

Australian Capital Territory

# Discrimination (BAE Systems Australia Ltd) Exemption 2011 (No 1)

Notifiable instrument NI2011–425

made under the

*Discrimination Act 1991*, section 109 (Grant of exemptions) and *ACT Civil and Administrative Tribunal Act 2008*, section 69 (2)

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**1 Name of instrument**

This instrument is the *Discrimination (BAE Systems Australia Ltd) Exemption 2011 (No 1)*.

**2 Exemption decision—ACT Civil and Administrative Tribunal Act, s 69 (2) (a)**

The attached order of the ACAT is taken to be a decision of the Human Rights Commission under the *Discrimination Act 1991*, section 109 (Grant of exemptions).

**3 Commencement—ACT Civil and Administrative Tribunal Act, s 69 (2) (b)**

This instrument is taken to have commenced on the date of the attached order.



Human Rights and Discrimination Commissioner

Date 29 July 2011

CONSENT AGREEMENT BETWEEN  
BAE SYSTEMS AUSTRALIA LIMITED

AND

ACT HUMAN RIGHTS COMMISSIONER

RECITALS

- (a) BAE Systems Australia Limited (**BAE Systems Australia**) is part of an international group of companies (Group) engaged in the development, delivery and support of advanced defence aerospace systems in the air, on land, at sea and in space. The Group designs, manufactures and supports military aircraft, surface ships, submarines, radar, avionics, communications, electronics and guided weapons systems. It has major operations across 5 continents (including Australia) and customers in approximately 130 countries.
- (b) BAE Systems Australia's main customer is the Commonwealth of Australia on behalf of the Australian Defence Force (the **ADF**). BAE Systems Australia is contracted to the Commonwealth of Australia to provide integrated military systems and support solutions to the ADF for the defence of Australia.
- (c) With respect to its Australian operations, a large part of the work performed by BAE Systems Australia occurs in South Australia. However, a percentage of its employees work in the ACT and are involved in projects (in the ACT region) that have exposure to services and items controlled by the requirements of the *Arms Control Export Act 22 USC § 2778 (2004) (USA) (Arms Control Act)* and the associated *International Traffic in Arms Regulations 22 CFR § 120 (2003) (USA) (ITAR)*.
- (d) The performance of ADF contracts involves BAE Systems Australia entering into contractual arrangements (usually by way of subcontract) with various technology partners, notably with companies in the United States of America (**US Contractors**).
- (e) Under the Arms Control Act and ITAR, the US Contractors are obliged to satisfy export controls before they can transfer certain controlled defence material

including technical data, goods and services to BAE Systems Australia. BAE Systems Australia is also required to observe the requirements of these laws as conveyed through its contractual arrangements with US Contractors on a project-by-project basis.

- (f) For the purposes of performing the contracts with the ADF and the US Contractors, BAE Systems Australia has entered into agreements which require compliance with the requirements of the Arms Control Act and ITAR. These agreements are generally in the form of Export Licences, Technical Assistance Agreements and Manufacturing Licence Agreements, which operate as the export authorisation by which a US Contractor is able to transfer, or provide access to BAE Systems Australia, of controlled defence articles including technical data (**Controlled Material**).
- (g) The US Government requires as part of the scheme for authorising the export of Controlled Material that the licence and access conditions are precisely stated. Amongst the conditions required by the US Government are:
- the identification of the nationality of all personnel who will have access to the Controlled Material;
  - disclosure to the US Contractor of the nationality of all personnel who will have access to the Controlled Material; and
  - limitations or prohibitions on persons of particular nationalities having access to the Controlled Material.
- (h) In order to comply with its obligations pursuant to the Export Licences, Technical Assistance Agreements and Manufacturing Licence Agreements, BAE Systems Australia must establish security systems sufficiently rigorous to satisfy the US Government and the ADF that these conditions are being satisfied.
- (i) In particular, BAE Systems Australia must ensure that unauthorised re-export or re-transfer of the Controlled Material does not occur, for example by disclosure to a person of a nationality not identified and authorised in the relevant licence or agreement or to a person of a proscribed nationality.
- (j) If BAE Systems Australia does not comply fully with the obligations imposed on it, serious and significant consequences could result, including it being prevented from working on ADF contracts already in place or under tender, and from competing for future ADF contracts which involve classified information. In addition, any breach by BAE Systems Australia of its contractual provisions with US Contractors could result in the imposition of penalties. Any of these

consequences would be fundamentally detrimental to BAE Systems Australia's business in Australia.

- (k) In order for BAE Systems Australia to comply with its mandatory ITAR related contractual obligations, it may be necessary for it to engage in conduct which may contravene certain provisions of the *Discrimination Act 1991* (ACT) (the **Act**).
- (l) On 3 January 2008 BAE Systems Australia applied for an exemption under section 109 of the Act, and on 30 June 2010 a decision was made by the ACT Human Rights and Discrimination Commissioner, refusing the exemption sought (**the Decision**).
- (m) On 27 July 2010 BAE Systems Australia made application for a review of the decision under section 110 of the Act in proceedings No AT 10/64.
- (n) Following mediation and extensive discussions, the parties have reached an agreement on the terms of an exemption under section 109 of the Act, which is more limited than the original terms of the exemption sought by BAE Systems Australia. The parties agree that the correct and preferable decision is to now grant the exemption under section 109 of the Act on the following agreed terms.

#### **AGREED TERMS**

Pursuant to section 109 of the Act, the Tribunal grants BAE Systems Australia Limited (**BAE Systems Australia**) an exemption from the operation of sections 10, 13, 23 and 69 of the Act subject to the following terms:

#### **CONDUCT**

BAE Systems Australia may engage in the following conduct in the Australian Capital Territory:

##### **Security Officer and Assistant Security Officer**

- 2. Request nationality or citizenship information from any person holding or applying to hold the positions of Security Officer or Assistant Security Officer (as defined in the Australian Defence Security Manual) within BAE Systems Australia.
- 3. Require any person holding the positions of Security Officer or Assistant Security Officer within BAE Systems Australia to be an Australian citizen.

##### **Australian security clearances**

- 4. Record information relating to security clearances granted to employees of BAE Systems Australia (**employees**) and employees of contractors who perform work on BAE Systems Australia's premises and who are subject to BAE Systems Australia's control and direction (**contract workers**).

### **Applicants for employment**

5. Inform applicants for employment in roles which will require access to material (**ITAR controlled material**) subject to contractual obligations arising from the *Arms Export Control Act 22 USC § 2778 (2004)*, *International Traffic in Arms Regulations (ITAR)* and the *Export Administration Regulations* and any permit, licence or approval granted, or agreement made, under those laws (**ITAR controls**) that they may be adversely affected by ITAR controls if they are not an Australian citizen or if they hold dual nationality and / or citizenship.

### **Request for information about nationality**

6. Request nationality information from applicants for employment who will be required to work with ITAR controlled material, providing this request for information is limited to information for determining whether an application for authorisation would be required for the applicant to undertake the work in that position.
7. Request nationality information from employees and contract workers who will be required to work with ITAR controlled material.

### **Use of nationality information**

8. Impose a condition on any offer of employment in roles which will require access to ITAR controlled material that the person must, pursuant to ITAR controls, be authorised to access that material whether pursuant to an individual clearance obtained from the United States Government or otherwise.
9. Take an employee or contract worker's nationality into account when determining whether that person may be offered a role or allocated work that involves access to ITAR controlled material.
10. Maintain records of the nationalities of all persons who have or will have access to ITAR controlled material.
11. Ensure that ITAR controlled material is disclosed only to persons who are authorized by ITAR controls to receive it.
12. Impose limitations or prohibitions on access to ITAR controlled material on persons not authorised to access that material.
13. Establish security systems that will prevent the unauthorized re-export or re-transfer of ITAR controlled material.
14. If and when required, disclose to:
  - (a) USA based contractors for whom BAE Systems Australia performs work under subcontract;

- (b) the United States Department of State;
- (c) the United States Department of Commerce; and
- (d) the United States Department of Defence;

the nationalities of all employees and contract workers who have access to ITAR controlled materials in the performance of the subcontract.

## CONDITIONS

1. The exemption applies only to BAE Systems Australia's conduct where:
  - (a) it is necessary to enable it to perform contractual obligations which involve access to ITAR controlled material;
  - (b) it has taken all steps that are reasonably available to avoid engaging in conduct which would otherwise be in breach of sections 10, 13, 23 and 69 of the Act, including:
    - (i) where an applicant for employment, employee or contract worker is a national or dual national of a country not approved for access to ITAR-controlled material in a relevant contract, then BAE Systems Australia will apply to the United States Department of State to amend the relevant contract and approve the addition of the person's nationality, which, if successful, would enable a person to have access to ITAR-controlled material; and
    - (ii) in the event that the United States Department of State requires BAE Systems Australia to provide further information specific to the person, then with the consent of that person, BAE Systems Australia will provide all relevant information to the United States Department of State so that an application for approval may be made in relation to that person.
2. Where, pursuant to this exemption, BAE Systems Australia wishes to reserve the right to make a conditional offer of employment in relation to a position which will involve access to ITAR-controlled material, any advertisement, invitation for expressions of interest, or other promotional information referring to the position must include the information that:
  - (a) the position is subject to ITAR controls and that any person occupying the position must be able to satisfy ITAR-based requirements which may require specific authorisation for that person to access ITAR-controlled material; and
  - (b) if a person is concerned as to whether or not they will satisfy the requirement in (a), they should contact a nominated employee of BAE Systems Australia who is able to provide relevant information, including information set out in condition 3 below.

3. BAE Systems Australia must provide in writing to any applicant for employment, employees and contract workers:
  - (a) express notice that they may be adversely affected by the ITAR controls if they are not an Australian national, if they hold dual nationality citizenship and /or citizenship, or if they are not of Australian national origin;
  - (b) notice that BAE Systems Australia has an exemption under the Act to enable it to take steps to prevent access to ITAR controlled material;
  - (c) a reasonable explanation in plain English of the nature of any such adverse effects;
  - (d) advice that any necessary application for specific authorisation for a person to access ITAR-controlled material would be made by BAE Systems Australia;
  - (e) information about how they can apply for Australian citizenship; and
  - (f) information regarding their rights under Australian Federal, State and Territory discrimination laws.
4. Where, pursuant to this exemption, an employee or contract worker who is not authorized pursuant to ITAR controls to have access to ITAR controlled material (including pursuant to any individual clearance), is moved from a project involving access to ITAR controlled material to any other work controlled by BAE Systems Australia or any of its related entities, BAE Systems Australia must, through a duly authorized officer, explain to the person why he or she is being transferred and must otherwise take all reasonable steps to avoid or limit harm or loss to that person.
5. Where BAE Systems Australia uses a system of security passes to reflect the fact of access to ITAR controlled material or levels of access to material subject to Australian security restrictions, the passes may be coded but not in such a manner that the nationality can obviously be identified from the coding.
6. All information relating to security passes, security clearance levels and access to ITAR controlled material shall be restricted to the Security Officer, Assistant Security Officer, and to their properly appointed nominees on a "need to know" basis.
7. BAE Systems Australia's employment policies shall be amended as soon as reasonably possible so as to refer to the terms of this exemption, including all conditions attaching to it, and to make clear that the purpose of the request for information regarding nationality is made solely for the purposes of compliance with contractual obligations imposed pursuant to laws of the United States.
8. BAE Systems Australia is required to provide a written report to the ACT Human Rights Commission every six months from the date of this instrument of exemption, over the three year period of the exemption, detailing:

- (a) the steps it has taken to comply with the above conditions;
- (b) the number of persons affected by this exemption, the nature of the effects, and the steps taken to address any adverse effects;
- (c) the anti-discrimination training of employees and contract workers provided by BAE Systems Australia; and
- (d) implementation and compliance generally with the terms of this exemption order.

The exemption is granted for a period of three years from the date of the Tribunal's order.

This order is a notifiable instrument and must be notified under the [Legislation Act](#).

H Watchirs

**SIGNED by the ACT Human Rights and Discrimination Commissioner**

**Dated** 15 July 2011

David Mahony, Company Secretary

**SIGNED for and on behalf of BAE Systems Australia Limited**

**Dated** 6 July 2011