

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015

Radiocommunications Act 1992

Purpose

The Australian Communications and Media Authority (ACMA) has issued the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2015* (the Class Licence).

The Class Licence revokes and replaces the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2002* (the 2002 Class Licence).

The ACMA has issued the Class Licence because the 2002 Class Licence was due to 'sunset' (i.e. be automatically repealed) on 1 October 2015, by operation of Part 6 of the *Legislative Instruments Act 2003* (the LIA).

Following review and consultation as described below, the ACMA formed the view that the 2002 Class Licence was operating effectively and efficiently, and continued to form a necessary and useful part of the regulatory framework. To preserve the effect of the 2002 Class Licence, the ACMA has therefore revoked the 2002 Class Licence before its sunset date and remade it with some minor changes.

Legislative Provisions

Under section 132 of the *Radiocommunications Act 1992* (the Act), the ACMA may, by notice published in the *Gazette*¹, issue class licences. Pursuant to section 139 of the Act, class licences are legislative instruments.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that, where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner, and subject to the like conditions (if any), to repeal, rescind, revoke, amend or vary any such instrument. The Class Licence revokes the 2002 Class Licence.

The Class Licence may be subject to disallowance in accordance with section 42 of the LIA.

Background

The Class Licence authorises the use of handphone stations on carrier frequencies in the 27 MHz band. A handphone station is a low powered radiocommunications transmitter and receiver combination designed to be carried personally. Handphone stations are typically used by bushwalkers or in the conduct of sporting events and other group activities where communication over distances of less than one kilometre is required. Handphone stations include a built-in antenna (usually about a metre long) and are typically powered by an internal battery.

¹ The registration of a legislative instrument on the Federal Register of Legislative Instruments will satisfy any existing requirement in the instrument's enabling legislation in force before 1 January 2005 to publish the instrument in the *Gazette* (see subsection 56(1) of the LIA). However, if the enabling legislation is enacted or amended at any time on or after 1 January 2005 and requires publication of the instrument in the *Gazette*, that requirement is in addition to the requirement to register the instrument (see subsection 56(2) of the LIA). Subsection 132(1) of the Act was amended on 1 July 2005, and so the requirement to publish the instrument in the *Gazette* is in addition to the requirement to register the instrument.

Operation

The Class Licence details the technical parameters, operating requirements and conditions that must be complied with in order for the operation of handphone stations to be authorised under the Class Licence.

Incorporation by reference

This Class Licence refers to the Act and other legislative instruments as in force from time to time (as permitted by section 314A of the Act). The Act and legislative instruments are the:

- *Australian Radiofrequency Spectrum Plan 2013*;
- *Radiocommunications Act 1992*;
- *Radiocommunications (Citizen Band Radio Stations) Class Licence 2015*
- *Radiocommunications (Interpretation) Determination 2015*; and
- *Radiocommunications Regulations 1993*.

The Act and legislative instruments are available on the ComLaw website at <http://www.comlaw.gov.au>.

Consultation

Subsection 17(1) of the LIA requires that, before the ACMA makes a legislative instrument, it must be satisfied that any consultation that the ACMA considers is appropriate and reasonably practicable to undertake has been undertaken. In addition, subsection 136(2) of the Act requires that, before revoking a class licence, the ACMA must publish a written notice that states the ACMA's proposal to revoke the class licence, that sets out the class licence and that invites interested persons to make representations about the proposed revocation of the class licence.

The ACMA published a consultation paper and draft instrument on its website between 29 June 2015 and 29 July 2015. The consultation paper explained:

- the sunseting process,
- the ACMA's preliminary view that the existing arrangements under the 2002 Class Licence should be saved from automatic repeal and be remade without significant change.

In addition, in accordance with subsection 136(2) of the Act, a notice was published in the Commonwealth of Australia Gazette on 26 June 2015 setting out the 2002 Class Licence, stating the ACMA's proposal to revoke the 2002 Class Licence and inviting interested persons to make representations about the proposed revocation of the 2002 Class Licence by 29 July 2015. This allowed for the one month minimum timeframe required for representations under subsection 136(2).

Interested parties were invited to comment. No comments were received.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) applies streamlined administrative processes to sunseting legislative instruments. The ACMA has determined that the 2002 Class Licence was fit for purpose and that it should be remade. The ACMA has certified those matters to the OBPR. The OBPR determined that the ACMA could follow the self-certification process to remake the instrument without significant change and that no further regulatory impact analysis was required for the making of the Class Licence (OBPR reference number 19230).

Detailed Description of the Instrument

Details of the Determination are set out in **Attachment A**.

Statement of Compatibility with Human Rights

As required by subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* a Statement of Compatibility with Human Rights has been prepared by the ACMA and is at **Attachment B**.

**DETAILS OF THE RADIOCOMMUNICATIONS (27 MHz HANDPHONE STATIONS)
CLASS LICENCE 2015**

PART 1- Preliminary

Section 1 – Name of Class Licence

Section 1 provides that the Class Licence is the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2015*.

Section 2 – Commencement

Section 2 provides that the Class Licence commences on the later of the day after it is registered or the day on which it is published in the *Gazette*. Both must occur in order for the class licence to commence. Gazettal is a requirement under subsection 132(1).

Section 3 – Definitions

Section 3 defines terms used in the Class Licence.

Section 4 – Revocation

Section 4 provides that the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2002* is revoked.

Section 5 – Class Licence

Section 5 provides that, subject to the conditions in sections 6, 7 and 8, a handphone station may be operated on a carrier frequency specified in Schedule 1 and subject to any restriction for that item in Schedule 1.

Section 6 – Conditions - General

Section 6 provides the general conditions under which a person may operate a handphone station. Included in section 6 are conditions aimed at ensuring that persons:

- operate handphone stations only on particular frequencies;
- operate only certain types of handphone stations;
- do not make alterations to handphone stations that are likely to cause interference; and
- do not operate handphone stations in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or for the purpose of harassing a person.

Section 7 – Direction

Section 7 provides that a person must comply with a direction that relates to the operation of a handphone station given by particular persons in order to: secure the safety of an aircraft or vessel in danger; deal with an emergency involving serious threat to the environment; deal with an emergency involving the risk of death; or of injury, to a person; or deal with an emergency involving the risk of substantial damage to, or substantial loss of, property.

Section 8 – Standards

Section 8 requires a handphone station to comply with any applicable standard as in force on the relevant device compliance day. Section 5 of the Act defines standard to mean a standard made

under section 162 of the Act. The device compliance day is defined in section 5 to mean the day the handphone station was manufactured, imported or altered or modified in a material respect.

Schedule 1 – Handphone station operational requirements

Schedule 1 to the Class Licence specifies the permitted carrier frequencies and restrictions for operation of a handphone station. The restrictions include maximum power outputs and the purpose for which certain frequencies may be used.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Radiocommunications (27 MHz Handphone Stations) Class Licence 2015

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Radiocommunications (27 MHz Handphone Stations) Class Licence 2015* (the Class Licence) revokes and replaces the *Radiocommunications (27 MHz Handphone Stations) Class Licence 2002* without making any significant change to the regulatory arrangements created by that instrument.

The class licence authorises the use of handphone stations on specified carrier frequencies in the 27 MHz band, subject to certain conditions and operating requirements.

Human Rights Implications

The objective of paragraph 6(g) of the instrument is to limit freedom of speech so as to protect public order and morality. It provides that a 27 MHz handphone station must not be operated: i) in a way that would be likely to cause a reasonable person, justifiably in all the circumstances, to be seriously alarmed or seriously affronted; or ii) for the purpose of harassing a person. This paragraph limits the content of transmissions of 27 MHz handphone stations and so may engage article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), which protects freedom of expression in any medium. However, Article 19(3) of the ICCPR provides that the rights in Article 19(2) of the ICCPR may be subject to restrictions as are provided by law and necessary for respect of the rights or reputations of others or for the protection of national security, public order, public health or morals.

The ACMA believes it is prudent to limit freedom of expression when granting the right to use a 27 MHz handphone station in order to meet the legitimate objectives of protecting public order and public morality.

Radiofrequency spectrum is a finite public resource, which is subject to competing demands. As such, access to it is necessarily limited, and such access is regularly given subject to conditions about matters and content that may be transmitted using the spectrum. In particular, conditions may relate to the protection of 'public order' and 'public morals', as recognised by Article 19 of the International Covenant on Civil and Political Rights.

27 MHz handphone stations are typically used by bushwalkers or in the conduct of sporting events and other group activities. However, as a class licensed device, these devices are available for purchase and can be used by anyone for any purpose consistent with the class licence. People using the devices may be communicating with people they know or do not know and can use the device to transmit and receive on publicly available frequencies. In this circumstance, it is possible that a person may use the device to incite crime, violence or mass panic, and thereby cause a reasonable person, justifiably in all circumstances, to be seriously alarmed or affronted. Thus, in part, the limitation on freedom of expression is necessary and appropriate to ensure public order. Likewise, a person may use such a device to harass an individual. The protection of individuals from harassment through unsolicited communication is a legitimate objective and the ACMA considers that it is reasonable and appropriate to limit the right granted to use such devices to deter harassing speech. The ACMA notes that this is consistent with the prohibition in section 474.17 of the Criminal Code.

Transmissions using 27 MHz handphone stations may also be heard by minors. The ACMA considers it to be a legitimate objective that the right to use spectrum to transmit messages to the general public, including minors, should be limited in order to protect the public from seriously affronting or alarming material on the basis of protecting public morality.

The ACMA considers this to be an appropriate and proportionate limitation on the right to use 27 MHz handphone stations and notes that the ACMA has no other power that could be used to achieve this

objective. The ACMA also notes that this limitation is consistent with other legislative limitations on the freedom of expression that have been put in place to protect public morality, including paragraph 108(2)(d) of the *Radiocommunications Act 1992*, which imposes a statutory licence condition on the same terms on all apparatus licences issued by the ACMA, and the rights and responsibilities of person providing broadcasting services under the *Broadcasting Services Act 1992*.

Conclusion

The Class Licence is compatible with human rights because, while it may limit the right to freedom of expression (by restricting persons from operating handphone stations in a way likely to cause a reasonable person to be seriously alarmed or seriously affronted; or for the purpose of harassing a person), that limitation is reasonable, necessary and proportionate. The ACMA believes it is reasonable because there is a balance to be struck between making radiocommunications spectrum available for use, enabling persons to communicate widely on publicly available frequencies, and ensuring that the content of transmissions using that scarce public resource do not expose the public (including minors) to unsolicited offensive material. The ACMA believes it is proportionate because the provision only restricts freedom of expression in relation to their use of a device operated under the class licence and only restricts use that would seriously affront or alarm a reasonable person, or that is harassing. The person's freedom of expression is otherwise unfettered.

Australian Communications and Media Authority