

# THE EXEMPTION APPROACH TOWARD RIGHTS: A REVIEW OF THE *BOEING AUSTRALIA* DECISION

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*Sensitive aerospace technology transfer and the manufacture of aeronautic and military components is subject to American law that places American security ahead of equality law. Reconciling the extraterritorial reach of powerful states and companies with domestic law can benefit from the ideas and solutions applied in other similar legal jurisdictions. The legal issue recently addressed by the Supreme Court of Canada in the Quebec v Bombardier Inc (Latif) decision has been consistently managed in Australia using a different approach more than eight years prior to Latif. In many ways Canada and Australia overlap in their respective economic, political, social, historical and legal cultures. However, Australian states traditionally enact much more detailed and nuanced private sector equality legislation, which is in turn subjected to broader administrative review and more adjudicative options than found in Canada. These differences permit Australia to employ the statutory exemption model. For public interest reasons relating to employment, the economy, defence, post-secondary education and research, private sector industries and companies may be granted indefinitely renewable exemptions from equality obligations. This article compares the Canadian legislation in Latif with the Australian State of Victoria's Equal Opportunity Act 1995, which contains numerous "exemptions" to the equality principle as demonstrated in the Boeing Australia case. The more complicated and time-consuming Canadian approach renders less generalizable decisions than the proactive exemption model employed in Australia.*

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*Les transferts de technologie secrète dans le domaine de l'aérospatiale ainsi que la fabrication de composantes aéronautiques et militaires sont régis par le droit américain qui place la sécurité au-dessus du droit à l'égalité. Les idées et les solutions développées dans des régimes juridiques similaires peuvent être utiles pour opérer le rapprochement entre la portée extraterritoriale des puissants États et entreprises, d'une part, et le droit national, d'autre part. Les questions juridiques récemment tranchées par la Cour suprême du Canada dans l'arrêt Québec c Bombardier Inc (Latif) ont systématiquement été traitées en Australie depuis plus de huit ans, en fonction d'une approche tout à fait différente. À de nombreux égards, le Canada et l'Australie se chevauchent dans leurs cultures économique, politique, sociale, historique et juridique respectives. Cependant, les États australiens promulguent traditionnellement des textes législatifs beaucoup plus détaillés et nuancés sur l'égalité dans le secteur privé. Cette*

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législation fait l'objet d'examen administratifs plus larges et d'alternatives adjudicatives plus étendues qu'au Canada. Ces différences permettent à l'Australie d'utiliser le modèle de l'exemption législative. Ainsi, pour des motifs d'intérêt public connexes à l'emploi, à l'économie, à la défense, à l'enseignement et à la recherche postsecondaires, les entreprises et industries du secteur public peuvent se voir exemptées des obligations d'égalité; exemptions qui peuvent être renouvelées indéfiniment. Cet article compare la législation canadienne présidant à l'arrêt *Latif* avec l'*Equal Opportunity Act 1995* promulguée par l'État de Victoria en Australie, qui contient de nombreuses « exemptions » au principe d'égalité, comme l'a démontré l'affaire *Boeing Australia*. L'approche plus complexe chronophage adoptée par le Canada ne permet pas la prise de décisions pouvant aussi facilement être généralisées que le modèle des exemptions proactives utilisé en Australie.

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## 1. Introduction

Interestingly, a virtually identical scenario to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* arose and was answered in Australia more than eight years prior to the Supreme Court of Canada's decision.<sup>1</sup> That case, analogous on its facts and legal issues, is *Boeing Australia Holdings Pty Ltd (Anti-Discrimination Exemption)*.<sup>2</sup> Exempted for public interest reasons relating to employment, the economy, defence and post-secondary education and research, it led to the same outcome. However, Australia follows a different procedural and analytical pathway that is not available

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<sup>1</sup> 2015 SCC 39, [2015] 2 SCR 789 [*Latif*].

<sup>2</sup> [2007] VCAT 532, online: <[www.austlii.edu.au/au/cases/vic/VCAT/2007/532.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2007/532.html)> [*Boeing Australia*].

in Canadian anti-discrimination legislation. This is a brief comment on the *Boeing Australia* case, how it compares to *Latif* and how it can inform Canadian equality law.

## 2. Australian Employment and Non-Discrimination Law

The employment and labour laws of any country inherently reflect that country's unique amalgam of economic, political, social history and legal culture. Australia is a federal common law country similar in many ways to Canada, but one clear point of departure is employment and labour law. In Australia, much more workplace legislation is federalized and subject to administrative adjudication than in Canada.<sup>3</sup>

While the federal (or “Commonwealth”) government in Australia exercises general legislative jurisdiction over employment and labour law, and has enacted some anti-discrimination legislation covering Australian workplaces,<sup>4</sup> the strongest and broadest coverage of employment equality protection is found in the subnational state jurisdictions in Australia, much as in Canada. The anti-discrimination legislation in Australian states can be highly nuanced and complex by Canadian standards. Not only is discrimination defined, and a more comprehensive set of personal attributes formulated, but there is a recognition that some circumstances may arise, or be identified, where discrimination should be permitted by way of an exemption from the operation of the legislation on a corporate-specific basis. Accordingly, Australian employers and administrative tribunals charged with applying the legislation are often possessed of more options. An employer can apply, in advance of hiring, for an exemption from the legislation.

We invoke the example of the State of Victoria and its *Equal Opportunity Act 1995*.<sup>5</sup> This legislation contains numerous enumerated activity-specific “exceptions”<sup>6</sup> and sector-specific “exemptions”<sup>7</sup> to the equality principle. The tribunal, which may be comprised of a single member, may grant

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<sup>3</sup> E.g. *The Fair Work Act 2009* (Cth) (and its offices of Ombudsman and Commission).

<sup>4</sup> See e.g. *Age Discrimination Act 2004* (Cth).

<sup>5</sup> (Cth) (first enacted in 1984).

<sup>6</sup> *Ibid*, ss 17–36. These exceptions in the employment-related context include domestic or personal services, genuine occupational requirements, political employment, family and small business employment, reasonable terms of employment, standards of dress and behaviour, care of children, compulsory retirement, youth wages, reasonable terms of partnership and reasonable terms of qualification.

<sup>7</sup> *Ibid*, ss 70–82. These exemptions include orders issued under statutory authority, things done to comply with orders of courts and tribunals, pensions, superannuation fund conditions, charities, religious bodies, schools, beliefs and principles, private clubs, protection

an exemption from the legislative obligations for a three year term that is renewable indefinitely. The Victorian statute reads as follows:

Exemptions by the Tribunal

1. The Tribunal, by notice published in the Government Gazette, may grant an exemption—
  - a) from any of the provisions of this Act in relation to—
    - i) a person or class of people; or
    - ii) an activity or class of activities; or . . .
  - c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.
2. An exemption remains in force for the period, not exceeding 3 years, that is specified in the notice.
3. The Tribunal, by notice published in the Government Gazette—
  - a) may renew an exemption from time to time for the period, not exceeding 3 years, specified in the notice;
  - b) may revoke an exemption with effect from the date specified in the notice, which must be a date not less than 3 months after the date the notice is published.
4. If the Tribunal revokes an exemption granted on the application of a person it must notify that person in writing at least 3 months before the date the revocation is to come into effect.
5. For the purposes of granting, reviewing or revoking an exemption under this section—
  - a) the Tribunal is to be constituted by—
    - i) a panel constituted under section 182; or
    - ii) the President—as the President directs;

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of health, safety and property, age benefits and concessions, welfare measures and special needs.

- b) the procedure of the Tribunal is at the discretion of the person constituting or presiding over the Tribunal.<sup>8</sup>

The tribunal referenced is the Victorian Civil and Administrative Tribunal (“VCAT”), in particular the Anti-Discrimination panel of the Human Rights Division of VCAT. A Boeing-related group of aerospace companies<sup>9</sup> combined as a single “applicant” to proactively seek, pursuant to section 83, an exemption from compliance with the anti-discrimination provisions of the *Equal Opportunity Act 1995*.<sup>10</sup> The exemption application was grounded on the applicant’s need to comply with foreign security laws.<sup>11</sup> The aircraft manufacturer applied to discriminate in employment on the basis of nationality so it could comply with technology licensing agreements made under foreign law.<sup>12</sup> Unlike in *Latif*, the exemption hearing was prosecuted in a context free of any specific individual(s) targeted or suffering prejudice by the employer’s recruitment campaign.<sup>13</sup>

### 3. The Facts of *Boeing Australia*

The *Boeing Australia* applicant collectively conducts a significant manufacturing business in Victoria.<sup>14</sup> One division alone employs some 1,300 people, more than half of whom work in Victoria.<sup>15</sup> At a factory at Fishermans Bend in Victoria, it makes components for the commercial and military aircraft industry. In some categories of aero structure components, it is the sole source supplier and “it exports approximately 97% of its manufactured product to the USA, France, the United Kingdom

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<sup>8</sup> *Ibid*, s 83.

<sup>9</sup> The companies are Boeing Australia Holdings Pty Limited, Boeing Australia Limited, Aerospace Technologies of Australia Limited, Hawker de Havilland Aerospace Pty Ltd, Preston Aviation Solutions Pty Ltd, other companies that are now or may in the future be related entities to Boeing Australia Holdings Pty Limited within the meaning of the *Corporations Act 2001* (Cth) and officers and employees of any company otherwise an applicant. It is interesting to note that the exemption that was being sought could apply to companies that will be “related entities” to Boeing in the future.

<sup>10</sup> *Boeing Australia*, *supra* note 2; *Equal Opportunity Act 1995*, *supra* note 5.

<sup>11</sup> *Boeing Australia*, *supra* note 2 at para 1.

<sup>12</sup> *Ibid*.

<sup>13</sup> The 1995 Victorian statute was updated and repealed by the *Equal Opportunity Act 2010*. The newer Act contains transitional provisions for exemptions granted under the previous Act (s 195), and continues provisions for exemptions similar to the previous Act (s 89), although these may prevail for five years rather than the previous three years. Jurisdiction to grant exemptions remains with VCAT. The new exemption provision expressly requires VCAT to consider the equality duty in the *Charter of Rights and Responsibilities 2006* (Vic).

<sup>14</sup> Although the case is now over a decade old, the facts remain essentially unchanged. Therefore, we refer to the facts in present tense.

<sup>15</sup> *Boeing Australia*, *supra* note 2 at para 14.

and Canada.”<sup>16</sup> These jobs add high value to the local economy. Australian engineers, tradespersons and administrators receive “good” jobs from these contracts. The aerospace industry also significantly contributes to the post-secondary education sector through co-operative research centres and collaborative programs, as well as the Australian defence forces. Boeing’s ability to manufacture these aircraft components depends upon it complying with licence agreements and on the export laws of the US, namely the *International Traffic in Arms Regulations* (“ITAR”) and the *Export Administration Regulations* (“EAR”), which were made more stringent after the September 11, 2001 terrorist attacks. These are regulations made under United States law that are imposed on companies undertaking work in this sector of manufacturing. Ultimately, the United States prohibits licensing such technology if it is revealed to persons of certain nationality.<sup>17</sup>

*ITAR* mandates for Boeing’s Australian operations that specific requirements be included in the licensing agreements for American aerospace technology. Notably, in accordance with Part 124.8 (5), the following must comprise part of these aerospace technology licensing agreements:

The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a person in a third country or to a national of a third country except as specifically authorised in this agreement unless the prior written approval of the Department of State has been obtained.<sup>18</sup>

The US Department of State effectively approved Australian and Canadian nationals as persons to whom technical data or defence service may be transferred. Permanent residents and individuals who possess dual citizenship with a country other than the United States or Canada were not approved. Boeing would be in breach of its licensing agreements if technical data were transferred to a national of a country other than Australia, the United States or Canada, without the prior written approval of the US Department of State.<sup>19</sup> Failure to comply with *ITAR* subjects Boeing to sanctions such as criminal liabilities, fines, loss of export privileges and access to technology that would jeopardize the manufacturing projects in

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<sup>16</sup> *Ibid* at para 7.

<sup>17</sup> See generally *Arms Export Control Act*, 22 USCA tit 22 §§ 2778 (2014) [“AECA”]; Administration of Reformed Export Controls, Exec Order No 13637, 78 FR 16129, (2013). The *International Traffic in Arms Regulations*, 22 CFR § 120–30, implements the AECA [“ITAR”].

<sup>18</sup> The expression “a national of a third country” is not defined in the *ITAR*.

<sup>19</sup> *Boeing Australia*, *supra* note 2 at para 11.

Victoria. The judge was of the view that “the threat of closure of Boeing’s operations, if it is not granted an exemption, is a real one.”<sup>20</sup>

Boeing put in place a strict export control regime to comply with its licensing agreements and the United States’ export laws. This necessitated employment practices that, unless they are exempted, would contravene several provisions of the *Equal Opportunity Act 1995*: recruitment activity,<sup>21</sup> redeployment and termination of employment,<sup>22</sup> engagement of contract workers throughout the work cycle,<sup>23</sup> authorizing discrimination,<sup>24</sup> requests for information<sup>25</sup> and discriminatory advertising.<sup>26</sup>

Boeing sought a necessary exemption, which would enable it to solicit nationality and citizenship status from existing and future employees; require existing and future employees to wear a badge identifying them as American, Australian or Canadian Boeing employees; prevent unauthorized employees from accessing controlled technology and identified roles by limiting computer access and other means; obtain export control compliance verification from employees; and ask foreign national or dual citizen employees to execute non-disclosure agreements. Meanwhile, the applicant promised to act within the exemption to the minimal extent necessary to meet the requirements of the *ITAR*. Mitigation of adverse effects could include training and informing employees about the exemption, applying for any feasible amendments to the licence, and reassigning employees from controlled programs to non-controlled programs.

## 4. The Anti-Discrimination Exemption

### A) Background to *Boeing Australia*

Boeing first applied for, and obtained, this exemption in December 2003 permitting the applicant to discriminate in its employment practices on the basis of nationality.<sup>27</sup> The first exemption was granted for three years and it expired on December 18, 2006. The single administrative judge identified significant public interests in support of the exemption: the potential loss

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<sup>20</sup> *Ibid* at para 12.

<sup>21</sup> *Supra* note 5, s 13.

<sup>22</sup> *Ibid*, s 14.

<sup>23</sup> *Ibid*, s 15.

<sup>24</sup> *Ibid*, s 98.

<sup>25</sup> *Ibid*, s 100.

<sup>26</sup> *Ibid*, s 195.

<sup>27</sup> Exemption applications are publicly advertised.

of US defence projects regulated by the *ITAR*, and Australia's own defence capability, employment and funding of research projects.

About three days prior to lapse of the exemption, Boeing applied for renewal of the exemption for a further period of three years, with one affidavit in support.<sup>28</sup> The Victorian Equal Opportunity and Human Rights Commission and a large national union made written submissions<sup>29</sup> in what the administrative judge referred to as an "important" exemption hearing.<sup>30</sup>

By way of update since the first exemption in 2003, no worker was dismissed from employment and Boeing reassigned five affected workers to non-controlled programs. The applicant negotiated terms with applicable unions about implementing export compliance. Boeing sought a mere extension of the original exemption to allow it to comply with the US security regulations.

The practice in Australia is to embed conditions in all exemptions. These include the limits that the applicant exercise the exemption only as reasonably necessary to satisfy the US security regulations. Exempted companies must take reasonable steps to avoid or reduce the adverse effects of the exemption. For example, the exempted employer is still expected to consider seeking exemptions in individual cases from the US authorities; provide all affected people with express notice in plain English that they may be adversely affected by the exemption, how they might be affected, their rights under all related legislation; and engage in anti-discrimination training. Boeing and other exempted employers must also file written reports to VCAT and the Victorian Equal Opportunity and Human Rights Commission every six months throughout the exemption. These reports must address steps the employer has taken to comply with the foregoing conditions, and to the extent known, the number of people affected by the exemption order, and its effects.

## B) Law and Analysis

In the Victorian statute, "nationality or national origin"<sup>31</sup> is definitionally embraced by the personal attribute of race.<sup>32</sup> It is clear that it is unlawful

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<sup>28</sup> On December 15, 2006 an interim exemption was granted: *Boeing Australia*, *supra* note 2 at para 20.

<sup>29</sup> Favourable and opposed, respectively.

<sup>30</sup> *Boeing Australia*, *supra* note 2 at para 1. More accurately, it was an extension hearing.

<sup>31</sup> *Equal Opportunity Act 1995*, *supra* note 5, s 4(c).

<sup>32</sup> *Ibid*, s 6(i).



for an employer to screen employment on the basis of nationality.<sup>33</sup> The administrative judge in *Boeing Australia* acknowledged that the concept of “nationality” is not without its own difficulties.<sup>34</sup> The *ITAR* limitation, expressed as “national of a third country” was tantamount to “citizenship of a third country” since citizenship is mediated by countries.

Section 83 did not lay out any criteria for the tribunal to consider in deciding exemption applications.<sup>35</sup> The judge found a broad grant of discretion, keeping in mind the objectives of the *Equal Opportunity Act 1995*,<sup>36</sup> the reasonableness of the corporate conduct,<sup>37</sup> the public interest,<sup>38</sup> whether there was an interest “sufficient to justify the exemption”<sup>39</sup> and whether the proposed exemption is necessary to avoid an unreasonable outcome.<sup>40</sup>

Apart from the 2003 *Boeing* exemption, the judge in the 2007 extension application found precedent favouring an exemption in only two prior earlier tribunal decisions, *ADI Ltd v Equal Opportunity Commission*<sup>41</sup> and *Exemption application re: Boeing Australia Holdings Pty Ltd*.<sup>42</sup> Both those cases involved very similar facts as the *Boeing* case—indeed, one was a *Boeing* case from Queensland—and the exemptions were granted in the public interest largely for the same reasons as in the 2003 *Boeing* decision.

The administrative judge reasoned that a compromise on equality was reasonable in this case. These circumstances necessitating the exemption were not of *Boeing*’s own making. If one wanted to retain and harvest the economic and social benefits of these American investments, there was no choice but to compromise. The *International Covenant on Economic, Social and Cultural Rights* recognition of the right to work as a human right was

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<sup>33</sup> A Victorian exemption does not impact operation of the federal *Racial Discrimination Act 1975* (Cth), which does not prohibit discrimination on the basis of “nationality.”

<sup>34</sup> *Boeing Australia*, *supra* note 2 at para 24.

<sup>35</sup> By contrast, the 2010 version of this legislation enumerates such criteria (in section 90). However, these are so broad as to offer little guidance.

<sup>36</sup> *Supra* note 5.

<sup>37</sup> *Stevens v Fernwood Fitness Centres Pty Ltd*, (1996), EOC 92-782 (State Administrative Tribunal).

<sup>38</sup> *ADI Ltd v Equal Opportunity Commission*, [2005] WASAT 49. The original 2003 *Boeing Australia* exemption was granted on the basis of community interest. The 2007 *Boeing Australia* judge (*supra* note 2), acknowledged “there is also a public interest in achieving convenient, economic and practical outcomes, even though such outcomes may serve private interests” at para 35.

<sup>39</sup> *Re Australian Grand Prix Corporation*, [2006] VCAT 2193.

<sup>40</sup> *Boeing Australia*, *supra* note 2 at para 34.

<sup>41</sup> *Supra* note 38.

<sup>42</sup> [2003] QADT 21 [*Boeing* 2003].

noted.<sup>43</sup> The judge observed, in the context of risk of plant closures: “[t]he continuity of employment is also important: to lose a job often has greater consequences than to not obtain a job.”<sup>44</sup> Other rationale also inclined toward granting the extension: the attribute of nationality was one over which people can at least attempt to exercise some control and compromise on equality would be mitigated by other conditions.

On May 3, 2007, the *Boeing Australia* exemption was extended for three years in the State of Victoria under the same conditions.

## 5. Epilogue

Apart from the *Boeing Australia* decision, the *ITAR* and *EAR* regulations imposed by the US on Australian companies have led to more than 30 other exemption applications and extensions.<sup>45</sup> BAE Systems, Raytheon, Thales,

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<sup>43</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 6 (entered into force 3 January 1976, ratified by Australia 10 December 1975).

<sup>44</sup> *Boeing Australia*, *supra* note 2 at para 43.

<sup>45</sup> Cases are listed by state, in chronological order. Victoria: *ADI Limited (Exemption)*, [2004] VCAT 1963; *Raytheon Australia Pty Ltd Exemption Application (Anti-Discrimination)*, [2007] VCAT 2230; *ADI Ltd (Anti-Discrimination)*, [2007] VCAT 2242; *BAE Systems Australia Ltd (Anti-Discrimination)*, [2008] VCAT 1799; *Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission*, [2011] VCAT 796; *Thales Australia Ltd and ADI Munitions Pty Ltd (Anti-Discrimination)*, [2011] VCAT 729; *BAE Systems Australia Ltd (Anti-Discrimination Exemption)*, [2012] VCAT 349; *Raytheon Australia Ltd (Human Rights)*, [2014] VCAT 1370; *Thales Australia Ltd and ADI Munitions Pty Ltd exemption (Human Rights)*, [2014] VCAT 1441; *BAE Systems Australia Defence Pty Ltd - Exemption (Human Rights)*, [2015] VCAT 230; *Linfox Australia Pty Ltd - Exemption (Human Rights)*, [2015] VCAT 528. Western Australia: *ADI Ltd v Commissioner for Equal Opportunity*, [2005] WASAT 259 [*ADI Ltd* Administrative Tribunal]; *Commissioner for Equal Opportunity v ADI Ltd*, [2007] WASCA 261 [*ADI Ltd* CA]; *Raytheon Australia Pty Ltd v Commissioner for Equal Opportunity*, [2008] WASAT 266 (five year exemption); *Thales Australia Ltd v Commission for Equal Opportunity*, [2012] WASAT 222; *Raytheon Australia Pty Ltd v Commissioner for Equal Opportunity* (orders of State Administrative Tribunal of Western Australia dated 8 November 2013) [unreported]. South Australia: *BAE Systems Australia Ltd*, [2008] SAEOT 1; *Raytheon Australia Pty Ltd*, [2008] SAEOT 3; *Re: BAE Systems Australia Ltd*, [2011] SAEOT 3; *Raytheon Australia Pty Ltd*, [2011] SAEOT 6; *BAE Systems Australia*, [2014] SAEOT 3; *Raytheon Australia*, [2014] SAEOT 5. ACT (Australian Capital Territory): *Raytheon Australia Pty Ltd v ACT Human Rights Commission*, [2008] ACTAAT 19 [*Raytheon*]; *ACT Human Rights Commission v Raytheon Australia Pty Ltd*, [2009] ACTSC 55 (unsuccessful appeal against an exemption granted) [*ACT HRC*]; *BAE Systems Australia Ltd & ACT Human Rights Commissioner*, [2011] ACAT 53 [*BAE Systems*]; *Raytheon Australia Pty Ltd & ACT Human Rights & Discrimination Commissioner (Administrative Review)*, [2012] ACAT 37 (consent order). Queensland: *Boeing 2003*, *supra* note 42; *Raytheon Australia Pty Ltd*, (2008) QADT 1; *Exemption Application re: Boeing Australia Holdings Pty Ltd & Related Entities (No 3)*, [2008] QADT 34 [*Boeing No 3*]. New South Wales: exemption orders made

Linfox and ADI Munitions are other companies that applied for, and were granted, exemptions from the nationality equal opportunity obligations in the state of Victoria and several other Australian states and territories where US technology was employed for defence and military projects. The tribunal panels were approximately equally composed of one person and three persons. Often the same decision makers in each respective state ruled on these exemption and extension applications over the 2003 through 2015 period.<sup>46</sup> A few exemption and extension applications have been unopposed,<sup>47</sup> and even more were the products of consent orders.<sup>48</sup> Some states allow exemption periods of up to five years.<sup>49</sup>

No outstanding exemption was revoked or adjusted. On the merits, only two applications—both from the Australian Capital Territory—were unsuccessful at first instance, but on appeal both exemptions were granted.<sup>50</sup> One application was technically dismissed on the ground that it was not necessary because genuine occupational requirements operated to exempt compliance.<sup>51</sup> Three exemptions were appealed but all were upheld on appeal.<sup>52</sup> Ultimately, in the US security regulations context, all exemptions and extensions sought were granted. In recent years, it appears that Australian tribunals have been relying on the historical indulgence of exemptions to support their continuation. After 14 years of consistently granting and extending exemptions in the same factual context, the legal issue now seems surrendered to *stare decisis*.

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under the *Anti-Discrimination Act 1977* (NSW) on behalf of *Boeing Australia Holdings Pty Ltd* on February 11 2005 (Government Gazette of the State of New South Wales, 11 February 2005); *ADI Ltd* on 1 July 2005 (Government Gazette of the State of New South Wales, 17 July 2005).

<sup>46</sup> Since extensions are generally approached the same way as original applications, we do not distinguish between exemption and extension applications.

<sup>47</sup> E.g. *Boeing 2003 supra* note 42 (five-year exemption).

<sup>48</sup> These were negotiated with the designated human rights commissioner and approved by the respective state equal opportunity tribunal.

<sup>49</sup> Western Australia and Queensland.

<sup>50</sup> *Raytheon, supra* note 45 (The ACT Anti-Discrimination Tribunal refused Raytheon's application for exemption, but that decision was reversed on review); *BAE Systems, supra* note 45 (in January 2008 BAE Systems Australia applied for an exemption, in June 2010, the ACT Human Rights and Discrimination Commissioner refused the exemption sought. BAE Systems applied for review. Following mediation, the parties agreed on the terms of an exemption).

<sup>51</sup> *Boeing No 3, supra* note 45.

<sup>52</sup> *ADI Ltd Administrative Tribunal, supra* note 45 (an appeal against the grant of exemption was dismissed by the Supreme Court of Western Australia: *ADI Ltd CA, supra* note 45; *ACT HRC, supra* note 45 (unsuccessful appeal against an exemption)).

## 6. Comparison with *Latif* and Analysis

The facts in *Latif* are complicated by the subject seeking to train within the US under his American pilot's licence. The failed security clearance emanated from US authorities and the Canadian connection was considerably more tenuous than the on-site Australian cases. Bombardier also refused to train *Latif* at its Montreal centre under his Canadian licence.

The Supreme Court of Canada's clarification, in *Latif's* post-breach approach, of the twostep process in the enforcement of Canadian human rights legislation, variably burdening both plaintiff and defendant, appears to be more complicated and time-consuming than the exemption model employed in Australia. The first step of the plaintiff establishing the three-part foundation of *prima facie* discrimination does not inhere in the Australian pre-emptive exemption model, and where it is invoked, it is a fact analysis about whether compliance was met. The second step where the defendant can seek justification or exemption under the legislation is common ground. There is more layered analysis using the Canadian approach and decisions from that framework are likely to be less generalizable. The *Latif* decision only served to enumerate the tests to be applied going forward; Canadians do not yet know how the US security regulations will fare under these tests.

Similarly, the *Boeing Australia* case can be criticized, especially for weak substantive analysis. The exemption was granted on grounds of employment, economy, defence, and post-secondary education and research but there was little conventional proof of the extent of the above grounds' benefits with or without the exemption. We do not know the size of the military and aerospace investments depending upon this technology, though the number of employees would figure in the hundreds or thousands, but not a factor greater than that. There were no data on economic and social impacts of the exemptions and alternatives to it. Mostly, these impacts were assumed to be significant and the exemptions were thought to be necessary. However, removing equality from any sector is a serious matter that ought to attract a more rigorous analysis, if only for the symbolic effects conveyed when society officially sanctions a withdrawal of equality.

It is not intuitive why the Australian tribunals engage in full spectrum analyses on extension applications. Normally, the facts of the exemptions have not changed much. If there are concerns around the extension, they should be caught by the Human Rights Commission and union oversight on the exemption throughout its validity. There is a reasonable basis for a lighter, modified review on extension applications. Likewise, despite the administrative judge referring to the conditions as "onerous" and the

Commission as an “effective watch dog,”<sup>53</sup> we consider the *Boeing Australia* exemption conditions non-specific, anemic and, for all practical purposes, meaningless. The reporting appears to be mostly a “make work” exercise.<sup>54</sup>

## 7. Conclusion

As the *Boeing Australia* case demonstrates, alongside *Latif*, we are in an interconnected world and transnational demands on private parties can intrude on all economies. The extraterritorial reach of powerful states and companies is not a new problem and other similar legal jurisdictions may provide some ideas and solutions to dealing with it.

Equality rights are not absolute. On the other hand, nationality is one of the least compelling protected grounds. States protect their own interests, which means the interests of their citizens and permanent residents. Other examples already exist of legal preference where employment is given to citizens, and Boeing Australia employees can apply for citizenship or renounce other citizenships.<sup>55</sup> One can usually exercise some control over one’s citizenship. According to *Boeing Australia*:

The human rights standard in issue in this case is concerned with discrimination on the basis of nationality, not discrimination on the basis on ethnicity or ethnic origin or national origin. This is of some relevance, as nationality – in the sense of citizenship – is to some degree a matter of choice. Further our society already recognises that citizenship might be an appropriate basis upon which to discriminate; for example, it is the main basis for determining who is entitled to vote in national and State elections.<sup>56</sup>

The *Boeing Australia* and *Latif* adjustments are sought because important aerospace technology is subject to American law that places American security ahead of this equality law. In both Canada and Australia, any qualification to equality will be applied pragmatically where likely benefit and harm will be compared,<sup>57</sup> although “good” jobs and economic

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<sup>53</sup> *Boeing Australia*, *supra* note 2 at para 47.

<sup>54</sup> Where, as the saying goes, “the employer pretends to report and the Commission pretends to oversee”.

<sup>55</sup> Employment in Canada requires applicants to possess the legal right to work. Employment in the Canadian post-secondary sector requires preference be given to Canadian citizens or permanent residents: *Immigration and Refugee Protection Act*, SC 2001, c 27.

<sup>56</sup> *Supra* note 2 at para 44.

<sup>57</sup> The Australian exemption approach is not without its critics. See e.g. Margaret Thornton & Trish Luker, “The New Racism in Employment Discrimination: Tales from the Global Economy” (2010) 32:1 Sydney L Rev 1; Simon Rice, “Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law” (2011) 10:2 Canberra

development might currently enjoy primacy over the principle of immutable rights.<sup>58</sup> At present, Australia is content with giving in to what the learned administrative judge in *Boeing Australia* called “the elephant in the room.”<sup>59</sup> He said:

The submission made by the [union] urged the tribunal to take a tough line; in effect, to apply pressure on the United States government to back down. This is a tempting submission. One suspects that the ITAR is misconceived; and, in any event, fails to achieve an appropriate balance between human rights and other important considerations, such as arms control and preventing terrorism. But, then, I rather doubt that the United States government will back down from ITAR in the face of a decision of the Victorian Civil and Administrative Tribunal ...

Companies operating in Australia are left with the choice of acquiescing or not manufacturing certain aerospace products. Although acquiescence involves compromising a human rights standard, the alternative involves the potential sacrifice of jobs, economic benefits, defence capability and higher education advantages.<sup>60</sup>

The exemption model is predicated on an affected private sector actor coming forth in advance to publicly request and to present a case for the exemption. Most Canadian equality statutes have an analogous “reasonable and justifiable” exemption that may be granted after the employment practice has begun and after it has been adjudged to be discriminatory with respect to a class of defined individuals already on site—the second step of the *Latif* analysis. We commend the Australian exemption model because it is proactive. It requires the private actor to conceive of both a rationale and a mitigation plan, and to take reasonable steps to avoid or reduce the adverse effects of the exemption via the conditions. Exemptions are temporary, constrained by conditions, revocable and renewable.

There is no reason to believe that exemptions have been, or will be, overused or abused in Australia.<sup>61</sup> The rigour applied to these exemptions, and to their extensions, along with the ongoing oversight and management

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L Rev 97; Beth Gaze & Joanna Howe, “Discrimination, Temporary Exemptions and Compliance with the Law” (2015) 23:1 Australian J Administrative L 10.

<sup>58</sup> Exemptions will be easy to obtain if impacts of discrimination are primarily theoretical.

<sup>59</sup> *Supra* note 2 at para 42.

<sup>60</sup> *Ibid* at paras 41–42.

<sup>61</sup> It is useful to note a point made by Rosemary Kayess & Belinda Smith, “Charters and Disability” in Matthew Groves & Colin Campbell, eds, *Australian Charters of Rights A Decade On* (Annandale: Federation Press, 2017) 151: they conclude that the Victorian and ACT Charters are slowly changing conceptions of disability. The authors question whether that will gradually erode the willingness of VCAT and equivalent bodies to grant exemptions.

of them—when compared to the negligible impact on equality law—renders the exemption model worthy of further consideration in Canada.