

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Radiocommunications Act 1992

Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018

Authority

The Australian Communications and Media Authority (the **ACMA**) has made the *Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018* (the **Determination**) under subparagraph 27(1)(be)(ii) and subsection 27(2) of the *Radiocommunications Act* (the **Act**).

Subsection 27(2) of the Act allows the ACMA to determine that acts or omissions by members of a class of persons to whom section 27 applies are exempt from any or all of Parts 3.1, 4.1 and 4.2 of the Act or from specified provisions of those Parts. Under subparagraph 27(1)(be)(ii) of the Act, the ACMA may, by written determination, determine that a body that performs functions related to the investigation, prevention or prosecution of serious crime, or of corruption (whether or not the body also performs other functions), is a body to which subsection 27(1) applies.

Corrective Services NSW (**CSNSW**) is a body that, relevantly, ‘performs functions related to the prosecution of serious crime’ (paragraph 27(1)(be)) and may, therefore, fall within the scope of section 27 if the ACMA makes a determination covering CSNSW, in writing, for the purposes of paragraph 27(1)(be).

The Determination:

- provides, for the purposes of paragraph 27(1)(be) of the Act, that CSNSW is a body to which section 27 of the Act applies; and
- exempts, from Parts 3.1, 4.1 and 4.2 of the Act, any act or omission by CSNSW, and certain staff or contractors of CSNSW, relating to the use, operation, possession or supply of certain public mobile telecommunications service jamming devices (**PMTS jamming devices**) at the Lithgow Correctional Centre provided that the act or omission occurs in the circumstances set out in the Determination.

The Determination will commence on 1 November 2018. Instruments made under subparagraph 27(1)(be)(ii) and subsection 27(2) of the Act are disallowable legislative instruments for the purposes of the *Legislation Act 2003* (the **LA**).

Background

The operation or supply, or possession for the purposes of operation or supply, of a PMTS jamming device is prohibited under section 189 of the Act (see the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011* (the **Declaration**) made under subsection 190(1) of the Act).

In 2009 CSNSW sought an exemption from the ACMA under section 27 of the Act to enable CSNSW to lawfully conduct a field trial of PMTS jamming devices at the Lithgow Correctional Centre. This trial was intended to inform decision-making on whether it would be in the public interest to allow deployment of PMTS jamming devices in New South Wales correctional facilities. The use of mobile phones by inmates is considered to be a serious problem by CSNSW. While it is an offence in NSW

for an inmate to use or possess a mobile phone without reasonable excuse, detection of possession and use of mobile phones can be difficult.

In 2010 the ACMA made the *Radiocommunications (Bench Testing by Corrective Services NSW of Mobile Telephone Jamming Device) Exemption Determination 2010*, which allowed CSNSW to conduct bench testing of possible jamming devices in a shielded environment. This resulted in the recommendation of a preferred technology for testing in a field trial.

In 2012, 2014 and 2015, at the request of CSNSW, the ACMA made three determinations under section 27 of the Act¹, to allow field trials of mobile phone jammers at Lithgow Correctional Centre. The *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2015 (2015 exemption determination)* expires on 1 November 2018.

The trial at Lithgow Correctional Centre (which is located in a low density area), has demonstrated that a mobile phone jammer can be operated successfully in a correctional facility without causing significant interference to mobile phones outside the facility.

Following a request by CSNSW and a public consultation process as described below, the ACMA has made the Determination to authorise CSNSW to use and operate a nominated PMTS jammer at Lithgow Correctional Centre on an ongoing basis, in specified circumstances.

Purpose and operation of the instrument

The purpose of the Determination is to:

- provide, for the purposes of subparagraph 27(1)(be)(ii) of the Act, that CSNSW is a body to which section 27 of the Act applies; and
- exempt from Parts 3.1, 4.1 and 4.2 of the Act, any act or omission by CSNSW, and certain staff or contractors of CSNSW, relating to the use, operation, possession or supply of nominated PMTS jamming devices at the Lithgow Correctional Centre provided that the act or omission occurs in the circumstances set out in the Determination.

The Determination is required to allow the lawful use, operation, possession or supply of a PMTS jamming device by CSNSW and specified CSNSW staff or contractors at the Lithgow Correctional Centre, in specified circumstances.

The Determination commences on 1 November 2018, the day on which the 2015 exemption determination expires. A provision-by-provision description of the Determination, including the circumstances in which the exemption will apply is set out in the notes at **Attachment A**.

Review of the operation of the instrument

¹ *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2012*; *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2014*; and *Radiocommunications (Field Trial by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2015*.

Continuity of access to private telecommunications outside the Lithgow Correctional Centre is an important issue that may even have safety-of-life implications. To be effective, PMTS jammers may require periodic reconfiguration; for example, as additional frequency bands are utilised for mobile telecommunications in the area. The ACMA proposes to manage the risks of the proposed ongoing operation of the PMTS jammer at the Lithgow Correctional Centre by establishing a process to monitor and review the operation of the Determination on a regular basis. As part of the monitoring and review process, the ACMA may ask CSNSW to provide periodic information and data about the jammer's performance. This will enable the ACMA to consider whether the Determination should continue to operate on its current terms or should be varied or revoked.

Subsection 33(3) of the *Acts Interpretation Act 1901* (the **AIA**) provides that where an Act confers a power to make a legislative instrument, the power shall be construed to include 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 ACMA may consider varying or revoking the Determination if there is evidence of a substantial increase in legitimate complaints about mobile telephone interference outside the perimeter of the Lithgow Correctional Centre, or where the jammer is, or is likely to be, the source of interference. It is also possible that other suitable means of blocking illicit telecommunications in prisons may emerge in the future. This may lead the ACMA to consider varying or revoking the Determination. In any event, the ACMA will undertake consultation with relevant stakeholders before any decision to vary or revoke the Determination is made.

Documents incorporated by reference

The following Acts, legislative instruments and other instruments are incorporated by reference or otherwise mentioned in the Determination:

- the Act;
- the AIA;
- the *Crimes (Administration of Sentences) Act 1999 (NSW)*;
- the Declaration;
- the LA;
- the *Radiocommunications Licence Conditions (Apparatus Licence) Determination 2015*;
- the *Telecommunications Act 1997*;
- a map of the Lithgow Correctional Centre approved by the ACMA (for the purpose of the definition of 'field zone' in section 4 of the Determination); and
- the written agreement referred to in the definition of 'nominated PMTS jamming device' in section 4 of the Determination.

References to Acts and legislative instruments are to the Act or legislative instrument as in force from time to time in accordance with section 10 of the AIA, and subsection 13(1) of the LA.

The written agreement and the map of the Lithgow Correctional Centre are documents incorporated as existing from time to time in accordance with subsection 314A(2) of the Act.

The Commonwealth Acts and legislative instruments referenced in the Determination can be found on the Australian Government's Federal Register of Legislation website at <http://www.legislation.gov.au>. The *Crimes (Administration of Sentences) Act 1999 (NSW)* is a NSW Act and can be found at <http://www.legislation.nsw.gov.au>.

The map of the Lithgow Correctional Centre which outlines the field zone is available on the ACMA website: www.acma.gov.au.

Consultation

Before the Determination was made, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA.

From 13 to 27 April 2018, the ACMA consulted directly with CSNSW, the Australian Mobile Telecommunications Association, Telstra, Optus and Vodafone on the proposal to continue the effect of the 2015 exemption determination by making another determination under section 27 of the Act. Following this preliminary consultation, the ACMA consulted with industry stakeholders and the general public on the proposed making of the Determination. Between 5 June and 6 July 2018, the ACMA conducted a public consultation process inviting submissions on the proposal to allow CSNSW to continue using and operating PMTS jamming devices at the Lithgow Correctional Centre on an ongoing basis through the release of a draft instrument and a consultation paper on the ACMA's website.

The ACMA received three submissions: from CSNSW, a joint submission from the Australian Mobile Telecommunications Association and Communications Alliance and from Optus. The ACMA considered all relevant issues raised when making the Determination. The matters raised in [the submissions](#) did not result in any changes to the draft instrument being made.

Regulatory impact assessment

The Office of Best Practice Regulation (**OBPR**) was consulted and advised that the proposal is likely to have no more than minor regulatory impacts on business, community organisations or individuals. The OBPR noted the ACMA's approach to minimise the risk of interference to PMTS networks, and other radiocommunications in the vicinity of Lithgow Correctional Centre. The OPBR advised that a Regulatory Impact Statement is not required. The OBPR reference number is 23734.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018*

Section 1 Name

This section provides for the Determination to be cited as the *Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018*.

Section 2 Commencement

This section provides that the Determination commences on 1 November 2018.

Section 3 Authority

This section identifies the provisions of the Act that authorise the making of the Determination, namely subparagraph 27(1)(be)(ii) and subsection 27(2) of the Act.

Section 4 Definitions

This section defines a number of key terms used throughout the Determination.

Section 5 References to other instruments

This section provides that in the Determination, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as existing from time to time.

Section 6 Corrective Services NSW is a body for the purposes of paragraph 27(1)(be) of the Act

Section 6 establishes CSNSW as a body for the purposes of paragraph 27(1)(be) of the Act. This enables the ACMA to make an exemption under subsection 27(2) in relation to persons performing a function or duty in relation to CSNSW, including staff and contractors as described in the definition of *CSNSW staff* in section 4.

Section 7 Exemption

Subsection 7(1) provides that any act or omission by CSNSW or CSNSW staff in relation to the use, operation, possession or supply (*exempt activity*) of a nominated PMTS jamming device is exempt from Parts 3.1, 4.1 and 4.2 of the Act in the circumstances specified in subsection 7(2). A *nominated PMTS jamming device* is defined in section 4 as a PMTS jamming device of a kind agreed in writing by the ACMA and CSNSW.

The circumstances specified in subsection 7(2) are described below. All of the circumstances must exist for the exemption to apply.

Paragraph 7(2)(a) provides that, before undertaking exempt activities, CSNSW must publish a notice on its website indicating that CSNSW and CSNSW staff are relying on this exemption to undertake exempt activities. The CSNSW website is www.correctiveservices.justice.nsw.gov.au.

Paragraph 7(2)(b) requires either:

- that the ACMA has not notified CSNSW in writing that CSNSW and CSNSW staff are excluded from relying on the Determination for a period specified in the notice; or
- if the ACMA has notified CSNSW in writing that CSNSW and CSNSW staff are excluded from relying on the Determination for a period specified in the notice, that the period specified or any extension has expired or the notice has been withdrawn.

The ACMA may decide to notify CSNSW that CSNSW and CSNSW staff are excluded from relying on the Determination for a variety of reasons, including where the ACMA has concerns about safety or potential interference issues or is unable to obtain or verify sufficient details about the operation of the nominated PMTS jamming device to alleviate such concerns. Examples of the kinds of situations that might raise such concerns include:

- threats to public safety resulting from the operation of the nominated PMTS jamming device;
- harmful emissions occurring outside the field zone;
- legitimate public complaints are received about the use of the nominated PMTS jamming device that require further investigation before it can continue to be operated;
- requests from the ACMA for information and data about the operation of the nominated PMTS jamming device from CSNSW are not met; or
- requests from the ACMA for particular testing to be conducted on the operation of the nominated PMTS jamming device or emission levels are not met.

Paragraph 7(2)(c) requires a carrier liaison agreement to be in place between CSNSW and each of the relevant carriers. A carrier liaison agreement will establish and formalise the liaison arrangements between **relevant carriers** and CSNSW for operational understanding and protocols, sharing of information and complaints resolution relating to the use of the PMTS jamming device at the Lithgow Correctional Centre. The **relevant carriers** are NBN Co Limited, Telstra Corporation Limited, Optus Mobile Pty Limited, Vodafone Hutchison Australia Pty Limited and Vodafone Network Pty Limited.

Paragraph 7(2)(d) specifies that the act is done or the omission must occur at the Lithgow Correctional Centre.

Paragraph 7(2)(e) provides that in relation to the use or operation of the nominated PMTS jamming device, the act or omission :

- is done or occurs for the purpose of causing harmful interference on designated frequencies in the field zone;
- causes harmful interference only to radiocommunications on base transmit frequencies (the term **base transmit frequencies** is defined in section 4);
- does not cause radio emissions above -128.5 dBm/kHz on non-designated frequencies outside the field zone; and
- complies with the electromagnetic radiation requirements in Part 3 of the *Radiocommunications Licence Conditions (Apparatus Licence) Determination 2015* as if the nominated PMTS jamming device were a transmitter operated under a licence to which that Part applies.

Statement of compatibility with human rights

Prepared by the Australian Communications and Media Authority under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018

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 instrument

The ACMA has made the *Radiocommunications (Use by Corrective Services NSW of PMTS Jamming Devices at Lithgow Correctional Centre) Exemption Determination 2018* to allow Corrective Services NSW (CSNSW) to use, operate, possess or supply public mobile telecommunications (PMTS) jamming devices at Lithgow Correctional Centre on an ongoing basis.

Under section 190 of the Act, subject to section 191, the ACMA may, by legislative instrument, declare that the operation or supply, or possession for the purpose of operation or supply, of a specified device (e.g. a PMTS jamming device) is prohibited for reasons set out in the declaration. The ACMA has prohibited the use of PMTS jamming devices under the *Radiocommunications (Prohibition of PMTS Jamming Devices) Declaration 2011*.

Subsection 27(2) of the Act allows the ACMA to determine in writing that acts or omissions by members of a class of persons to whom subsection 27(1) of the Act applies are exempt from compliance with any or all or specified provisions of Parts 3.1, 4.1 and 4.2 of the Act. The instrument establishes CSNSW as an eligible body under subparagraph 27(1)(be)(ii) of the Act, and exempts any act or omission by specified persons performing a function or duty in relation to CSNSW relating to the operation, use, possession or supply of a nominated PMTS jamming device.

The purpose of the instrument is to allow the operation or use of a PMTS jamming device at the Lithgow Correctional Centre to prevent illicit mobile phone use by inmates and to minimise the conduct of criminal activities, without causing interference to PMTS outside the perimeter of Lithgow Correctional Centre.

Human rights implications

The ACMA has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the ACMA has formed the view that the instrument engages the right to freedom of opinion and expression in Article 19 of the *International Covenant on Civil and Political Rights (the ICCPR)*.

Right to freedom of opinion and expression

Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

The use of PMTS jamming devices is intended to prevent inmates at the Lithgow Correctional Centre from being able to use mobile telecommunications and therefore impacts upon their freedom of expression. However, the legislative instrument is not incompatible with the right engaged as the limitation is reasonable, necessary and proportionate to the achievement of the legitimate objective of preventing inmates from using mobile phones in a correctional facility.

It is an offence under section 253F of the *Crimes (Administration of Sentences) Act 1999* (NSW) for an inmate to, without reasonable excuse, use or have in his or her possession in a place of detention, a mobile phone, SIM card or charger, or any part of a mobile phone, SIM card or charger. The use of mobile phones by inmates is a threat to the proper administration of correctional facilities and is contrary to the objectives of imprisonment. It can be difficult to detect the use and possession of mobile phones in correctional facilities. Use of PMTS jamming devices will potentially help to reduce criminal activities and intimidation amongst inmates, which should mean improved public safety outcomes and better correctional facility management.

The granting of an ongoing exemption for CSNSW follows a successful trial period involving the use of PMTS jamming devices at Lithgow Correctional Centre. The ACMA will, however, monitor CSNSW's use of the PMTS jamming devices at the prison to ensure the exemption remains appropriate and reasonable.

Conclusion

The instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the achievement of a legitimate objective; namely the prevention of criminal activities and the preservation of public safety.