

Australian Capital Territory

# Discrimination (Systems Planning and Analysis, Australia Pty Ltd) Exemption 2022 (No 1)

Notifiable instrument NI2022-24

made under the

Discrimination Act 1991, s 109 (Grant of exemptions)

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## 1 Name of instrument

This instrument is the *Discrimination (Systems Planning and Analysis, Australia Pty Ltd) Exemption 2022 (No 1)*\*.

## 2 Commencement

This instrument commences on the day after it is notified.

## 3 Exemption decision—Discrimination Act, s 109

The Human Rights Commission exempts Systems Planning and Analysis, Australia Pty Ltd from the operation of sections 10, 13, 20, 23 and 69 of the *Discrimination Act 1991* for a period of 3 years.

## 4 Conditions on exemption

This exemption is subject to the conditions provided in the decision of the Human Rights Commission set out in Schedule 1 of this instrument.

Karen Toohey  
Discrimination Commissioner

Dated: 17 January 2022

\*Name amended under Legislation Act, s 60

## Schedule 1

Pursuant to section 109 of the *Discrimination Act 1991* (ACT) (**Act**), the Human Rights Commission grants Systems Planning and Analysis, Australia Pty Ltd (**SPA**) an exemption from the operation of sections 10, 13, 20, 23 and 69 of the Act subject to the following terms:

### CONDUCT

SPA may engage in the following conduct in the Australian Capital Territory:

#### Chief Security Officer and Security Officer

1. Request nationality and/or citizenship information from any person holding or applying to hold the positions of Chief Security Officer or Security Officer (as those terms are used in the Defence Security Principles Framework) at SPA.
2. Require any person holding the positions of Chief Security Officer or Security Officer at SPA to be an Australian citizen.

#### Applicants for employment

3. Inform applicants for employment in roles which will require access to material (**Controlled Material**) subject to permits, licences, approvals or agreements made under US and Australian import and export control laws (**ITAR and EAR controls**) that they may be adversely affected by the International Traffic in Arms Regulations (**ITAR**) and the Export Administration Regulations (**EAR**) if they are not an Australian citizen or if they hold dual nationality and/or citizenship from proscribed countries.

#### Request for information about nationality

4. Request information from prospective and current employees of SPA (**employees**), individual contractors and employees of contractors (**contractors**) who perform work for or on behalf of SPA and who are subject to SPA's control and direction for positions related to projects which use Controlled Material, in relation to the prospective and current employee or contractor's citizenship, previous citizenships, race or nationality, or substantive contacts where such contacts are affiliated with countries proscribed by section 126.1 of ITAR, providing this request for information is limited to information for determining whether an application for authorisation would be required to allow the job candidate, employee or contractor to have that access and whether in SPA's reasonable judgment that application would have significant prospects of success.

#### Use of nationality information

5. Impose a condition on any offer of employment or contract for services in roles which are likely to require access to Controlled Material that the person must, pursuant to ITAR and EAR controls, be authorised to access that material whether

pursuant to an individual approval obtained from the United States Government or otherwise.

6. Take an employee or contractor's citizenship, previous citizenships, race or nationality, or substantive contacts, where such contacts are affiliated with countries proscribed by section 126.1 of ITAR, into account in determining whether that person may be offered a role or allocated work that involves access to Controlled Material.
7. Maintain records of the nationalities and citizenships of employees and contractors who have or may have access to Controlled Material.
8. Require present and future employees and contractors involved in projects which access Controlled Material to notify SPA of any change to their citizenship status or substantive contacts where such contacts are affiliated with countries proscribed by section 126.1 of ITAR.
9. Restrict access to Controlled Material to particular SPA employees and contractors based on their citizenship, previous citizenships, race or nationality, or substantive contacts where such contacts are affiliated with countries proscribed by section 126.1 of ITAR.
10. Record information relating to security clearances granted to employees and contractors who perform work for or on behalf of SPA and who are subject to SPA's control and direction for positions related to projects which use Controlled Material.
11. Impose limitations or prohibitions on access to Controlled Material on persons not authorised to access that material.
12. Maintain records of the nationalities of persons who have or will have access to Controlled Material, with distribution limited to only those persons with a need to know, for the purposes of determining their ability to participate in a particular project.
13. Establish security systems and access protocols that will prevent the unauthorised re-export or re-transfer of Controlled Material.
14. Disclose, if and when required, citizenship, previous citizenships, race or nationality, or substantive contacts where such contacts are affiliated with countries proscribed by section 126.1 of ITAR, of SPA's employees and contractors to:

(a) The United States Government, including:

- (i) the United States' Department of State;
  - (ii) the United States' Department of Commerce;
  - (iii) the United States' Department of Defence;
- (b) the Australian Department of Defence;
- (c) the Australian Space Agency;
- (d) United States based contractors for whom SPA performs work under subcontract; and
- (e) any other organisation for which, or on whose behalf, or at whose request SPA undertakes work in respect of which SPA has directly or indirectly an obligation not to transfer Controlled Material to persons of certain nationalities.

## CONDITIONS

1. The exemption applies only to SPA's conduct where it is necessary to enable it to obtain and manage ITAR and EAR export licensing or to perform contractual obligations which involve access to Controlled Material.
2. Other than the particular exemption referred to above at paragraph 4 (Request for information about nationality), the remaining exemptions apply only to SPA's conduct where:
  - (a) 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) reliance on ITAR exemptions, exceptions or other provisions, including clause 126.18 of ITAR, where applicable;
    - (ii) where an employee or contractor is a national or dual national of a country not approved for access to Controlled Material, then SPA will either request the United States Government, or request the relevant export license holder(s) to request the United States Government, to amend the relevant export licenses to enable the person to have access to Controlled Material, unless SPA, on reasonable grounds, determines that either:
      - (A) the job candidate, employee or contractor is not the best candidate for the position; or
      - (B) such an application does not have significant prospects of success; and

- (iii) in the event that the United States Government requires SPA to provide further information specific to the person, then with the consent of that person, SPA will work with the person to supply (or request that the relevant export license holder(s) supply) all relevant information to the United States Government so that an application for approval may be made in relation to that person.
- 3. Where, pursuant to this exemption, SPA wishes to reserve the right to make a conditional offer of employment or contract for services in relation to a position which will or may involve access to 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 will or is likely to require access to Controlled Material and that any person occupying the position must be able to satisfy ITAR and EAR controls which may require specific authorisation for that person to access Controlled Material; and
  - (b) if a job candidate is concerned as to whether or not they will satisfy the requirement in (a), they should contact a nominated employee of SPA who is able to provide relevant information, including information set out in Condition 4 below.
- 4. SPA must specifically communicate to job candidates for roles, and existing employees and contractors in roles, whether currently or in the future, requiring access to Controlled Material:
  - (a) express notice that they may be adversely affected by the ITAR and EAR controls if they are not an Australian national, if they hold dual nationality and/or citizenship from proscribed countries, or if they are not of Australian national origin;
  - (b) notice that SPA has an exemption under the Act to enable it to take steps to prevent access to 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 Controlled Material would be made by SPA, in appropriate cases;
  - (e) information about how they can apply for Australian citizenship; and
  - (f) information regarding their rights under Australian Federal, State and Territory discrimination laws.

SPA may comply with this Condition 4 through a range of alternatives, including individual written notices, published policy statements, web-based posting or other similar means.

5. Where, pursuant to this exemption, an employee or contractor who is not authorised pursuant to ITAR and EAR controls to have access to Controlled Material (including pursuant to any individual approval), is moved from a project involving access to Controlled Material to any other work or has their employment terminated in circumstances where there is no other work the employee or contractor can perform at SPA, SPA must, through a duly authorised officer, explain to the person why he or she is being transferred or terminated and must otherwise take all reasonable steps to avoid or limit harm or loss to that person.
6. Where SPA uses a system of security passes to reflect the fact of access to 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.
7. All information relating to security passes, security clearance levels and access to Controlled Material shall be restricted to:
  - (a) relevant personnel of SPA and Systems Planning and Analysis, Inc.; and
  - (b) relevant personnel of United States Government agencies and Australian Government agencies pursuant to which SPA has an obligation,  
and to their properly appointed nominees on a "need to know" basis.
8. SPA's employment or other relevant 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 SPA's request for nationality information is made solely for the purposes of compliance with legal and regulatory obligations imposed pursuant to the defence export control laws of Australia and the United States.
9. SPA is required to provide a written report to the ACT Human Rights Commission by 31 January and 31 July each year, from the date of this instrument of exemption, over the 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 contractors provided by SPA;  
and
  - (d) implementation and compliance generally with the terms of this exemption order.

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

**SIGNED by the ACT Discrimination Commissioner**

**Dated 17 January 2022**