approach in *Moonen v Film and Literature Board of Review*,[43] acknowledged that there may be 'good reason to adopt [that earlier] approach depending on what was in issue'.[44] In other words, the *Hansen* approach may not be the correct approach in every case.[45] Another qualification is that to count Hayden J among the majority in *Momcilovic v The Queen* glosses over the fact that his view was *obiter*, as he (alone) found that the interpretation and justified limits provisions are invalid because they confer on the courts a legislative function.[46] Finally, the High Court did not rely on the *Charter* to decide the appeal, so that it could be argued that all its views on the operation of the *Charter* are *obiter*.[47]

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[35] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796.
[36] Ibid, [22]; the Victorian Tribunal makes no mention in its reasons of *Raytheon v ACT HRC*, the only other exemption application considered under a human rights law.
[37] *Momcilovic v The Queen* [2011] HCA 34, [164]-[168].
[38] Ibid, [280].
[39] Ibid, [427].
[40] Ibid, [675]-[684].
[41] Ibid, [35].
[42] Ibid, [572].
[43] *Moonen v Film and Literature Board of Review* [2002] NZLR 9.
[44] *Hansen v The Queen* [2007] NZSC 7; (2007) 3 NZLR 1, 115, [94].
[45] *R v Fearnside* [2009] ACTCA 3, [98], citing H Wilberg, 'The Bill of Rights and Other Enactments' [2007] *NZLJ* 112.
[46] *Momcilovic v The Queen* [2011] HCA 34, [432]-[436]; [441]-[454].
[47] Mark Hosking, *High Court Affirms Constitutionality of Charter and Considers Key Interpretative Provisions* (2011) Human Rights Law Centre <http://www.hrlc.org.au/jurisdiction/australia/momcilovic-v-the-queen-2011-hca-34-8-september-2011>.

It seems, however, that the *Hansen* approach has been endorsed by the High Court, and the alternative approach – taken by the Victorian Court of Appeal in *R v Momcilovic* and the ACT Supreme Court in *Islam* – has been rejected.[48] This means that a court first considers whether the intended meaning of a provision is a justified limit on a human right and, if it is not, the court considers seeks an interpretation which is, as far as possible, consistent with the law's purpose and compatible with human rights.

IV THE REASONING IN *RAYTHEON V ACT HRC*

The Tribunal in *Raytheon v ACT HRC* had in fact followed the *Hansen* approach in that it first considered the justifiable limits question and then considered the requirement to interpret a Territory law, as far as possible, consistently with the law's purpose and compatible with human rights. But the Tribunal's reasoning was flawed in a number of respects: it failed to decide the purpose of the relevant law (the *DA*), it erroneously applied authority to say that the purpose of *DA* was effectively unbounded, it did not ask the correct question concerning justifiable limits on human rights, it did not consider the prescribed criteria to decide whether there was a justifiable limits on human rights, and it did not attempt to interpret in a way that, as far as possible, is consistent with both the *DA*'s purpose and human rights.

The task facing the Tribunal in *Raytheon v ACT HRC* was to work out the meaning of the exemption power in s109 of the *DA* in light of the *HRA*. The first step was to determine the *DA*'s purpose. Section 109 of the *DA* empowers the ACT Human Rights Commission ('HRC') to exempt a person from the operation of the *DA*, and says that in the exercise of that power the matters to which the HRC must have regard include 'the need to promote an acceptance of, and compliance with the *DA*, and the desirability … of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination'.[49] Clearly s 109 *DA* permits conduct that would otherwise be unlawful under the *DA*. Beyond that, however, the provision has two available meanings: either it permits any such conduct, regardless of its inconsistency with the purposes of the *DA*, or it permits only such conduct that is consistent with the purposes of the *DA*.

When working out the meaning of an Act in the ACT,[50] s 139 of the *Legislation Act* ('*LA*') requires that 'the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.[51] In this case the Act is the *DA* and, according to its statutory objects, [52] the *DA*'s purpose is:

> (a) to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs; and
> (b) to eliminate, so far as possible, sexual harassment in those areas; and
> (c) to promote recognition and acceptance within the community of the equality of men and women; and

[48] Notably, the High Court decision in *Momcilovic v The Queen* makes no reference to occasions when Australian courts and tribunals have considered the issue, other than in the decision under appeal, such as the extensive deliberation by the ACT Supreme Court in *Islam*.
[49] *Discrimination Act 1991* (ACT), s 109(3).
[50] *Legislation Act 2001* (ACT), s 138.
[51] See, eg, *Kingsley's Chicken Pty Ltd and Queensland Investment Corporation and Canberra Investments Pty Ltd* [2006] ACTCA 9.
[52] *Discrimination Act 1991* (ACT), s 4.

> (d) to promote recognition and acceptance within the community of the principle of equality of opportunity for all people.

The Tribunal found wiggle room in these statutory objects,[53] seizing on the phrase 'so far as possible' to say that the statutory objects are not expressed in absolute terms. The Tribunal's reasoning is neither detailed nor explicit, but it seems to have read the phrase 'so far as possible' not as practical recognition that legislation alone cannot achieve the objects in s 4 of the *DA*, but as a positive statement that a result other than achieving those objects is also within the objects of the *DA*. As a result, the Tribunal 'arrived at the conclusion that, in addition to the objects of the *Discrimination Act* specified in section 4, it is not its purpose to exclude all forms of discrimination and that in relation to the forms of discrimination to which it applies it confers a broadly-based discretion to exempt persons from the application of its provision'.[54]

In widening the purposes of s 109 of the *DA*, the Tribunal relied not only on wiggle room in the statutory objects, but also on the High Court in *Stevens v Kabushiki Kaisha Sony*[55] to say that '[i]n determining what is the purpose of the *Discrimination Act* … it is necessary to avoid fixing upon the statement of objectives contained in section 4 … and to have regard to the broader operation of the Act as a whole'.[56] This approach misunderstands what the High Court was saying and doing in *Stevens v Kabushiki Kaisha Sony*.

First, the observations in the joint decision in *Stevens v Kabushiki Kaisha Sony* were explicitly concerned with 'the present case',[57] in which the Court was dealing with amendments to an Act. The amendments were not encompassed by the Act's statement of objects, and extrinsic materials did not give any clear indication of how the amendments took their final form.[58] It was in those circumstances that the joint decision cautioned against 'fix[ing] upon one 'purpose' and then bend[ing] the terms of the definition to that end'.[59] This observation is both narrower than the broad claim made by the Tribunal, and in much less definitive terms than the Tribunal's rephrasing.

Secondly, the uncertainty that resulted from looking at extrinsic materials in *Stevens v Kabushiki Kaisha Sony* led the Court to focus on the text of the provisions themselves as 'the best – and certainly the preferable – guide to the meaning of the relevant provisions'.[60] This is no warrant at all for the licence that the Tribunal in *Raytheon v ACT HRC* took from the decision, 'to avoid fixing upon the statement of objectives' when determining the purpose of a statute. In any event, at no stage did the Tribunal say what it believed the purpose of the *DA* to be. Rather, having freed itself from relying on the DA's stated objects, the Tribunal simply

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[53] For use of the term 'wiggle room' when engaged in statutory interpretation , see *PNJ v The Queen* [2008] HCATrans 370 (12 November 2008), per French CJ; for reference to 'wiggle room' in statutory interpretation, see R Gregory, 'Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation' (2001-2002) 35 *Akron Law Review* 451, 465, 484.
[54] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [80].
[55] *Stevens v Kabushiki Kaisha Sony* [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850.
[56] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [43].
[57] *Stevens v Kabushiki Kaisha Sony* 2005] HCA 58; (2005) 224 CLR 193, 208 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[58] Ibid, 207 [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[59] Ibid, 208 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[60] Ibid, 232 [129] (McHugh J); and see 208-209 [35]-[47] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

relied on like cases in other jurisdictions to say that the exemption power 'could be exercised even where the justification for doing so was beyond … anti-discriminatory objectives'.[61]

It is notable that in the 2011 Victorian decision of *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*, the Victorian Tribunal arrived very quickly at the same position on the equivalent exemption provision in Victoria, saying simply that the discretion to grant the exemption is 'unconfined'.[62] In doing so the Victorian Tribunal purported to find support in *Lifestyle Communities (No 3)*,[63] which, as is noted below, in fact supports exactly the opposite view.[64]

Because it found a purpose for the *DA* that is effectively unconfined, the Tribunal did not have to choose between two possible meanings for s 109 of the *DA* – the breadth of the purpose that was found negated any real difference between the two meanings. The Tribunal therefore found no work for s 139 of the *LA*,[65] and proceeded on the basis that, whatever the purpose of the *DA* is, it includes permitting discriminatory conduct without qualification.

Consistently with the *Hansen* approach the Tribunal then considered the operation of the justifiable limits provision in the *HRA*. Section 28(1) of the *HRA* states that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the *HRA* requires that when deciding whether a limit is reasonable, certain matters be considered:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose;
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Tribunal gave scant attention to these mandatory considerations, failing to methodically identify and address them, and there must be some doubt as to whether the Tribunal's conclusion was in fact reached, as it claimed, '[h]aving regard to the matters specified in section 28(2)'.[66]

The Tribunal concluded that 'the exemption would subject the human rights in issue to limits which are demonstrably justified in a free and democratic society'.[67] This is quite simply the wrong test. Section 28 of the *HRA* is concerned with the reasonableness of limits imposed *by Territory laws*. The Tribunal instead considered the reasonableness of limits that would be imposed *by the exemption were it granted*. Section 28(2)(a), for example, requires consideration of the nature of the right affected by s 109 of the *DA*, not by the proposed exemption, and so on for each of the considerations in s 28(2) of the *HRA*. The Victorian Tribunal made the same error in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity*

[61] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47].
[62] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [10].
[63] *Lifestyle Communities (No 3)* [2009] VCAT 1869.
[64] See text below associated with fn 76, and 113-115.
[65] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [37]-[48].
[66] Ibid, [68].
[67] Ibid, [33]-[68].

and Human Rights Commission, looking not at whether the relevant law subjected a human right to reasonable limits,[68] but at whether the proposed exemption did.[69]

Had the Tribunal in *Raytheon v ACT HRC* asked the right question, it would have asked whether s 109 *DA* subjects human rights to reasonable limits that can be demonstrably justified in a free and democratic society. The human rights that might be limited are the rights set out in Part 3 *HRA*,[70] which include, relevantly for the *DA*, the right to equal and effective protection against discrimination on any ground.[71] The *HRA* gives discrimination because of race as an example of discrimination against which people are protected.[72]

Even on a narrow reading of s 109 *DA* – that it permits only conduct which is consistent with the purposes of the Act – it subjects human rights to limits. The *DA* itself gives examples of such conduct (as matters the ACT Human Rights Commission must have regard to):[73] conduct which promotes an acceptance of and compliance with the DA, and conduct which redresses the effects of past discrimination. For s 109 of the *DA* to operate this way is likely to be seen as a reasonable limit on human rights that can be demonstrably justified in a free and democratic society. Under the *Hansen* approach favoured in *Momcilovic v The Queen*, the next step – interpretation consistent with human rights as far as possible – is unnecessary.

On the other hand, the meaning of s 109 *DA* may be, as the Tribunal in *Raytheon v ACT HRC* found, that any conduct is permissible, unconfined by the purposes of the Act. Understood in that way, s 109 of the *DA* clearly subjects human rights to limits – to such extreme limits, in fact, that the human right to equal and effective protection against discrimination on any ground can be entirely negated. It allows, for example, outright prejudicial treatment of people because of, say, their race or sex. The question under s 28 of the *HRA* is whether this can be demonstrably justified in a free and democratic society.

Crucially, this is not answered by going to evidence from the parties; rather, it is decided on the terms of the particular legislation. Section 28 is concerned with limits 'set by Territory laws', not by, for example, 'the effect of the operation of the law in the circumstances'. The point was made by Bell J in *Momcilovic v The Queen* when she said that the question is whether '*the ordinary meaning of the provision* would place an unjustified limitation on a human right'.[74] The Tribunal's reasons do not make clear the purpose for which it considered evidence of the 'public interest' (discussed further below), but if it was as evidence of justifiable limits on human rights then it was mistaken in doing so.

An interpretation of s 109 of the *DA* which permits an exemption allowing any discriminatory conduct, entirely negating protection against discrimination – such as outright prejudice – cannot be demonstrably justified in a free and democratic society. An attempt must therefore be made under s 30 of the *HRA* to '[s]o far as it is possible to do so consistently with its purpose, [interpret it] … in a way that is compatible with human rights'.

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[68] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).
[69] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [51]
[70] *HRA*, s 5.
[71] Ibid, s 8(3).
[72] *Discrimination Act 1991* (ACT), s 8.
[73] Ibid, s 109(3).
[74] *Momcilovic v The Queen* [2011] HCA 34, [684], emphasis added.

For s 109 of the *DA* the interpretation exercise returns to the question of the Act's purpose ,which the Tribunal avoided. The Act's essential purpose is a human rights one – the elimination of discrimination – and a human rights-compatible meaning of the Act will trim back the 'unbounded' purpose found by the Tribunal to its human rights core. In other words, s 30 of the *HRA* operates as a remedy for the unjustifiable limits on human rights imposed by the very broad terms (as the Tribunal chose to see them) of s 109 of the *DA.*

Had the Tribunal used s 139 of the *LA* it would have reached the same conclusion; because the *DA* itself has a human rights purpose it does seem that s 30 of the *HRA* adds nothing to s 139 *LA*. But the equivalence of s 139 of the *LA* and s 30 of the *HRA* arises only because the *DA* is a human rights law. There is no necessary conflation more generally,[75] and when the law in question is not a human rights law – as is usually the case – interpretation under s 30 of the *HRA* will be a far more difficult exercise.

The Tribunal in *Raytheon v ACT HRC* was mistaken when it read the phrase 'consistently with its purpose' in s 30 of the *HRA* as having an obvious connection to s 139 of the *LA*, and when it concluded that s 30 of the *HRA* therefore merely requires a purposive interpretation. In the Victorian Civil and Administrative Tribunal Bell J was understandably concerned that the approach in *Raytheon v ACT HRC* sets the wrong example, and quite rightly saw it as suggesting that a human rights law makes no difference to the operation of the exemption power, reduced to 'do[ing] little if any more work than the standard principles of interpretation, when it was intended to go further in the direction of human rights'.[76] Limiting the scope of s 30 of the *HRA* to the purposive rule in s 139 of the *LA* is not warranted by the relevant *Explanatory Statement*, which makes no explicit reference to s 139 *LA*. Rather, the *Explanatory Statement* says that s 30 of the *HRA* '*clarifies the interaction between* the interpretive rule and the purposive rule',[77] and 'draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557'.[78] The effect of s 30 of the *HRA* is that unless the law is intended to operate in a way that is inconsistent with the right in question, *the interpretation that is most consistent with human rights must prevail*'.[79]

In summary, there were two paths the Tribunal in *Raytheon v ACT HRC* could have travelled, and they would have led to the same position: a reading of s 109 of the *DA* that was human rights-compliant and consistent with the *DA*'s purpose. Understanding s 109 of the *DA* in this way means that the exemption sought by Raytheon would have to have been refused. Raytheon did not pretend that it was seeking an exemption to promote the objects of the *DA*; rather, it was seeking an exemption for an unrelated purpose (to operate its business) said to

[75] See the discussion of 'Reconciling s 30 and s 139' in *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147, [208]-[220].
[76] *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [103].
[77] The Legislative Assembly for the Australian Capital Territory, *Human Rights Amendment Bill 2007 Explanatory Statement*, 2007, emphasis added.
[78] The way in which *Ghaidan* should be understood and applied is a current and difficult issue: in Australia, for example, see *Momcilovic v The Queen* [2011] HCA 34; *In the Matter of an Application for Bail by Isa Islam (Islam)* [2010] ACTSC 147; Michael Stanton, 'Fighting Phantoms: A Democratic Defence of Human Rights Legislation', (2006) 32(3) *Alternative Law Journal* 138; generally, for example, see Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70(2) *Modern Law Review* 294; Alison Young, '*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap' [2005] *Public Law* 23.
[79] Ibid, emphasis added.

be in the 'public interest', discussed below. For political and practical reasons, refusing the exemption may not have been the preferred result, but it would have been the correct result under anti-discrimination and human rights law. As the Tribunal in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* quite rightly said (before granting an exemption): Whether or not '[the discrimination] prohibitions may be considered uncomfortable or inconvenient, Parliament has enacted them'.[80]

V RAYTHEON'S 'PUBLIC INTEREST' EVIDENCE

The Tribunal in *Raytheon v ACT HRC* dealt at a very early stage in its reasons with Raytheon's argument that there was a substantial public interest in granting the exemption.[81] It seems to have done so for one of two reasons, both mistaken.

The Tribunal may have taken account of evidence of the 'public interest' as part of the s 28 *HRA* assessment of whether the s 109 of the *DA* exemption power is a justifiable limit on human rights; this was an error, as the question of justifiable limits is assessed by reference to the terms of the relevant law.[82] Alternatively, the Tribunal may have taken account of evidence of the 'public interest' when exercising the discretion under s 109 of the *DA*; this was an error, as the issue is not whether there is a public interest in granting an exemption, but whether an exemption should be granted taking into account the considerations that are appropriate under 109 of the *DA*.

In an inclusive list, the only two prescribed considerations under 109 of the *DA* are the need to promote an acceptance of and compliance with the *DA*, and the desirability, if relevant, of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination.[83] Because the Tribunal considered that s of the 109 of the *DA* was broad enough to encompass reasons for an exemption beyond the *DA*'s anti-discriminatory objectives,[84] it was open to receiving evidence which addressed reasons for the exemption other than to promote the objects of the *DA*. Those other reasons were made more palatable, and even persuasive, by being said to be in the 'public interest'. If, however, s 109 of the *DA* is given a meaning that accords with a narrower, human rights purpose, evidence of non-human rights implications of an exemption is irrelevant.

In any event, the Tribunal heard Raytheon's argument that there was a substantial public interest in granting the exemption,[85] that is, in allowing it to discriminate on the ground of a person's race. On its face, this is a bold argument. It says, in effect, that the public interest is served by allowing racial discrimination. The public interest said by Raytheon to be served by allowing racial discrimination was, first, avoiding an adverse impact on Australia's defence capability and readiness.[86] This gives the public interest argument a sense of overwhelming import, suggesting that no argument can succeed when the security of the state is at stake; indeed, it seems that the Tribunal had exactly that sense. But such a claim demands very good evidence if it is to be established: it is easy to make grand claims of

[80] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [15].
[81] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [25].
[82] See text associated with above n 74.
[83] *Discrimination Act 1991* (ACT), s 109(3).
[84] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47]
[85] Ibid, [25].
[86] Ibid, [25].

possible doom; a tribunal should of course be careful in concluding that such claims have substance, let alone that they can be shown to be likely.

There was, however, scant evidence before the Tribunal that refusing an exemption – and so requiring Raytheon to comply with the *DA*'s prohibition against racial discrimination – was likely to have an adverse impact on Australia's defence capability and readiness. The only evidence was affidavit evidence of two of the respondent's lawyers, who made untested claims that without access to ITAR controlled material Raytheon would not be able to keep a NASA site operational, would experience difficulties in managing its business and in running some classified programs, and may not be able to complete its contracts, all of which could compromise Australia's defence capabilities and, in some instances, affect the readiness of its defence forces. Similarly, in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* the applicant, with the same legal representatives, relied on the same general and untested assertions.[87]

None of the lawyers' evidence was probative of the public interest claim Raytheon relied on; it failed the Rice-Davies test: 'He would say that wouldn't he'.[88] At its highest, the evidence was assertions that there could be some unspecified consequences, made by people who were not obviously qualified or well-placed to say so. On an ordinary standard of proof, the balance of probabilities,[89] the evidence lacks probity. Having regard to the nature of the subject matter and the gravity of what was in issue[90] – permitting race discrimination – the evidence was (or should have been) entirely unpersuasive. The Tribunal reasoned that 'the evidence of neither [witness] was challenged in these proceedings, save as to its sufficiency, and the Tribunal should, therefore, accept and act on it'.[91] It is impossible to see how, if evidence is challenged as to its sufficiency, it should 'therefore' be accepted and acted on.

It was that very insufficiency of evidence that led the Northern Territory Anti-Discrimination Commissioner to say in 2007 that 'Raytheon has failed to convince me that Australia would be any less secure nationally without the … exemption'.[92] In seeking an ITAR-related exemption from the *Anti-Discrimination Act* (NT), Raytheon had asserted 'that a failure to grant the exemption would substantially undermine Australia's defence capabilities', but the assertion was found to be 'unproven and unsupported by evidence'.[93] The NT Commissioner observed that 'the important subject of national security deserves a rigorous analysis … [but that] Raytheon has made no attempt beyond mere assertion to convince me of the accuracy of this proposition'.[94] In a Queensland case where the application for the exemption was not decided because it was considered unnecessary in the circumstances, the Tribunal said that it

[87] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [35]-[39], [41].
[88] Based on the response 'He would, wouldn't he', given by the courtesan Mandy Rice-Davies when told in court that Lord Astor had denied having met her; see A Partington (ed), *The Oxford Dictionary of Quotations* (Revised 4th ed, Oxford, 1996) 540; the expression 'imputes interests to those who claim to be disinterested': P. Heelas, *Religion, Modernity, and Postmodernity* (Wiley-Blackwell, 1998) 32.
[89] See eg *Evidence Act 2011* (ACT), s 140(1).
[90] See eg ibid, s 140(2); *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537, 577 (Branson J).
[91] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [64].
[92] *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027, [7.13].
[93] Ibid, [7.12].
[94] Ibid, [7.13].

would have refused the application on its merits as the arguments were unpersuasive and supported by scant evidence.[95]

The ACT HRD Commissioner was of the same view when making the decision that was subject to review in *Raytheon v ACT HRC*, saying that 'although Raytheon and other submissions have asserted that the grant of this exemption is vital 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'.[96] In observing that the threshold for limiting the right to equality and non-discrimination on racial grounds is high, the ACT HRD Commissioner may have had in mind the *Briginshaw* principle that the seriousness of the issues is a factor when assessing the strength of the available evidence,[97] but an awareness of this principle is starkly absent from the Tribunal's evaluation of the evidence in *Raytheon v ACT HRC*.

A second 'public interest' that Raytheon claimed was served by allowing racial discrimination was avoiding 'loss of employment opportunities for a significant number of people [already] employed'.[98] Even if, for the sake of argument, people's loss of employment is a matter of public interest and it is proper to take account of matters of public interest in deciding an exemption application, the evidence in support of the claim was inadequate.

The lawyers' affidavits claimed that without access to the ITAR-related material, employees would not be able to 'keep the [Tidbinbilla] site operational', that employees at Raytheon's head office needed the material to do their work, and that work would 'likely' be sent offshore. As well they claimed that failing to comply with the ITAR licence means that Raytheon's authority 'could' be revoked, that Raytheon 'could' be barred from using or receiving ITAR-related materials, and that US exporters to Raytheon 'could' be prosecuted.

These general and conditional claims fall well short of an ordinary standard of probative evidence, and fail completely to respond to the nature of the subject matter and the gravity of the matters.[99] However, even if the evidence had some probative value, the Tribunal should have weighed Raytheon's professed concern for loss of jobs against the position taken by the workers' representatives. The granting of an exemption was opposed by Unions ACT, on behalf of the Communication Electrical Plumbers Union, the Community and Public Sector Union, the Australian Manufacturing Workers' Union and the Australian Workers Union, all representing several hundred workers who may be affected by an exemption. Independently of this submission, the Australian Manufacturing Workers' Union also opposed the granting of an exemption. The unions' opposition was known to the Tribunal, having been set out in the decision under review,[100] but the Tribunal made no reference to it.

The Tribunal felt justified taking account of these public interest matters because of the broad meaning it gave to s 109 of the *DA*, but also because of some idea it had of national

[95] *Boeing Australia Holdings Pty Ltd & related entities (No. 2)* [2008] QADT 34, [83(f)].
[96] Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.
[97] See eg references at above n 90.
[98] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [26]; and see similarly *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [38]-[39], [41].
[99] See eg references at above n 90.
[100] Letter from the ACT Human Rights Commission to Mr Peter Arthur, 20 November 2007, <www.hrc.act.gov.au/content.php/category.view/id/105>.

consistency: the Tribunal took comfort in the fact that in all the other exemption decisions 'the same kinds of grounds that are relied upon for the grant of an exemption in this case were regarded as a sufficient justification for exemption by the decision-maker in each of those cases'.[101] It followed, therefore, that the same approach of 'having regard to broad considerations of public interest'[102] should be taken in *Raytheon v ACT HRC*, 'in the interests of uniformity and comity'.[103] In doing so, the Tribunal abdicated any responsibility for analysing and giving effect to the specific provisions of the ACT legislation, quite apart from analysing whether the approach taken in the other jurisdictions was warranted. Similarly, the Victorian Tribunal in *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*, seems to have been swayed by the fact that similar exemptions had been granted elsewhere.[104]

VI REFLECTING ON THE FAILURE TO STARE DOWN THE ITAR

Despite its thin and confused reasoning, *Raytheon v ACT HRC* is important as the first and, so far, only attempt under the *HRA* to reconcile a discrimination exemption provision with human rights law. The merits of the decision were not reviewed; the ACT HRD Commissioner's appeal was dismissed because the issues that were said in the Notice of Appeal to be questions of law were found not to have been framed as such.[105] A more recent application to review a refused exemption in the ACT was settled by an agreement which allows racial discrimination in defined circumstances,[106] an apparent concession by the ACT HRD Commissioner that the poorly-reasoned decision in *Raytheon v ACT HRC* stands in the way of a human rights compatible interpretation of the exemption power.

As noted above, Bell J in Victoria has already expressed concern that the approach in *Raytheon v ACT HRC* sets the wrong example.[107] Despite the uncertain future of the *Charter* in Victoria,[108] the first and, so far, only ITAR-related decision under the Victorian *Charter*, *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* is also troubling in its approach and in its ready adoption of public interest arguments.

With other decisions that have considered similar exemption applications, *Raytheon v ACT HRC* invites speculation on the extent to the decision makers have been conscious of the pressure on them to grant the exemption. In the face of alleged risks to national security, business viability and employment, it must be hard for a court or tribunal to stand by the purpose of anti-discrimination legislation, no matter how clearly it is stated in all jurisdictions, and even when reinforced by human rights laws as in the ACT and Victoria.

Courts and tribunals have been left to cope with pressure which is not a technical legal one but is ITAR-induced, and which has political, diplomatic and economic dimensions that

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[101] *Raytheon Australia Pty Ltd & Ors and ACT Human Rights Commission* [2008] ACTAAT 19, [47].
[102] Ibid, [44].
[103] Ibid, [49].
[104] *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 796, [40]
[105] *ACT Human Rights Commission v Raytheon Australia Pty Ltd & Ors* [2009] ACTSC 55.
[106] *BAE Systems Australia Limited v ACT Human Rights Commission* [2011] ACACT 53.
[107] Above n 76.
[108] Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act* 2006, Parliament of Victoria, September 2011, Recommendation 13: 'that the justifiable limits provision be redrafted', and Recommendation 35: 'that [the] interpretation of laws [provision] … be repealed'.

should properly be taken up by the Australian Government.[109] Courts and tribunals have characterised the exemption question as one which asks whether '[t]he public interest in granting the exemption outweighs the public interest and other interests in not granting it'.[110] But in reality they have had little real choice, in the face of employers' (poorly substantiated) claims that without the exemption the defence contracts will be breached with serious consequences, including the loss of jobs.

The newly-discovered broad 'public interest' criterion has distorted discrimination law, undermining conventional acceptance that 'temporary exemptions were expected to promote the aims of the Act [and that] commercial disadvantage was deemed not constitute a proper purpose'.[111] The broad 'public interest' criterion has opened up the exemptions power so widely that what a discrimination statute promises in one part, it takes away in another. This was acknowledged openly in Western Australia, for example, when the defence manufacturers conceded that in their exemption application they could not invoke the 'spirit' of the *Equal Opportunity Act 1984* (WA), and the Tribunal concluded that 'the grant of the exemption would not fit within the objects' of the Act.[112] This 'expansive view' has been criticised as irreconcilable with 'the primary purpose of the equal opportunity legislation'.[113] Bell J is right to reject the proposition – central to the way that courts and tribunals have tried to manage the confronting demands of the ITAR – that the exemption power in anti-discrimination laws can be exercised to achieve 'convenient, economic and practical outcomes',[114] and says that to exercise the power to that end is a matter of 'expedience' which is 'inconsistent with the principled purposes of the legislation, even given the provisions for exceptions and exemptions'.[115]

It should be the case that human rights laws in the ACT and Victoria give decision makers the strength they need to stand by the spirit of anti-discrimination laws, and to stay within the objects of those laws. That has indeed been the case so far under the Victorian *Charter* for non-ITAR related exemptions.[116] Bell J has observed that '[t]he discretion … to grant an exemption must be exercised compatibly with the human rights in the *Charter*, especially the equality rights',[117] and Harbison J felt bound by the *Charter* to 'not make an exemption unless I am sure that the proposed exemption is justified by the purpose of the Equal Opportunity Act, and that the granting of the exemption is compatible with human rights'.[118]

An ITAR-related exemption which is sought genuinely, and not for convenience,[119] may indeed raise concerns about security, defence, business viability and employment. If it is refused because of the proper operation of the exemption power, then the solution for those

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[109] See Simon Rice, 'Discriminating for World Peace' in Jeremy Farrall and Kim Rubenstein (ed), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, Cambridge) 355-377, 362-364.
[110] *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [161].
[111] Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act', (2010) 23 *Australian Journal of Labour Law* 240, 246, citing *Stevens v Fernwood Fitness Centres Pty Ltd* (1996) EOC 92-782.
[112] *ADI Ltd v Commissioner for Equal Opportunity & Ors* [2005] WASAT 259, [111].
[113] *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [65].
[114] Ibid, referring to *Boeing Australia Holdings Pty Ltd* [2007] VCAT 532, [35].
[115] *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [65].
[116] See eg Ibid; *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415; see also Thornton, above n 111.
[117] *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [75].
[118] *Royal Victorian Bowls Association Inc* [2008] VCAT 2415, [47].
[119] *Exemption Application by Raytheon Australia Pty Ltd and related companies*, ADC (NT) 2007/027, [7.19].

who insist they need an exemption lies with the parliament and the view it takes on how that power should operate in future.

There is now a much clearer path to reconciling discrimination exemptions and human rights law than there was at the time of *Raytheon v ACT HRC*. It is important for the integrity of anti-discrimination law and human rights law in Australia that courts and tribunals follow the path clearly marked by the legislature, since explicated in *Momcilovic v The Queen*. The political and pragmatic pressures of the ITAR exemption cases are such that unless there is fidelity to the statutory regime, 'judges [and tribunals] may be suspected of tailoring their approaches in order to produce a desired outcome'.[120]

[120] *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* [2007] HCA 57, [68] (Kirby J).